JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
28 February 2002 *

In Case T-395/94,

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),

Hapag Lloyd AG, established in Hamburg (Germany),

Mediterranean Shipping Company SA, established in Geneva (Switzerland),

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

Nedlloyd Lijnen BV, established in Rotterdam (Netherlands),

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

Nippon Yusen Kaisha (NYK Line), established in Tokyo (Japan),

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

P & O Containers Ltd, established in London (United Kingdom),

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

* Language of the case: English.

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

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

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

represented by J. Pheasant, N. Bromfield and, initially, S. Kim and, subsequently, M. Levitt, solicitors, with an address for service in Luxembourg,

applicants,

supported by

The European Community Shipowners' Associations ASBL, having its head office in Brussels (Belgium), represented by D. Waelbroeck, lawyer,

and

The Japanese Shipowners' Association, having its head office in Tokyo (Japan), represented, initially, by N. Forwood QC and P. Ruttley, solicitor, and, subsequently, by F. Murphy, avocat, with an address for service in Luxembourg,

interveners,

Commission of the European Communities, represented by B. Langeheine and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

The Freight Transport Association Ltd, having its head office in Tunbridge Wells (United Kingdom), incorporating the British Shipping Council,

Association des utilisateurs de transport de fret, having its head office in Paris (France), incorporating the Conseil des chargeurs français,

and

The European Council of Transport Users ASBL, having its head office in Brussels, incorporating the European Shippers' Council,

represented by M. Clough, solicitor-advocate QC, with an address for service in Luxembourg,

interveners,

APPLICATION for the annulment of Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, 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: Y. Mottard, Legal Secretary,

having regard to the written procedure and further to the hearing on 8 June 2000,

gives the following

Judgment [1]

Relevant legislation

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,

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here.

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

2 The detailed rules for the application of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) to inland transport are defined in Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

3 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).

4 Article 1(2) of Regulation No 4056/86 provides that '[i]t shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services [meaning the transport of goods in bulk by means of vessels chartered on demand]'.

5 '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'.

6 The eighth recital in the preamble to Regulation No 4056/86 reads as follows:

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

7 Article 3 of Regulation No 4056/86 provides for a block exemption for '[a]greements, decisions and concerted practices of all or part of the members of one or more liner conferences... 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'.

8 In order to prevent liner conferences from engaging in practices which are incompatible with Article 85(3) of the Treaty and, in particular, from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted, Regulation No 4056/86 attached certain conditions and obligations to the block exemption. First, Article 4 of that regulation provides that, subject to the nullity of the agreement or the relevant part of that agreement, the exemption is to be granted subject to the mandatory condition that such an agreement is not to cause detriment to certain ports, transport users or carriers by applying differentiated conditions of carriage. Second, Article 5 of Regulation No 4056/86 attaches to the exemption certain obligations relating, in particular, to loyalty arrangements and to services not covered by the freight charges.

9 Furthermore, it is noted in the 13th recital in the preamble that 'there can be no exemption if the conditions set out in Article 85(3) [of the Treaty] are not

satisfied;... the Commission must therefore have power to take the appropriate measures where an [exempted] agreement or concerted practice owing to special circumstances proves to have certain effects incompatible' with that article.

10 For that purpose, Article 7 of Regulation No 4056/86 provides for a mechanism for monitoring exempted agreements. Where the persons concerned are in breach of an obligation laid down in Article 5 of that regulation or where, owing to special circumstances, agreements which qualify for an exemption have effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, the Commission may take certain measures. Special circumstances expressly include those created by 'acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition'. In that case, Article 7 of Regulation No 4056/86 provides that the Commission is to withdraw the benefit of the block exemption.

11 For the purposes of the application of Article 85(3) of the Treaty and pursuant to Article 12 of Regulation No 4056/86, undertakings which seek application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of Article 85(1) of the Treaty to which they are parties are to submit applications to the Commission. Unless the Commission notifies those applicants, within 90 days from the date of the publication in the *Official Journal of the European Communities* of a summary of the application, that there are serious doubts as to the applicability of Article 85(3) of the Treaty, the agreement, decision or concerted practice is to be deemed exempt for a maximum of six years from the date of that publication (first subparagraph of Article 12(3) of Regulation No 4056/86). If the Commission finds, after expiry of the 90-day time-limit, but before expiry of the six-year period, that the conditions for applying Article 85(3) of the Treaty are not satisfied, it is to issue a decision declaring that the prohibition in Article 85(1) of the Treaty is applicable (second subparagraph of Article 12(3) of Regulation No 4056/86). Finally, if the Commission finds that the conditions of Article 85(1) and of Article 85(3) of the Treaty are satisfied, it is to issue a decision applying Article 85(3) of the Treaty (second subparagraph of Article 12(4) of Regulation No 4056/86).

Facts

12 The present action for annulment concerns Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1; 'the TAA decision' or 'the contested decision'). By that decision, the Commission took the view that certain provisions of the Trans-Atlantic Agreement ('the TAA'), an agreement on the scheduled transport ('liner transport') of containers across the Atlantic between Northern Europe and the United States of America and on the inland carriage of containers, to which the 15 applicant shipping companies were parties, infringed Article 85(1) of the Treaty. The Commission refused to grant an exemption to those provisions under Article 85(3) of the Treaty. The Commission did not impose any fines in respect of the infringements found.

13 The uncontested facts, according to the TAA decision and the written submissions of the parties, may be summarised as follows.

14 The transatlantic trade is the third-largest world trade after the transpacific and the Europe/Far East trade. In 1984, the nine liner conferences which had until then been operating on the transatlantic route were replaced by two conferences: the North Europe-USA Rate Agreement (Neusara) in respect of westbound traffic and the USA-North Europe Rate Agreement (Usanera) in respect of eastbound traffic. In 1992, the seven shipping companies which belonged to both of those conferences (Atlantic Container Line, Compagnie générale maritime, Hapag Lloyd, Maersk, Nedlloyd, P & O and Sea-Land) jointly held 52.9%, in the westbound sector, and 55.7%, in the eastbound sector, of the market in containerised liner transport services. Their main competitors were, at that time, Orient Overseas Container Line ('OOCL'), Cho Yang, DSR-Senator Lines,

Mediterranean Shipping Company ('MSC'), Polish Ocean Line (POL), Atlantic Cargo Shipping, Evergreen, Independent Container, Lykes and Star Shipping. All the other companies independent of the liner conferences had market shares of less than 1%.

15 The Neusara and Usanera conferences operated according to the same principles. The rates charged for transport services were based on a published tariff which was valid for all members of the conference. For a given route, the rates for shipping were dependent on the nature of the goods transported. Thus, for the same route, rates could vary by a multiple of five according to the goods transported. Shippers could have their goods transported by any member of the conference and pay the rate indicated in the conference tariff.

16 In order to obtain a rate lower than the conference tariff, shippers had two options. First, they could obtain a discount on the tariff from one of the conference members by means of an 'independent rate action'. That expression refers to the mechanism prescribed in certain provisions of the relevant United States legislation, the US Shipping Act 1984, in order to guarantee to all the members of a conference serving the ports of that country the option of unilaterally granting a discount on the conference tariff. In the Usanera and Neusara conferences, a shipping company which decided to take independent rate action was required to inform the other members of it.

17 Second, shippers could conclude a 'service contract' with the conference. Under such a contract, the shipper undertook to have the conference ship a minimum quantity of goods over a specified period. In exchange for that undertaking, the conference granted the shipper a discount on its tariff. No conference allowed its members to enter into service contracts individually.

18 The markets in containerised maritime liner transport services are generally subject to economic conditions which vary according to the direction of the traffic. Thus, on the transatlantic route, there is a significant imbalance between the demand for eastbound services and that for westbound services. In 1987 and 1988, westbound traffic was much greater than eastbound traffic. However, as from 1991, the situation was reversed, with eastbound traffic slightly exceeding westbound traffic. In 1992, the rates of utilisation of vessels — the ratio between the volume of demand and total capacity available — were estimated at 72.4% for eastbound traffic and at 62.6% for westbound traffic. Finally, during 1993, westbound traffic grew strongly while eastbound traffic decreased considerably.

19 Rates for maritime transport services, or 'freight rates', on the transatlantic route fell significantly between 1980 and 1992. Thus, between 1988 and 1992, the decrease in westbound traffic was followed by a steady decline in freight rates. From 1988 to 1991, the rates in the westbound sector fell by more than 23%, while they rose by 10% to 13% in the eastbound sector.

20 In that economic context, shipowners suffered significant financial losses.

21 As early as 1985, faced with the deterioration in market conditions, conference members and certain independent companies (Evergreen, POL, MSC, OOCL and Lykes) concluded so-called 'discussion' agreements which allowed them to discuss, in particular, their rates, tariffs and conditions of carriage. Those agreements, called Eurocorde and Gulfway, did not provide for any binding decisions. As from 1990, certain shipowners took the view that the Eurocorde

and Gulfway agreements did not allow for the imposition of freight rate increases which might satisfy both conference and non-conference members and they expressed the wish to adopt a new framework of cooperation going beyond discussion agreements and the traditional structures of liner conferences.

22 Negotiations were begun between the shipowners with a view to concluding an agreement of a type as yet unknown in the transatlantic trade in order to combat the fall in freight rates. In order to achieve that objective, the shipowners considered that it was imperative to have a framework of cooperation which governed both the fixing of freight rates and the limitation of the carrying capacity offered.

23 According to the explanations supplied by the applicants, such an agreement could succeed in stemming the instability of the market only by bringing together a sufficient number of shipping companies. In order to bring freight rates back to a level ensuring sufficient viability, the shipowners took the view that it was necessary to bring together within one and the same structure both members of the Usanera and Neusara conferences and independent companies. However, the realisation of such an objective encountered a major obstacle. The independent shipowners refused to join conferences which, like Usanera and Neusara, operated on the basis of a single tariff, since they could not impose on their clients freight rates as high as those charged by those conferences.

24 On 6 May 1992, the member companies of Usanera and Neusara, on the one hand, and five independent shipping companies (DSR-Senator Lines, Cho Yang, OOCL, POL and MSC), on the other, concluded the TAA.

25 After the TAA was concluded, four other independent shipping companies joined that agreement, namely Nyppon Yusen Kaisha (NYK), Neptune Orient Lines (NOL) and Transportación Marítima Mexicana and Tecomar. After having

ceased trading on the transatlantic route, Compagnie générale maritime withdrew from the TAA, with the result that the number of parties to the TAA stabilised at 15.

26 The TAA regulated several aspects of containerised liner transport, including 'slot and space charters' and equipment exchange, the fixing of the price of transport and port handling services and the common management of maritime transport capacity. For the purposes of considering the present application, the relevant provisions of the TAA are those relating to the fixing of the price of transport services and the transport capacity management programme.

27 As regards prices, the TAA provided for the fixing in common of the tariffs applicable to maritime transport and intermodal transport. The latter, which the parties also call 'multimodal' or 'door-to-door' transport, includes, in addition to maritime transport, the inland carriage of maritime containers between the coast and inland locations. The price of an intermodal transport service is made up of two elements, one relating to the maritime service, the other to the inland service. Thus, the TAA established, in addition to a maritime tariff, a tariff for the inland transport services operated in the territory of the Community in the context of an intermodal transport operation.

28 The provisions of the TAA on price agreements for maritime and inland transport services are noted in recitals 11 to 15 in the preamble to the TAA decision in the following terms:

'(11) The members of the TAA establish their tariffs for both the maritime and inland sectors and publish them jointly. Any independent action by one of the members (the offer of a lower [freight] rate than the tariff...) must be notified 10

days in advance to the secretariat of the TAA, which informs the other members (Article 13 of the agreement as amended).

(12) A standing "Rate Committee" monitors the application of the objectives of the agreement in so far as they concern tariffs (Article 13 of the agreement). It is made up of the former members of the conferences established in the trade between Northern Europe and the east coast of the United States (i.e. [Atlantic Container Line], Hapag Lloyd, P & O, Nedlloyd, Sealand and Maersk) plus OOCL and NYK. Application of those conference agreements was suspended following the entry into force of the TAA (see recital 117 et seq.).

... Service contracts

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

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

— no contracts may be signed for annual volumes less than 250 TEU containers (20-foot equivalent units). On 16 September 1993 the Commission was informed by the parties that they had lodged with the Federal Maritime Commission [independent administrative authority responsible, in particular, for the implementation of the US Shipping Act 1984] an amendment to the agreement lowering the limit to 200 TEU as from 1 January 1994.

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

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

29 As regards transport capacity, Article 18 of the TAA provided for a Capacity Management Programme ('the CMP'). Under that provision, the purpose of the TAA could not be achieved unless the parties extended their cooperation to the management of their supply of transport capacity. To do that, the shipowners agreed not to utilise a substantial part (up to 25%) of their available capacity. The members of the TAA had established for two years, by periods of three months, the real available capacity of each of them and the volume of goods that each member was authorised to carry. Thus, the shipowner which exceeded its authorised quota over a given three-month period undertook to pay a fine of USD 500 (United States dollars) per TEU container. However, it could charter slots from other TAA members if they had not reached their quota. The volumes prescribed by the programme could be revised. All the parties to the TAA participated in the CMP. At the date of the TAA decision, the CMP was implemented only in the westbound sector of the trade.

30 On 28 August 1992, the TAA was notified to the Commission. On the basis of Article 12(1) of Regulation No 4056/86, the signatories of the TAA requested a decision applying Article 85(3) of the Treaty.

31 By letter of 24 September 1992, the Commission informed the members of the TAA that it would also examine the agreement in the light of Regulation No 1017/68.

32 Between 13 October 1992 and 19 July 1993, the Commission received numerous complaints concerning the implementation of the TAA. The complaints were from exporters and associations of exporters established in various Member States of the Community who exported to the United States of America, the authorities of several European ports, and forwarding agents and associations of forwarding agents. The TAA was accused in those complaints of various breaches of Articles 85 and 86 of the Treaty in connection with the unfairness of the contract conditions imposed by the members of the TAA and the artificial limitation of the supply of transport.

33 By letter of 10 December 1993, the Commission sent the applicants a statement of objections. The addressee undertakings submitted their written observations and, in addition, were heard on 28 and 29 April 1994.

34 On 5 July 1994, following discussions during the pre-litigation procedure, the applicants notified the Commission of a new agreement, the Trans-Atlantic Conference Agreement ('the TACA'), which was presented as an amended version of the TAA. After various amendments were made, the new agreement took effect on 24 October 1994, replacing the TAA.

35 In those circumstances, on 19 October 1994, the Commission adopted the TAA decision, after having consulted the Advisory Committee on Restrictive Practices and Dominant Positions (land and maritime transport). The contested decision is divided into four parts. In Part One, the Commission set out the main provisions

of the TAA. Part Two is devoted to an analysis of the market and the economic context of transport services on the transatlantic route. In Part Three, relating to the role of the TAA, the Commission examines the origin of that agreement, the economic power of the structure which it establishes, its impact on the market and the complaints made against it. Part Four contains a legal assessment of the TAA's provisions on the CMP and on price-fixing for maritime and inland transport.

36 At the end of its analysis, the Commission decided as follows:

'*Article 1*

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

Article 2

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

Article 3

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

Article 4

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

Article 5

The undertakings to which this decision is addressed are hereby required, within a period of two months of the date of notification of this decision, to inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith.'

37 On 21 December 1994, the Commission adopted Decision 94/985/EC 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 FEFC decision'). On 16 March 1995, pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC), some of the companies to which that decision was addressed lodged at the Registry of the Court of First Instance an application for annulment of the FEFC decision (Case T-86/95).

38 On 27 January 1997, pursuant to Article 173 of the Treaty, the parties to the TACA lodged at the Registry an application for annulment of Commission Decision C(96) 3414 final of 26 November 1996 relating to a proceeding pursuant to Article 85 of the Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) withdrawing any immunity from fines which might arise from notification of the TACA (Case T-18/97).

39 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 TACA decision'). By applications lodged on 7, 29 and 30 December 1998, the parties to the TACA made applications for annulment of the TACA decision, which were registered under the numbers T-191/98, T-212/98, T-213/98 and T-214/98.

Procedure

40 On 23 December 1994, pursuant to Article 173 of the Treaty, the applicants lodged at the Registry of the Court of First Instance an application for annulment of the TAA decision. By separate application under Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC), they also sought suspension of the operation of the TAA decision.

41 By order of 10 March 1995 of the President of the Court of First Instance in Case T-395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595, the operation of Articles 1, 2, 3 and 4 of the TAA decision was suspended until delivery of the final judgment of the Court of First Instance in the main action, in so far as those articles prohibit the applicants from jointly exercising rate-making authority in respect of the inland portions within the Community of

through-intermodal transport services. The Commission's appeal against that order was dismissed by order of the President of the Court of Justice on 19 July 1995 (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165).

42 By order of 8 June 1995, the President of the Fourth Chamber (Extended Composition) of the Court of First Instance granted leave to intervene to the Japanese Shipowners' Association ('the JSA') and the European Community Shipowners' Association ASBL ('the ECSA') in support of the form of order sought by the applicants, and to the Freight Transport Association Ltd ('the FTA'), incorporating the British Shipping Council, the Association des utilisateurs de transport de fret ('the AUTF'), incorporating the Conseil des chargeurs français, and the European Council of Transport Users ASBL ('the ECTU'), incorporating the European Shippers' Council, in support of the form of order sought by the Commission.

43 By application lodged at the Court Registry on 3 October 1995, the applicants submitted a second application for interim measures pursuant to Article 186 of the Treaty, in which they requested the President of the Court of First Instance to address an order to the Commission to the effect 'that a decision to withdraw immunity from fines from the applicants in respect of European intermodal [rate-making] authority be stated to become effective, if ever, only after final judgment by the [Court] on an application to be lodged expeditiously by the applicants under Articles 173 and 174 [of the EC Treaty] for the annulment of such decision' (point 1.26 of the application for interim measures). By order of 22 November 1995 (Case T-395/94 R II *Atlantic Container Line and Others* v *Commission* [1995] ECR II-2893), the President of the Court dismissed that application as inadmissible.

44 On 30 October 1995, the High Court of Justice of England and Wales referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a number of questions relating, in particular, to the application of Article 85 of the Treaty and to the interpretation of Regulations No 4056/86 and No 1017/68 in the field of maritime liner transport (Case

C-339/95 *Compagnia di Navigazione Marittima and Others*, OJ 1995 C 351, p. 4). By order of 26 June 1996, the Court of First Instance stayed proceedings in Case T-395/94 pending delivery of the judgment in Case C-339/95, pursuant to the third paragraph of Article 47 of the EC Statute of the Court of Justice and Articles 77(a) and 78 of the Rules of Procedure of the Court of First Instance. Immediately prior to the date fixed for the Advocate General to deliver his Opinion in Case C-339/95, the Court of Justice was informed that an agreement had been concluded between the parties to the proceedings and that the case would be removed from the register of the national court, which was therefore withdrawing its request for a preliminary ruling. Consequently, by order of the President of the Court of Justice of 11 March 1998, Case C-339/95 was removed from the register and proceedings in Case T-395/94 resumed their course without the Court of Justice having given any answers to the various questions referred for a preliminary ruling.

45 In the light of the particularly voluminous nature of the applications lodged in the four actions against the TACA decision and the connection between the substantive issues raised in them and in the present case, Case T-86/95 and Case T-18/97, an informal meeting with the parties was held on 18 January 1999 for the purpose of examining the measures which might be adopted in order to ensure that the cases were dealt with efficiently. However, it was not feasible to group together the cases relating to the TAA and TACA decisions or to obtain from the applicants a summary of the written pleadings in the cases concerning the TACA decision.

46 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 to answer a number of written questions. The parties complied with those requests within the time-limits set.

47 The parties presented oral argument and replied to the Court's questions at the hearing on 8 June 2000.

Forms of order sought by the parties

48 The applicants, supported by the JSA and the ECSA, interveners, claim that the Court should:

— annul the TAA decision;

— in the alternative,

— annul Articles 1, 2, 3 and 4 of the TAA decision in so far as they have the effect of prohibiting the applicants from fixing the rates applying to inland transport as part of intermodal transport in the context of any cooperative agreement for the provision of liner shipping services;

— annul Article 5 of the TAA decision;

— annul Articles 1, 2, 3 and 4 of the TAA decision in so far as they have the effect of prohibiting the applicants from concluding joint service contracts, agreements to refrain from entering into individual service contracts and agreements to refrain from taking independent action on joint service contracts;

— order the Commission to pay the costs.

49 The Commission, supported by the FTA, the AUTF and the ECTU, interveners, contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

The need to rule on the case

50 The interveners, the FTA, the AUTF and the ECTU, have raised the question as to whether there is any continuing need to rule on the action in that the TAA decision relates to an agreement which is no longer in force.

51 Under Article 113 of the Rules of Procedure, the Court of First Instance may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with an action or declare that there is no need to adjudicate on it. Thus there is no need to adjudicate on an application for annulment of a decision which has not had, and can no longer have, any adverse effects on the applicants and which has accordingly become devoid of purpose (Case 74/81 *Flender and Others* v *Commission* [1982] ECR 395, paragraph 9).

52 The Court finds that the contested decision produces legal effects *vis-à-vis* the applicants. First of all, the Commission found that the provisions of the TAA relating to price-fixing for transport services and the common management of maritime transport capacity infringed Article 85(1) of the Treaty. It then required

the applicants to bring an end to those infringements and to refrain in future from any agreement or concerted practice which might have the same or a similar object or effect as those provisions. Finally, it required the applicants to inform customers with whom they had concluded service contracts and other contractual relations in the context of the TAA that such customers were entitled, if they so wished, to renegotiate the terms of those contracts or to terminate them forthwith.

53 Those effects have not necessarily disappeared by reason of the cancellation of the TAA, which was moreover the result of the Commission's negative assessment of the TAA in the light of the Treaty competition rules. In addition, the annulment of the contested decision might preclude a subsequent finding by the Commission that provisions which were the same or similar to those criticised in the TAA decision infringed the competition rules.

54 It follows that, notwithstanding the cancellation of the TAA, the contested decision continues to prejudice the applicants and produces binding legal effects such as to adversely affect their interests, so that the applicants retain an interest in seeking the annulment of that decision. The conditions which might warrant not ruling on an action are not satisfied therefore in the present case.

Substance

55 In support of the principal claim for annulment of the contested decision, the applicants rely in effect on three pleas in law. The first plea alleges breach of Article 85(1) of the Treaty. The second alleges infringement of Article 3 of Regulation No 4056/86 by reason of the non-application to the TAA of the block exemption. The third plea is based on the refusal to grant an individual exemption. The interveners supporting the applicants rely on breach of the Agreement on the European Economic Area ('the EEA Agreement'). In the

alternative, the applicants submit three claims for partial annulment of the contested decision. First, they seek annulment of Articles 1, 2, 3 and 4 of that decision in so far as they prohibit price-fixing for intermodal transport. Second, they seek annulment of Article 5 of the contested decision. Third, they seek annulment of Articles 1, 2, 3 and 4 of that decision in so far as they prohibit joint service contracts.

The principal claim for annulment of the contested decision

I — *The first plea in law asserting infringement of Article 85(1) of the Treaty*

A — *Arguments of the parties*

56 to 68 ...

B — *Findings of the Court*

69 The TAA, in so far as it included price-fixing agreements on both maritime and inland transport services and agreements on the non-utilisation of maritime transport capacity, involved, as set out in recitals 286, 298 and 306 of the

contested decision, an agreement which manifestly restricted competition. These are restrictions of competition expressly referred to in Article 85(1)(a) and (b) of the Treaty.

70 Moreover, the applicants do not dispute the anti-competitive nature of the TAA provisions in issue, but submit that, although it had a particular obligation to do so in this case, involving as it does an agreement relating to international trade, the Commission has not established that there was an appreciable restriction of competition within the common market and an appreciable effect on trade between Member States.

71 As a preliminary point, the Court finds that that line of argument cannot be accepted in the light of the wording of Regulation No 4056/86. In fact, international maritime transport, in particular that with non-member countries, appears as the first type of transport referred to in that regulation. Article 1(2) of Regulation No 4056/86 provides that the regulation 'shall apply only to international maritime transport services from or to one or more Community ports', and the sixth recital in the preamble specifies that 'trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports'. Similarly, the 15th recital in the preamble to Regulation No 4056/86 provides that 'account should be taken of the fact that the application of this regulation to certain restrictive practices or abuses may result in conflicts with the laws and rules of certain third countries'. Finally, and most importantly, it would be pointless to provide for a block exemption in favour of liner conferences, almost all of which concern only routes with non-member countries, if those conferences could not be caught by Article 85(1) of the Treaty.

72 As regards, first, the general objections relating to the Commission's failure to demonstrate that there were restrictions of competition within the common market, it must be emphasised that the TAA related to transport services, both

maritime and inland, between Europe and the United States. As the Court of First Instance has already held, the relevant markets directly affected were those in transport services and not that in the export of goods to the United States (see 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, paragraph 205). *Bulk Oil* and *Junghans* are thus irrelevant to the present case since they concerned restrictions on the export of goods outside the Community and not the sale of services within the Community. In this case, the restrictions of competition occurred within the common market because it is there that the members of the TAA, including several shipping companies established in the Community, were in competition to sell their services to clients, namely shippers, established in the Community. The fact that certain members of the TAA are not established in the Community does not, moreover, cast doubt on that conclusion. In that regard, the Court of Justice has held that where producers established outside the Community sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market, so that concertation between those producers on the prices to be charged to their customers in the Community has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* ('*Wood pulp*') [1988] ECR 5193, paragraphs 12 and 13).

73 The statement of reasons for the contested decision is sufficient in that respect because it is explained, particularly in recital 289, that '[t]he TAA covers shipping lines operating in several Member States and restricts competition between those lines in respect of the services and prices each of them offers... the elimination or reduction of competition in respect of the services or prices of the shipping lines is capable of reducing to a significant extent the benefits to be derived by the more efficient shipowners. This may in turn affect the normal interplay of gains and losses of market share which would have taken place in the absence of the TAA'. The Commission also stated, in recital 67 in the preamble to the contested decision, that the geographic market in which the TAA's maritime transport services were marketed, that is to say containerised liner shipping services

between Northern Europe and the United States via the maritime routes between the Northern European ports and ports in the United States and Canada, was made up of the catchment areas of such Northern European ports. In recital 68 in the preamble to the TAA decision, the Commission stated as follows: '[t]he catchment areas in question depend both on distances from the ports and on the costs of inland haulage. In the case in point, the catchment areas of the Northern European ports can be regarded as covering, in particular, Ireland, the United Kingdom, Denmark, the Netherlands, Belgium, Luxembourg, most of Germany and Northern and central France'. The contested decision has therefore explained to the required legal standard that the TAA included restrictions of competition in respect of prices and the capacity of the transport services which TAA members marketed within the Community.

74 Furthermore, the Commission pointed out in the contested decision that the TAA brought about, in other respects, restrictions of competition within the common market. As is stated in recitals 290 to 293, 301 and 305 in the preamble to that decision, the agreements on prices and transport capacity also influenced competition between ports in different Member States by artificially extending or diminishing their catchment areas. It should be noted in that regard that the sixth recital in the preamble to Regulation No 4056/86 states that 'restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market'.

75 The Court finds, next, that the appreciable nature of those restrictions has been established to the required legal standard in the contested decision. First, the Commission stressed the seriousness of the restrictions of competition at issue and, in recitals 189 to 263 in the preamble to that decision, it made clear the impact of the TAA on the structure and level of prices and its effect on the market. Second, the Commission pointed out, without being contradicted, the considerable economic importance of the services to which the TAA related. In recitals 83, 84 and 438, the defendant thus noted that the transatlantic trade is

the third-largest world trade, that a substantial proportion of the trade between Europe and the United States, which amounts to some 80 billion euro in each direction, is carried by liner shipping and that the members of the TAA held a market share of the order of 75% in 1991 and 1992 or, at the very least, of 50% according to their own definition of the market.

76 In any event, in so far as the applicants' objections may be understood as requiring the demonstration of actual anti-competitive effects, even though the anti-competitive object of the provisions in issue is manifestly proven, those objections cannot be upheld. It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342; see also, to the same effect, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15; and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 122).

77 Finally, in so far as the applicants' arguments seek to challenge the anti-competitive nature of the CMP, suffice it to say that the CMP clearly had the object and effect of restricting the TAA members' planned supply of transport capacity in order to increase or, at the very least, maintain freight rates. Moreover, the applicants' assertion that supply has always exceeded demand on the transatlantic route is true only of overall supply on the market and not of the supply, expressed in terms of transport capacity, of each member of the TAA, which the CMP is indeed specifically designed to restrict. It cannot therefore be denied that the CMP constituted a restriction of competition within the meaning of Article 85(1)(b) of the Treaty. Furthermore, that restriction of competition was appreciable and affected trade between Member States for the same reasons as the provisions of the TAA fixing the prices of maritime transport services.

78 It follows that the Commission has established to the required legal standard in the contested decision that the TAA restricted competition within the common market for the purposes of Article 85(1) of the Treaty.

79 As regards, second, the effect on trade between Member States, it should be recalled, first of all, that it is settled case-law that, for an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the Member States (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 Osakeyhtiö and Others* v *Commission* ('*Wood pulp II*') [1993] ECR I-1307, paragraph 143). In particular, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect (see, in respect of Article 85 of the Treaty, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 235; and, in respect of Article 86 of the Treaty, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 69).

80 It must be stated, next, that the TAA was an agreement between shipping companies, including a number established in the Community, which related to the conditions for the sale of maritime and inland transport services to shippers established in various Member States of the Community. Such an agreement was capable of affecting trade between Member States for the purposes of Article 85(1) of the Treaty. Given that the condition concerning the effect on trade between the Member States is intended to define the scope of Community law in contrast to that of the laws of the Member States (*Consten and Grundig* v *Commission*, and *SPO and Others* v *Commission*, paragraph 227), it cannot be disputed that the TAA, which imposed conditions for the sale of transport services on a large proportion of the Community's shippers, falls within the scope of Community competition law.

81 Furthermore, the TAA was capable of modifying the pattern of trade in goods transiting through the ports served by the shipping companies which are TAA members. As a result, the TAA must be regarded as having affected trade between Member States, over and above the trade consisting of only maritime transport services, since port and auxiliary services linked to the carriage of goods were also affected.

82 Finally, although more indirectly, the TAA had, or at the very least was capable of having, an effect on the trade in goods between Member States, in so far as the transport prices fixed by the TAA represented a proportion of the end selling price of the goods transported. The intensity of competition in the maritime transport sector seems indeed to indicate that the price of that transport is an element in the cost of the goods thus transported, such as to have an impact on their sale.

83 As regards, third, the applicants' objections in respect of the Commission's analysis of inland transport services, it should first be noted that, for the purposes of applying Article 85 of the Treaty, the reason for defining the relevant market is to determine whether the agreement at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. That is why, for the purposes of applying Article 85 of the Treaty, the applicants' objections to the Commission's definition of the market cannot be viewed in isolation from their objections concerning the effect on trade between Member States and the impairment of competition (*SPO and Others* v *Commission*, paragraphs 74 and 75; and 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 1093).

84 It should be noted next that in recitals 71 and 72 in the preamble to the contested decision the Commission clearly identified the inland transport services

concerned. It rightly considered that the relevant inland transport services were those for the inland haulage of containers offered to shippers, between ports in Northern Europe and inland points in Europe, as part of a transatlantic intermodal transport operation (see the judgment in Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraphs 117 to 130, delivered on the same day).

85 The applicants' objections alleging a failure to define, or an error in the definition of, the relevant market must therefore be dismissed.

86 In addition, the applicants' argument that the relevant market should include all inland transport movements of a type similar to, or substitutable for, the movement of TAA containers is unfounded. As the applicants themselves have indeed stated in the context of another plea: '[w]hat is at issue here is not inland transport per se, but rather inland transport as part of a through-intermodal transport service... The TAA inland tariff is a tariff for use only in relation to through-intermodal transatlantic maritime transport services and produces no effects on any other market (such as the market for purely inland movements).' (See, by analogy, the judgment in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, upheld by the Court of Justice in Case C-53/92 *Hilti* v *Commission* [1994] ECR I-667). The inland transport concerned included only the inland haulage of containers in connection with transatlantic maritime transport services.

87 As regards the complaints that the Commission did not prove that the agreements fixing inland transport rates were a restriction of competition within the common market and affected trade between Member States, suffice it to recall the finding above that TAA members competed against each other in respect of the sale of their transport services within the common market. That was also true of the inland haulage transport services supplied with other services including the maritime transportation proper of containers as part of an intermodal transport

operation. The prices of those inland transport services were an important element in the price of the intermodal transport sold by the members of the TAA. The agreements fixing inland transport rates therefore appreciably reduced competition between those companies and affected trade between Member States in the same way as the agreements on maritime transport. As regards inland transport services, the effect on inter-State trade and the localisation within the common market of the restriction of competition are even less open to challenge because some of those transport services are actually operated in the territory of the different Member States. The assertion in recital 306 in the preamble to the contested decision that agreements fixing the rates and conditions of the inland element of intermodal transport services are a restriction of competition within the meaning of Article 85(1) of the Treaty can therefore not be validly challenged.

88 Furthermore, as is stated in recital 309 in the preamble to the contested decision, the price agreements on inland transport services changed the nature of the relationship between shipowners and inland transport undertakings, which was liable to affect trade in inland transport services between Member States. Fixing the sale price of inland transport services could, in particular, influence the shippers' decision to entrust the inland haulage of their containers to members of the TAA or to an inland transport undertaking, thereby distorting competition on the inland segment between the shipping companies which were TAA members and the inland transport undertakings in various Member States.

89 Similarly, in recital 310 in the preamble to the contested decision, the Commission made the further correct finding that the collective fixing of inland transport rates altered the natural catchment areas of the ports of the various States. Fixing those prices on the basis of an assumed move between an inland point and the nearest port served by any member of the TAA, and thus regardless of which ports were actually served by the various members of the TAA, neutralised the economic advantage which a shorter distance from a given port might confer. The applicants have not in fact challenged the existence of such

deflection of freight resulting from the application of the inland transport tariff, but have merely qualified its importance. The suggestion, which has after all not been proven, that, even without the TAA, the shipping companies would absorb the additional costs of moving goods to a more distant port does not alter the fact that the object, or at least the effect, of the practice known as 'port equalisation' was to drain goods towards ports to which otherwise they would not have been sent and that that modification in the pattern of trade in goods was a consequence of the price agreements on inland transport.

90 In any event, it is settled case-law that the condition relating to the effect on trade between Member States is satisfied where it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see, to this effect, *inter alia* Case 99/79 *Lancôme and Coparfrance* [1980] ECR 2511, paragraph 23; Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 103). The Commission has no obligation therefore to demonstrate that trade has actually been so affected (*Ferriere Nord* v *Commission*, paragraphs 19 and 20), which, moreover, is difficult to prove to a sufficient legal standard in most cases, but it is required to establish that the agreement is capable of having that effect (Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15; and *Ferriere Nord* v *Commission*, paragraph 19). Accordingly, the applicants' objections must be dismissed in so far as they may be understood as requiring from the Commission proof that trade between Member States has actually been affected, on each of the markets or sub-markets which they deem relevant.

91 Finally, as regards the appreciable nature of the restrictions of competition resulting from the price agreement on inland transport, it should be recalled, first, that, according to recital 146 in the preamble to the contested decision, which has not been challenged by the applicants, in 1992, TAA members shipped more than 1.5 million TEU containers of the almost 2 million shipped in the context of transatlantic trade and, second, that, according to the applicants' answers to the

Court's written questions, between 40% and 50% of the containers shipped by TAA members were carried to or from the ports in the context of intermodal transport contracts. Consequently, the price agreements on inland transport services concerned at least 600 000 containers, namely 30% of the containers shipped between Europe and the United States.

92 It is clear from the foregoing that, first, by virtue of its anti-competitive object and in the light of the economic power of its members, the TAA was capable of having an appreciable effect on trade between Member States and significantly modified the conditions of competition in the territory of a number of Member States and, second, the contested decision contains a sufficient statement of reasons for that assessment.

93 The first plea in law alleging a breach of Article 85(1) of the Treaty must therefore be dismissed.

II — *The second plea in law based on the non-application to the TAA of the block exemption provided for in Article 3 of Regulation No 4056/86*

94 The Commission decided that the TAA was not covered by the block exemption granted to liner conferences by Article 3 of Regulation No 4056/86 because, first, it was not a liner conference within the meaning of that regulation, in that it established at least two rate levels and, second, even if the TAA were regarded as a liner conference, the CMP was not an activity covered by the exemption under Article 3. The Commission also considered in the TAA decision that, whichever

interpretation of the concept of liner conference were adopted, Regulation No 4056/86 was, in any event, inapplicable to agreements fixing inland transport rates in the context of intermodal transport.

A — *Arguments of the applicants*

95 ...

1. Incorrect assessment of the economic characteristics of maritime liner transport

(a) Partial inadmissibility of the Commission's defence

96 ...

(b) Economic characteristics of the liner shipping market

97 to 105 ...

(c) Stabilising effects of the TAA on the transatlantic trade

106 to 109 ...

(d) Recognition by Community law of the inherent instability of the liner shipping market

110 to 121 ...

2. Definition of 'liner conference' within the meaning of Regulation No 4056/86 and the dual tariff structure of the TAA

122 to 127 ...

B — *Arguments of the ECSA and the JSA*

128 to 129 ...

C — *The arguments of the Commission*

130 ...

D — *Arguments of the FTA, the AUTF and the ECTU*

131 to 133 ...

E — *Findings of the Court*

134 The applicants submit, in substance, that by virtue of an excessively narrow definition of the concept of stability, the Commission wrongly considered in the contested decision that the TAA was not covered by the block exemption provided for in Article 3 of Regulation No 4056/86, since that decision was based on the fact that, first, the TAA was not a liner conference because its members did not charge uniform or common freight rates, second, the CMP was not covered by the block exemption and, third, agreements fixing inland transport rates in the context of intermodal transport did not fall within the scope of Regulation No 4056/86.

135 Recital 319 in the preamble to the contested decision states:

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

— it establishes at least two rate levels,

— it provides for non-utilisation of capacity.'

136 It must be noted that, according to the contested decision, the dual tariff structure prevents the TAA from being regarded as a liner conference within the meaning of Regulation No 4056/86, while the CMP is regarded as an activity which could

not be exempted under Article 3 of that regulation. According to recital 359 in the preamble to the contested decision, 'even if the TAA were a conference agreement within the scope of Article 1 of Regulation... No 4056/86, the capacity management programme set up by TAA members would not be exempted by Article 3 of that regulation'.

137 It is also clear from recitals 320 to 358 in the preamble to the contested decision, as was, moreover, confirmed by the Commission in the defence and the rejoinder as well as at the hearing, that the refusal to consider that the TAA was covered by the group exemption provided for in Article 3 of Regulation No 4056/86 is based, first and foremost, on the ground that the TAA was not a liner conference within the meaning of Article 1 of Regulation No 4056/86 because it did not provide for uniform or common freight rates.

138 Article 3 of Regulation No 4056/86 provides for an exemption from the prohibition in Article 85(1) of the Treaty for 'agreements, decisions and concerted practices of all or part of the members of one or more liner conferences... when they have as their objective the fixing of rates and conditions of carriage'.

139 The group exemption provided for in Article 3 of Regulation No 4056/86 thus relates to agreements fixing rates in the context of liner conferences. As is clear from the eighth recital in the preamble to Regulation No 4056/86, that group exemption is accorded to liner conferences on the grounds that they have a stabilising effect, assuring shippers of reliable services, and that they contribute generally to providing adequate, efficient, scheduled maritime transport services and also give fair consideration to the interests of users. The eighth recital also states that such results 'cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates'.

140 It follows that an agreement can qualify for the exemption provided for in Article 3 of Regulation No 4056/86 only if it is the agreement of a liner conference.

141 It is first necessary, therefore, to define 'liner conference' within the meaning of Regulation No 4056/86 and, next, to determine whether the TAA could be regarded as a liner conference.

1. The definition of 'liner conference' within the meaning of Regulation No 4056/86

142 According to Article 1(3)(b) of Regulation No 4056/86, a liner conference is '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'.

143 The existence of a liner conference within the meaning of Regulation No 4056/86 thus depends on the charging of 'uniform or common freight rates' by its members.

144 The applicants submit, in substance, that the Commission wrongly considered in the TAA decision that 'uniform or common freight rates' means that those rates must be identical for all the members of the conference for the same product. According to the applicants, a group of shipping companies may constitute a liner conference within the meaning of Regulation No 4056/86 and therefore qualify for the block exemption, so long as the freight rates are established in common by

the members of the group, even if they vary from one member to another. The term 'uniform' refers only to uniformity in the rates charged to shippers, but not between shipowners.

145 In order to determine the meaning of the expression 'uniform or common freight rates', it is necessary to have regard not only to the terms used, but also to the mechanism of the block exemption, to the context of Regulation No 4056/86 and to the objectives which it pursues.

146 First, it should be recalled that, according to settled case-law, having regard to the general principle of the prohibition of agreements restricting competition in Article 85(1) of the Treaty, provisions derogating therefrom in an exempting regulation must, by their nature, be strictly interpreted (*Compagnie maritime belge de transports*, paragraph 48; Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37). This conclusion 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 (horizontal agreement having as its object the fixing of prices). It follows 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. The exemption can relate only to the types of agreement which the Council, when Regulation No 4056/86 was adopted, regarded, in the light of experience, as satisfying the conditions of Article 85(3) of the Treaty. Apart from the power enjoyed by the Council, if the need arose, to amend Regulation No 4056/86, the undertakings concerned also always have the option to apply for an individual exemption to offset any disadvantages of the limitations inherent in the block exemption.

147 Second, it is common ground that the definition of 'liner conference' in Article 1(3)(b) of Regulation No 4056/86 was taken word for word from the United Nations Convention on a Code of Conduct for Liner Conferences, which

was adopted on 6 April 1974 and entered into force on 6 October 1983. The link between Regulation No 4056/86 and the Unctad Code is also clear from the third recital in the preamble to that regulation, according to which 'the regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) No 954/79 should take account of the adoption of the [Unctad] Code; [and] as far as conferences subject to the [Unctad] Code... are concerned, the regulation should supplement [that] Code or make it more precise'. The Unctad Code thus constitutes an important point of reference for the interpretation of the concept of liner conference referred to in Regulation No 4056/86.

148 As is clear, in particular, from the numerous references to academic writing in recitals 321 and 322 in the preamble to the contested decision, the Unctad Code refers to traditional liner conferences whose essential characteristic is that all their members agree to charge the same freight rates for the maritime transport of the same product on a regular service. It must, however, be said that the applicants have not cited any publication or referred to any work which would contradict that assertion. At most, they have identified, rightly but without its having any relevance, the exact scope of a work to which reference is made in recital 324 in the preamble to the TAA decision. Furthermore, the applicants have not specifically claimed that the operation of traditional liner conferences is not based on the charging of uniform freight rates, but have merely stated, vaguely, in a part of their application other than that containing the statement of the second plea, that '[t]he history of liner conferences indicates that all three types of agreement on price have been a feature of cooperation between liner operators'.

149 The requirement of uniformity of rates for all members of a traditional liner conference, referred to by the Unctad Code, is also clear from Article 13(2) of that code which, in the French version, as in most of the other language versions except the English, provides that conference tariffs must specify *one* freight rate for each commodity.

150 Moreover, although a provision of Community law must be interpreted in the light of that law and obviously cannot depend on the law of a non-member State, it can none the less be noted, since Regulation No 4056/86 refers to the liner conferences covered by the Unctad Code, as is stated in recital 346 in the preamble to the TAA decision, that the analysis of the United States Department of Justice also confirms that liner conferences are based on uniform freight rates for all conference members and are thereby different from agreements such as the TAA, known as 'rate agreements', which provide for rates which are different for different members. According to the Department of Justice, '[c]onference membership in these rate agreements allows conferences to meet with all major "independent" lines to fix rates. Thus conference monopoly power can be extended, through rate agreements, to encompass most non-conference lines.... Such an agreement need not specify uniform rates: the parties may agree on rates which are different for different carriers, reflecting service variations or other factors.... Rate agreements typically provide for the right of independent action by agreement members. Where conferences are members of rate agreements, the lines normally agree upon a rate differential between conference and non-conference rates, rather than on uniform rates as is the case with respect to conferences.' (*The Regulated Ocean Shipping Industry*, a report of the US Department of Justice, January 1977, pp. 69, 70 and 142.)

151 Third, it is also clear from the documents preparatory to the adoption of the Unctad Code cited in recital 327 in the preamble to the contested decision, such as the 1970 preparatory report for that code, drawn up by the secretariat of the United Nations Conference on Trade and Development (Unctad) and entitled *The Liner Conference System*, that the fixing of uniform freight rates for the same cargo and for all conference members is an essential characteristic of a liner conference. Thus, point 156 of that report states that '[i]n any conference the basic agreement between the members is to charge *uniform rates*' (emphasis added by the Court). Similarly, conferences are described as 'groups of lines operating on routes with basic agreements to charge uniform rates...' (point 8). It is noted that '[t]he competition between the members of the conference is controlled by all the members agreeing to charge uniform rates' (point 14). The

report states that the advantages brought by conferences include the fact that they 'maintain that all the member lines charge uniform rates without discrimination between shippers on the basis of their economic power or the size of their shipment. A conference shipper is sure that his competitors cannot, by shopping around, obtain a lower rate' (point 27). 'Conferences further argue that they provide fixed rates which are reasonably stable' (point 28). In Chapter VI on the stability of freight rates, it is noted that '[o]ne important claim made by conferences is that they give to importers and exporters stability of freight rates which they believe will enable long-range planning of trade to take place' (point 225). 'To meet this widespread desire on the part of shippers is one main reason why cargo-carrying lines combine into conferences and agree to quote the same rates and conditions for similar cargo to all shippers' (point 226). 'Rate stability, therefore, seems possible only if the lines enter into an agreement or understanding to charge uniform rates' (point 227). Similarly, point 6 of the 1972 preparatory report of the Unctad secretariat entitled *The Regulation of Liner Conferences (A Code of Conduct for the Liner Conference System)* states that liner conferences are 'groups of shipping lines operating on routes with basic agreements for charging uniform rates'.

152 It is clear from the foregoing that, contrary to the applicants' submissions, the history of the drafting of the Unctad Code shows that the essential characteristic of liner conferences is the fixing of uniform freight rates applicable by all the members of the conference for the transport of a particular product.

153 Accordingly, the fact, relied on by the applicants, that, before the expression 'uniform or common freight rates' was adopted, formulations including 'uniform' on its own, 'agreed' on its own and 'uniform or agreed' were proposed, is irrelevant. Those successive proposals merely highlight the semantic difficulty in international discussions of translating a common concept designated by numerous expressions in the different States or in the different languages.

154 Moreover, the alleged difference in meaning between 'uniform' and 'common' is scarcely of consequence, since the two terms appear to be synonymous. Where shipping companies charge freight rates characterised as uniform or common, the client pays the same price, whichever company transports the cargo.

155 Finally, the joint use of 'uniform' and 'common' is explained by the need to ensure that the definition in the Unctad Code also covers the practice of promotional freight rates (referred to in Article 15 of the Unctad Code) and that of special rates under loyalty arrangements (referred to in Article 7 of the Unctad Code). In those two cases, the freight rates are indeed 'common', since they are identical for all members and *vis-à-vis* all shippers, but they are not 'uniform', since a different price will be charged for the carriage of the same cargo according to whether it comes under the general tariff or the tariff applicable to promotional activities or loyalty arrangements.

156 Fourth, the Court of First Instance has held that a liner conference, 'as emerges from Article 1 of Regulation No 4056/86, by virtue of its nature... is intended to define and apply uniform freight rates and other common conditions of carriage' (*Compagnie maritime belge de transports*, paragraph 65).

157 Similarly, the Court of Justice has confirmed that 'by its very 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, can be characterised as a collective entity which presents itself as such on the market *vis-à-vis* both users and competitors' (Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge de transports and Others* v *Commission* [2000] ECR I-1365, paragraph 48). The conference puts itself forward as an entity on the market since it fixes uniform 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.

158 Fifth, as is clear, in particular, from the eighth recital in the preamble to Regulation No 4056/86, liner conferences qualify for a block exemption because of their stabilising effect. That stability is best ensured if all the members of the conference adopt uniform freight rates rather than if there are several rates according to the members concerned. A uniform level of freight rates within the conference also allows users, account of whose interests is also a requirement for the exemption, to be assured of being able to obtain the transport service at the same price, whichever conference member it approaches. That interest of the shippers in having access to a reference rate in respect of a particular commodity is appreciably reduced if the members of the conference do not charge one rate, but two or more, in respect of the same product.

159 Contrary to the applicants' submissions, that interpretation of the concept of liner conference is not inconsistent with the possibility, acknowledged by the Commission, for a conference member to take independent action. That action is fundamentally different from the system of differentiated prices. The taking of independent action, which enables a conference member, subject usually to 10 days' notice, to offer, for a specific product, a lower freight rate than that in the conference tariff, does not create another level of prices which may be generally charged, since that action concerns only a single ad hoc transaction. The stabilising effect of the existence of uniform or common freight rates for all conference members therefore continues in the event of independent action, whereas it is undermined where the conference tariff, which lists all the freight rates applicable, is replaced by a system of rates which vary according to the members. In addition, independent action is, by definition, decided on and taken by a carrier in accordance with the principle of competition law that each operator determines, completely independently, the policy which he intends to follow on the market; by contrast, a system of differentiated prices implies an anti-competitive arrangement additional to that of the liner conference, since it is in practice akin to an agreement between a conference and independent companies.

160 Similarly, the interpretation in the contested decision of 'uniform or common freight rates' as meaning that those rates must be identical for all conference

members cannot be regarded as inconsistent with the fact that loyalty arrangements, as defined in Article 5(2) of Regulation No 4056/86, are exempted under Article 6 of that regulation. Loyalty arrangements, on the basis of which reductions on the freight rates laid down in the tariff are granted to the shippers who agree to be loyal to the conference, do not undermine the stabilising effect of the conference since those reductions are granted whichever conference member undertakes the carriage and charged uniformly to all the shippers which are parties to those arrangements and dispatch the same cargo.

161 Sixth, according to Article 85(3)(b) of the Treaty, an exemption cannot be granted to an agreement which eliminates competition. In that regard, the Court of Justice has stated that 'if Article [3(g)] provides for the institution of a system ensuring that competition in the common market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless' (Case 6/72 *Europemballage Corporation and Continental Can* v *Commission* [1973] ECR 215, paragraph 24). Similarly, it is clear from the case-law that 'price competition is so important that it can never be eliminated' (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 21).

162 In Regulation No 4056/86, the Council did not intend to derogate, and indeed could not have derogated, from Article 85(3) of the Treaty. On the contrary, the Council refers on several occasions, in particular in the 13th recital in the preamble to Regulation No 4056/86 and in Article 7 thereof, to the need to ensure that the block exemption does not cover practices which are incompatible with Article 85(3) of the Treaty. As regards the exemption of a horizontal price-fixing agreement which has as its object or effect the elimination, at least to a large extent, of internal competition between conference members, the existence of external competition from the independent shipping companies, that is those which operate outside the conference, constitutes the principal guarantee of maintaining effective competition where there is a block exemption.

The introduction, or the practice, of differentiated prices makes it possible to attract into a group independent shipping companies which, otherwise, would continue to compete with the members of the conference. Admittedly, any agreement between shippers fixing two, or more, levels of prices does not automatically lead to the elimination of external competition. Thus, an agreement fixing several levels of prices, of the type contained in the TAA, might bring together only carriers representing, collectively, a relatively small part of the market and thus not lead to the elimination of external competition. By contrast, a conference whose members charge uniform freight rates might represent almost the entire market and eliminate external competition. However, those situations are largely theoretical and, in general, it cannot be disputed that the possibility of fixing different levels of prices makes it possible to attract into the group companies which, without that flexibility, would remain independent and that this situation is likely to lead to the elimination of external competition; by contrast, the obligation to fix uniform freight rates for all conference members is not such as to encourage all operators to join the conference, which guarantees the existence of external competition.

163 That analysis is corroborated by the present case. Recital 341 in the preamble to the contested decision states that '[t]he real purpose of the introduction of differentiated [freight] rates in a case such as that of the TAA is to bring [independent carriers] inside the agreement: if they were not allowed to quote prices lower than those of the old conference members, these independents would continue as outsiders competing against the conference, especially in terms of price'. The record of a meeting between all the future members of the TAA on 13 January 1992 in Geneva shows that that assertion was well founded. That document states that '[a]ll independent lines advised that they would not become members if this just created a new Usanera/Neusara conference with a different name. After much discussion all lines were comfortable that the new agreement would allow them sufficient commercial freedom to maintain their own pricing and marketing philosophies.' The applicants themselves stated as follows in point 2.14 of the application: 'the TAA could succeed where its predecessors had failed only by bringing together a sufficient number of lines operating on the trade to ensure a reversal of the tendency to destructive competition.... The differences in [freight] rates charged by the TAA members reflected this market reality and without this it would not have been possible to achieve the stabilising effect which was the objective of the TAA'. Thus, the case of the TAA illustrates

precisely the fact that the practice of differentiated prices makes it possible to attract into a conference companies which, without that flexibility as to tariffs, would remain independent. That type of agreement, which is likely to bring about the elimination of external competition, cannot therefore be regarded as satisfying, a priori, the conditions laid down in Article 85(3) of the Treaty. It follows that Article 3 of Regulation No 4056/86, which provides that agreements of the members of liner conferences are exempted from the prohibition in Article 85(1) of the Treaty when they have as their object the fixing of freight rates and conditions of carriage, cannot be applied to agreements between shipowners providing for two, or more, levels of prices, especially since the existence of external competition is the essential requirement for granting the block exemption to agreements between the members of liner conferences, because it ensures the maintenance of effective competition.

164 Seventh, if, as the applicants propose, 'uniform or common freight rates' were taken to mean merely that those rates must have been reached 'in common', this would imply that every price agreement between shipping lines would be covered by the exemption under Article 3 of Regulation No 4056/86. As the Commission rightly points out in recital 349 in the preamble to the contested decision, such an interpretation would make Article 3 of that regulation incompatible with Article 85(3) of the Treaty, since, without any guarantee of beneficial results, a derogation from the prohibition in Article 85(1) of the Treaty would be automatically granted, on the basis of Article 3 of Regulation No 4056/86, to every horizontal price agreement between shipowners providing liner services, an agreement which constitutes precisely one of the most serious restrictions on competition.

165 Eighth, as regards the economic analysis put forward by the applicants, it must be recalled, first, that the anti-competitive object which characterises a price agreement cannot be altered by the economic context in which the agreement is situated (*Cimenteries CBR*, paragraph 1088). Nor does an economic analysis alone make it possible to determine the scope of a regulation providing for a block exemption. Since that regulation is to be interpreted strictly, it is necessary to determine only whether an agreement referred to in Article 85(1) of the Treaty

qualifies, under the provisions of the regulation concerned, for the exemption provided for in that regulation. In that regard, the view taken by the applicants in the course of the administrative procedure, that '[i]n the circumstances, according to the members of the TAA, the assessment should focus on the compliance of the organisation of the trades with the Council's political objectives as understood by the TAA members, and not the compliance of the formal agreement with the wording of Regulation No 4056/86' (point 252 of the statement of objections, referring to the TAA's reply to the statement of objections of 24 May 1993, p. 68, 2.26), cannot be accepted.

166 It should be noted, next, that the applicants have not shown, or, *a fortiori*, proved, how the economic analysis they put forward, even if it is well founded, could affect the definition of liner conference within the meaning of Regulation No 4056/86. Furthermore, the only arguments which the applicants seem to wish to draw from that analysis and to rely on in support of their second plea have already been taken into account and rejected in the paragraphs above. Accordingly, even if the concept of stability must be given a broader meaning than that attributed by the Commission and an agreement between shipping companies may have a stabilising effect as a result of the charging of freight rates which are not identical for all the companies, it does not thereby follow that that agreement falls within the scope of the block exemption. As stated above, the block exemption cannot apply to all agreements which, in the view of the parties to those agreements, have some kind of stabilising effect, but only to those which, to the extent that they correspond to the type of agreement referred to in the provisions of the exempting regulation, are deemed to bring about the positive effects referred to in the eighth recital in the preamble to Regulation No 4056/86 and to satisfy all the conditions imposed by Article 85(3) in order to qualify for an exemption.

167 It follows from each of the reasons set out above and, in any event, from all those reasons taken together, that the block exemption provided for by Article 3 of Regulation No 4056/86 can apply only to liner conferences whose members operate by charging uniform or common freight rates, that is by applying a tariff of freight rates identical for all conference members for the same product. By

contrast, an agreement between carriers providing for a scheme of tariffs which vary according to the members cannot be regarded as a liner conference under Regulation No 4056/86.

168 That conclusion is not affected by recital 354 in the preamble to the contested decision which states that that decision 'does not consider how far other agreements between shipowners for two-tier pricing might be exempted by Article 3 of Regulation (EEC) No 4056/86'. Without its being necessary to analyse the precise meaning of that passage of the decision, suffice it to state that it is an *obiter dictum* and that, in any event, the Commission's opinion is no guarantee that the interpretation of a provision of a Council regulation is correct.

169 It must also be stated that one of the applicants itself took the view that an agreement such as the TAA for a scheme of tariffs which vary according to the members was an agreement of a new type which could not be regarded as a liner conference.

170 It should be noted that Mr Karl-Heinz Sager, chairman of DSR-Senator Lines, an independent company which is now a member of the TAA, has consistently defended the need for a new structure in liner shipping, bringing together conference shipowners and independent companies (see, in particular, the speeches given on 11 April 1990 at the Eurofreight conference, Brussels, and on 12 November 1991 at the RAI International Exhibition Centre, footnote 69 to recital 129 in the preamble to the contested decision). Similarly, in a speech given to the 'Propellor Club', Tokyo, Mr Sager stated that 'conferences should be substituted by simple "Trade Lane Agreements". Unlike in conferences, members should not even try to have equal tariffs and prices but should organise

themselves in such a way that they can meet, discuss and decide on matters such as general market developments, capacity requirements and management, optimal utilisation of their assets amongst them and perhaps the establishment of floor prices (out of pocket cost) for the pure port-to-port transportation of containers.... [T]he carriers have now developed a totally new structure, viz. the [TAA]'.

171 That view of the true nature of the TAA is also shared by observers of maritime transport. Thus, the 1992 Drewry Report on *Container Market Profitability to 1997* described the TAA as a 'radical approach' to agreements between shipowners and stated that 'the agreement is set to be a model which other trades may well seek to replicate as a post-conference system of carrier co-operation'.

2. The classification of the TAA

172 Next, it is necessary to determine whether the Commission rightly considered that the TAA was not a liner conference because its members did not charge uniform or common freight rates.

173 It should be recalled, in that regard, that both during the administrative procedure and in the application the applicants always disputed the need to charge uniform freight rates in order to qualify for an exemption under Article 3 of Regulation No 4056/86. The applicants have simply submitted that the two-tier pricing structure of the TAA should not have disqualified them from the exemption. They have never, on the other hand, disputed that the TAA indeed established a two-tier pricing structure and that they did not charge uniform freight rates. It follows that, since the argument put forward by the applicants in the reply seeks to claim that TAA members charged uniform freight rates from

which it was possible to deviate by taking independent action, it constitutes a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. In the absence of evidence that that plea is based on matters of law or of fact which have come to light in the course of the present procedure, it is inadmissible.

174 The Court finds, in any event, that the Commission rightly considered that the TAA did not provide any tariff of uniform freight rates to be charged by all its members.

175 It should be noted, in this regard, that the TAA decision indicates that the former independent companies were given more freedom than the former conference members in respect of tariff rates and service contracts (recital 135). According to documents relating to the TAA, all former conference members were 'structured members', whereas the former independent companies were regarded as 'unstructured members'. The structured members were parties to the 'Rate Committee' and to the 'Service Contracts Committee' (recital 136 in the preamble to the contested decision). In the TAA decision, the Commission admitted the following evidence that the TAA provided for two kinds of members and different price levels. First, TAA documents showed that (a) unstructured members were directly allowed to underquote structured members by USD 100 per TEU (Tariff Formation Committee, 1 October 1992); and (b) all TAA members agreed that unstructured members would, if necessary, use independent action to establish rate differentials (recital 140 in the preamble to the contested decision). This last point is clear, moreover, from a fax of 1 December 1992 on 'Highlights of TAA principals meeting — London 23 November 1992' which stated: 'Addressed DG IV complaint to TAA that fixed differentials by non-rate committee lines on class tariff would be violation of EC competition laws. Lines then agreed with counsel to file class tariff as uniform and common rates for all members. Non-rate committee lines may establish differentials via independent

action, if necessary'. Second, structured members could not conclude individual independent service contracts, whereas unstructured members were allowed to do so. Third, unstructured members could take part in a service contract negotiated by the Service Contract Committee, whereas structured members could not take part in service contracts negotiated by unstructured members. Fourth, transport rates were sometimes different for structured and unstructured members under the same service contract.

176 It must be stated that the applicants have not disputed any of these matters of fact which are indeed evident directly from the text of the TAA itself and that, in the light of those facts, the Commission rightly considered that the TAA was not a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86 on the ground that that agreement provided a different tariff scheme for the two categories of members, and not uniform or common freight rates applicable by all the members.

3. Conclusions on the block exemption

177 It is clear from the foregoing, first, that the block exemption provided for in Article 3 of Regulation No 4056/86 can apply only to the liner conferences referred to in Article 1(3)(b) of that regulation and, second, that the TAA cannot be regarded as a liner conference within the meaning of that regulation.

178 It follows that the present plea in law alleging infringement of Article 3 of Regulation No 4056/86 must be dismissed and it is unnecessary to determine whether the Commission also rightly decided that the CMP and the price-fixing agreements on inland transport in the context of intermodal transport did not qualify for the block exemption. It is clear, moreover, from recitals 359 and 372

in the preamble to the contested decision that the CMP and the abovementioned agreements were examined in the light of Article 3 of Regulation No 4056/86 only on the assumption that the TAA was regarded as a liner conference within the meaning of Article 1 of that regulation.

III — *The third plea in law based on the refusal to grant an individual exemption*

A — *The TAA decision*

179 The Commission examined in turn the TAA agreements on maritime transport and then those fixing inland transport rates in the light of the four conditions to which exemption under Article 85(3) of the Treaty is subject.

1. The maritime transport agreements

(a) First condition: the agreements must improve the production or distribution of goods or promote technical or economic progress

180 The Commission disputed the assertion made by the members of the TAA during the administrative procedure to the effect that the main advantage produced by that agreement, which has been recognised as an advantage by Regulation No 4056/86, is its stabilising effect. The nature of the stability produced by the TAA was different from that envisaged in Regulation No 4056/86, in terms of both the intended objectives and the means used.

181 As regards the TAA's objective, the Commission found that stability was 'understood as a guarantee of the maintenance on the trade of all the TAA members, even the least efficient, well beyond what is envisaged by the eighth recital of Regulation... No 4056/86'.

182 As to the means used, the TAA decision states that the stability envisaged by the TAA 'severely limit[ed] real and effective competition by integrating most independents into the TAA and leaving a substantial proportion of capacity unused'. As regards more specifically the CMP, the Commission found that economic analysis invalidated the avowed objective to rationalise trade and to regulate overcapacity associated with the imbalance between the eastbound and westbound sectors, seasonal fluctuations in demand and the cyclical nature of supply and demand over several years. In particular, the Commission observed that the CMP was not indispensable to the regulation of excess capacity associated with seasonal fluctuations in demand or the cyclical nature of activity in this sector. There was a problem of excess capacity only in the eastbound sector, whereas the CMP was intended to suspend capacity in the westbound sector only.

183 The Commission concluded that the first condition laid down in Article 85(3) of the Treaty was not satisfied on the grounds that:

— the stability referred to by the TAA enabled the less efficient operators to remain in the market artificially, meaning that prices remained too high;

— the TAA generated no benefit as compared with a liner conference in terms of the quality and adequacy of services;

— the inclusion of the independent companies in the TAA had excessively restricted competition, without bringing any additional benefits compared with a liner conference;

— the CMP did not reduce costs or rationalise the supply of services.

184 In addition, the Commission noted that, by prohibiting direct and individual negotiations between structured members and shippers and by obliging clients to negotiate transport rates with the TAA secretariat, the TAA limited the opportunities for direct cooperation between shipowners and clients.

(b) Second condition: the agreements must allow consumers a fair share of the benefit

185 According to the contested decision, the TAA did not satisfy this condition. It did not allow its clients, the shippers and forwarding agents, a fair share of the benefit within the meaning of Article 85(3) of the Treaty. The Commission based its findings on the following evidence:

— the TAA enabled its members to increase prices substantially;

— those increases were contrary to the interests of shippers which, together with forwarding agents, complained about the effects of the TAA;

— in the long term, the TAA prevented the use of part of existing capacity, but did not eliminate it, and made clients carry the burden of unutilised capacity.

(c) Third condition: the agreements must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives sought

186 The members of the TAA have not demonstrated why a liner conference, within the meaning of Regulation No 4056/86, was not sufficient to attain the objective of stability allegedly sought. The Commission formally challenged the contention that the CMP is indispensable. It concluded that the restrictions of competition went well beyond those which would be strictly necessary and indispensable to achieving the alleged objective of stability.

(d) Fourth condition: the agreements must not afford to the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question

187 According to the TAA decision, this condition was not satisfied, because the TAA afforded its members the possibility of eliminating competition on the direct transatlantic route in respect of a substantial part of the services in question.

188 The Commission analysed in turn:

— the possibility of eliminating competition inside the TAA (internal competition);

— whether such a possibility concerned a substantial part of the services in question;

— whether external competition was able to prevent the members of the TAA from eliminating competition in respect of a substantial part of the services in question.

189 First, on the basis of the following evidence, the Commission took the view that the TAA enabled its members to eliminate all internal competition:

— members established in common the capacity offered and fixed tariffs;

— any independent action had to be communicated at least 10 days in advance to the other members, thus allowing them to follow or the independent action to be withdrawn;

— service contracts could be negotiated in common by all members, and had to be negotiated in common for most members;

— the rate flexibility allowed to unstructured members did not represent effective competition, because that flexibility was agreed by all members, its scale was decided by the parties to the agreement and the TAA considerably restricted the competitive conduct of the unstructured members;

— the activity of the TAA secretariat contributed to the commercial integration of the members;

— competition on the market in containerised liner transport was mainly on price, with quality of service appearing to be secondary;

— the competitive impact of quality of service was negated by the CMP, the effect of which was to restrict supply;

— within the TAA, the shipowners' respective market shares had not substantially changed in spite of considerable changes in prices and capacity.

190 Second, the Commission found that the TAA accounted for between 65% and 70% of the relevant market in 1993, as compared with approximately 75% in 1992. The Commission concluded that, in 1992 and 1993, the TAA accounted for a substantial part of the relevant market.

191 Third, the Commission took the view that external competition was not such as to prevent TAA members from eliminating competition. It based that view on findings relating to the competition from, first, shipping companies which had remained outside the TAA and, second, the sea route between Northern Europe and Canada. As regards competition from other quarters, the Commission disregarded competition from the Mediterranean route and unscheduled maritime transport services, commonly known as tramp transport, on account of their

negligible importance. Finally, by reference to the recitals in the third part of the TAA decision, relating to potential competition, the Commission noted that the influence of such competition was limited, on account of the particular features of the transatlantic trade and of the provisions of the TAA and the fact that most potential competitors were party to agreements in respect of other sea routes, which had also been signed by TAA members.

2. The inland transport agreements

192 The Commission examined the agreements fixing inland transport rates in the context of intermodal transport in the light of the four conditions of Article 85(3) of the Treaty, as set out in Article 5 of Regulation No 1017/68.

(a) First condition

193 Article 5 of Regulation No 1017/68 requires in respect of that first condition that the agreement in question 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 the productivity of undertakings; or

— furthering technical or economic progress'.

194 On the basis of those criteria, the Commission concluded that, far from bringing about economic progress, the provisions of the TAA on the inland transport tariff for Europe were 'likely to discourage the new investment which would normally be expected where there is competition'. The first condition was therefore not satisfied.

(b) Second condition

195 Since shippers and forwarding agents had complained specifically about the provisions of the TAA relating to inland transport, the Commission took the view that this condition was not satisfied.

(c) Third condition

196 The Commission took the view that this condition was not satisfied in respect of the economic benefits to be obtained by providing or upgrading intermodal transport services. In response to the applicants' arguments that the inland rate-fixing agreements were indispensable to the stability of the trade and had

therefore to supplement the maritime transport agreements in order to ensure the reliability of containerised liner services, the Commission stated in the TAA decision that:

'[I]n that the TAA's rate and capacity agreements for the maritime sector do not meet the first condition of Article 85(3) of the Treaty..., the TAA inland rate-fixing agreements pursue objectives which do not meet the first condition of Article 85(3) [of the Treaty] and cannot be considered indispensable within the meaning of [that article] or Article 5 of Regulation (EEC) No 1017/68'.

(d) Fourth condition

197 Since none of the preceding conditions had been fulfilled, the Commission did not deem it necessary to examine the fourth and last condition.

B — *Arguments of the applicants*

198 ...

1. The refusal to grant individual exemption to the maritime transport agreements

(a) First condition

199 to 200 ...

(b) Second condition

201 ...

(c) Third condition

202 to 206 ...

(d) Fourth condition

207 ...

(i) The relevant market

208 to 209 ...

The relevant service market

210 to 211 ...

The relevant geographic market

212 to 216 ...

(ii) Competition

217 ...

Internal competition

218
to
224 ...

The market share held by the members of the TAA and the competitive pressure which they exert on the relevant market

225
to
227 ...

External competition

— Cumulative effect of different sources of external competition

228
to
233 ...

— Potential competition

234
to
243 ...

2. The refusal to grant individual exemption to the inland transport agreements

244 to 245 ...

C — *Arguments of the ECSA*

246 to 247 ...

D — *Arguments of the Commission*

248 ...

E — *Arguments of the FTA and the ECTU*

249 to 250 ...

F — *Findings of the Court on individual exemption*

1. Admissibility of certain parts of the defence and the annexes thereto

251 The applicants submit that the defence is in part inadmissible on the ground that it contains allegations of fact which were not presented to them in the course of

the administrative procedure and are not included in the TAA decision. Those criticisms relate, in particular, to the passages in the defence relating to the economic analysis of maritime transport by Dr Lévêque and Dr Reitzes, set out in the two reports annexed to the defence. In that regard, the applicants plead infringement of Article 190 of the Treaty. They submit that all the Commission's arguments must be contained in the contested measure and that the Commission may not make new allegations against the undertakings where it is defending the merits of its decision in the course of judicial proceedings.

252 The Court notes, first of all, that, in the context of an action for annulment under Article 173 of the Treaty, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; and Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1, paragraph 74).

253 Other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and it is not sufficient for it to be explained subsequently for the first time before the Court (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 95).

254 However, in the present case, the object of Dr Lévêque's and Dr Reitzes' expert reports, which are subsequent to the contested decision, is not to make good any inadequacy in the statement of reasons on which that decision is based, but to give guidance to the Court on the criticisms made by the applicants in their application of the grounds of that decision relating to the economic characteristics of the maritime transport sector and the effects of the TAA on the transatlantic route.

255 It follows that the applicants' claim as to the inadmissibility in part of the defence cannot be allowed.

256 The Commission took the view in the TAA decision, first, in recitals 383 to 461, that the maritime transport agreements did not satisfy any of the four conditions laid down in Article 85(3) of the Treaty for individual exemption and, second, in recitals 462 to 491, that nor did the agreements fixing inland rates qualify for individual exemption because they did not satisfy the first three conditions of Article 85(3) of the Treaty and it was therefore not necessary to examine whether the fourth condition prohibiting the elimination of competition might be fulfilled.

257 Before examining the abovementioned agreements, it must be borne in mind as a preliminary point that, according to settled case-law, in the context of an action for annulment pursuant to Article 173 of the Treaty, the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62; Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 109; Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104; *SPO and Others* v *Commission*, paragraph 288; and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 190).

258 In the exercise of that discretion, the Commission is admittedly bound to comply with Regulation No 4056/86 and to apply the competition rules to the liner shipping sector in a manner compatible with the Council's appraisals of the characteristics of that sector, as mentioned in that regulation.

259 Accordingly, the fifth and sixth recitals in the preamble to Regulation No 4056/86 refer to the necessity 'to avoid excessive regulation of the sector' and to 'define the scope of the provisions of Articles 85 and 86 of the Treaty, taking into account the distinctive characteristics of maritime transport'.

260 However, Regulation No 4056/86 clearly cannot derogate from Articles 85 and 86 of the Treaty; the fifth recital in the preamble to that regulation indeed states that it is necessary to provide for 'implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market'. The 13th recital in the preamble to Regulation No 4056/86 states in addition that 'there can be no exemption if the conditions set out in Article 85(3) [of the Treaty] are not satisfied'. Article 14 of Regulation No 4056/86 confers on the Commission, subject to review by the Court of Justice, sole power to issue decisions pursuant to Article 85(3) of the Treaty.

261 As regards more specifically the concept of stability, the Council took the view that 'liner conferences have a stabilising effect, assuring shippers of reliable services' and therefore provided for a block exemption for them. However, that does not mean that every agreement between shipping companies which may promote a certain stability in the maritime transport sector must be granted an exemption, whether block or individual. First, the Council did not assert (and indeed could not have asserted) that stability is more important than competition, but it did make provision, in particular in Articles 4, 5 and 7 of Regulation No 4056/86, 'to prevent conferences from engaging in practices which are incompatible with Article 85(3) of the Treaty', in the words used in the ninth recital in the preamble to that regulation. Second, the Council expressly limited its positive assessment of stability to liner conferences only, excluding every other agreement of a different kind, stating that the beneficial results of stability 'cannot be obtained without the cooperation that shipping companies promote within conferences' (eighth recital in the preamble to Regulation No 4056/86).

262 It follows that although stability, to the extent that it contributes to assuring shippers of reliable services, may be an advantage for the purposes of the first condition of Article 85(3) of the Treaty, the Commission cannot be obliged to grant individual exemption to every agreement which, in the opinion of the parties, may contribute to such stability. Within the limits imposed by Regulation No 4056/86, the Commission retains its discretion in applying Article 85(3) of the Treaty.

263 In that regard, it is not for the Court to substitute its assessment for that of the Commission or to give a ruling on pleas, complaints or arguments which, even if they were well founded, could not, in any event, lead to the annulment of the TAA decision as requested by the applicants.

264 It must also be borne in mind that the Court of Justice has held that it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption and, if the Commission raises objections, to submit alternatives to it (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 52; and Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 45). According to the case-law, the four conditions for granting an exemption under Article 85(3) of the Treaty are cumulative (see, in particular, *Consten and Grundig* v *Commission*; and *CB and Europay* v *Commission*, paragraph 110) and therefore non-fulfilment of only one of those conditions will render it necessary to refuse the exemption (judgment of the Court of First Instance in *SPO and Others* v *Commission*, paragraph 267, upheld on appeal by order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR 1611, paragraphs 34 to 37).

2. The refusal to grant individual exemption to the maritime transport agreements

265 In the present case, priority must be given to the examination of the fourth condition under Article 85(3) of the Treaty relating to the prohibition on eliminating competition.

266 The applicants submit that, in concluding that the TAA afforded its members the possibility of eliminating competition on the transatlantic routes in respect of a substantial part of the services in question, the Commission committed errors of fact and of law and made an erroneous economic analysis in relation to the definition of the relevant market and the elimination of competition.

(a) The definition of the relevant market

267 According to recital 27 in the preamble to the contested decision, '[t]he market for sea transport services to which the TAA relates is that for containerised liner shipping between Northern Europe and the United States using the sea routes between ports in Northern Europe and ports in the United States and Canada'.

268 The applicants raise two objections to that definition. First, they deny that containerised transport services constitute the relevant service market and, second, they assert that the market includes the Mediterranean ports of Southern Europe.

(i) The relevant service market

269 As a preliminary point, the Court notes that, in recitals 25 to 58 in the preamble to the contested decision, the Commission made a detailed, structured analysis of

the definition of the relevant service market, describing in turn the various types of transport (air or sea) and then, as part of sea transport, scheduled or unscheduled services, conventional or containerised transport, and specialised transport.

270 In the application, by contrast, the applicants merely stated on that point that they 'contest the Commission's view that containerised transport services constitute the relevant service market'. In their reply to the statement of objections, the applicants listed a number of other sources of competition for the carriage of containerisable cargo, namely competition from non-containerised operators (whether liner or on demand), other specialised modes of transport and air transport. They also criticise the Commission for having failed to evaluate the cumulative effect of those sources of competition.

271 The applicants' assertion as to the existence of competition from other quarters cannot result in the Commission's assessment on that point in the contested decision being declared unlawful, since the applicants have not put forward any evidence to invalidate the precise and specific reasons on which the Commission's definition of the relevant market is based.

272 According to the case-law, the market to be taken into consideration comprises the totality of 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 (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37). In the contested decision, the Commission established that, for the vast majority of categories of goods and users of containerised liner shipping, the other forms of maritime transport (unscheduled, conventional and specialised transport) and air transport did not offer a reasonable alternative to containerised liner shipping services.

273 The fact that other modes of transport, whether maritime or air, may engage in marginal competition on the market in containerised liner shipping services in respect of a limited number of products, as the applicants state and as the Commission indeed expressly acknowledged in recitals 50 to 58 in the preamble to the contested decision, does not mean that, for that reason, they can be regarded as forming part of the same market. The Commission has demonstrated that substitutability concerns only a very small part of the demand and the applicants have not adduced any evidence that that demonstration is incorrect.

274 In the reply, the applicants referred to two pieces of evidence in order to establish the existence of a certain degree of competition with air transport and conventional liner shipping. It should be observed, at the outset, that that information, which was relied on for the first time at the reply stage, constitutes new evidence within the meaning of Article 48(1) of the Rules of Procedure and yet is not based on matters of law or of fact which came to light in the course of the procedure. In any event, that information is not such as to demonstrate the merits of the applicants' argument, as is clear from the examination below.

Air transport

275 The Commission noted that '[b]ecause it costs a great deal more, air transport between Northern Europe and the United States involves only limited quantities of high value-added goods or goods for which the transport time is a decisive factor' and concluded that air transport forms a separate market from containerised liner shipping.

276 In the application, the applicants merely asserted that air transport constitutes a source of competition for the carriage of containerisable cargo, but they failed to adduce any evidence or even to challenge the merits of the Commission's position.

277 In the reply, the applicants claimed that a significant number of products are transported by sea and by air and they attached, by way of evidence, a document from the US Census Bureau with figures on United States imports in 1993 from Germany, Sweden and the United Kingdom. For each of those countries, that document contains statistics on:

— the value and total weight of imports;

— the total value and quantity of imports as a function of the mode of transport: maritime and air;

— the list of the 20 most imported products, in terms of weight, by air.

278 The applicants' argument to the effect that, for those 20 products, air transport accounts for 16%, 14% and 19% of the total volume of exports by air and by sea to the United States from Germany, Sweden and the United Kingdom, respectively, is not relevant, because those products are not representative. It is also clear from those figures that the total exports by air from those three countries to the United States represent only 2%, 1.3% and 0.6%, respectively, by weight of exports from those countries by sea to the United States, although

they represent 47%, 43% and 100%, respectively, by value of exports by sea. Similarly, for the three countries in question, those 20 products represent 50% by weight of the total exports by air to the United States, although they represent hardly more than 1% of exports to the United States by sea from the United Kingdom, 5.8% for Germany and 4.5% for Sweden.

279 Far from demonstrating any error on the part of the Commission, those statistics confirm that the demand for air transport involves limited quantities of high value-added light goods and that air transport forms a separate market from containerised liner shipping.

Conventional (break-bulk) liner transport

280 In the reply, the applicants submitted that, for certain low-value, high-volume products, conventional and containerised liner transport are in competition. They rely on an extract from their reply to the statement of objections in which they stated that a large number of commodities which, before the advent of containerisation, were carried by conventional transport may still today be carried by such transport. They refer to certain commodities (liquids, lumber, woodpulp and (paper)board) for which shippers use one or other of those services.

281 It thus appears that, without producing further evidence, the applicants merely repeat the arguments put forward in the course of the administrative procedure in their reply to the statement of objections. The Court finds that the applicants have not really challenged the reasons for which those arguments were rightly

rejected by the Commission in recitals 42 to 46 and 52 in the preamble to the TAA decision. It is clear from those recitals, first, that containerised transport has almost completely replaced conventional transport on the transatlantic route on account of the nature of the cargo and the economic advantages of using containers, in particular the suitability for intermodal transport, and, second, that conventional transport, on the transatlantic route, is a reasonably attractive alternative for operators only for a very few categories of goods.

282 As regards the alleged cumulative effect of the different sources of competition, the Court finds, as the Commission rightly did in recitals 69 and 70 in the preamble to the contested decision, that shipping operators, who discriminate between the different categories of goods by applying highly differentiated rates (the transport price varying, according to the goods, by a multiple of five for the same transport service), are capable of limiting the effects of marginal competition for the carriage of specific categories of goods. Furthermore, the applicants' argument to the effect that although they had to deal with a different source of competition for each category of goods they are exposed to competition for all their services cannot succeed. Not only have the applicants failed to establish that they were faced with competition from other transport services in respect of each category of goods and thus across the whole range of their services, but also, as stated above, the Commission has proved to the required legal standard that, for the vast majority of categories of goods and users, the other maritime transport services cannot be substituted for containerised liner shipping. The complaint of failure to take account of the cumulative effect of the different sources of competition must also therefore be rejected.

283 The Commission was therefore correct to consider that containerised liner shipping services form a separate market.

284 The extract from the eighth recital in the preamble to Regulation No 4056/86 relied on by the applicants, according to which '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', cannot affect that conclusion.

285 The Court finds, first of all, that not only is the Council's assessment of the different modes of transport which may compete with liner conferences very general and full of reservations, as shown by the use of the introductory words 'in most cases', but it relates above all to the situation of liner conferences and the main competition identified is that from liner shipping operators which do not belong to a conference. Specifically, it was found in the context of examining the block exemption that the TAA did not constitute a liner conference, but an agreement which, by virtue of its flexibility as to tariffs, made it possible to attract into a conference companies which would otherwise have remained independent and could have exerted effective competitive pressure.

286 As regards, in particular, unscheduled (tramp) maritime transport services, it should be noted, first, that they are regarded by the Council as a source of potential competition only 'in certain circumstances'. Next, those services are, under Article 1(2) of Regulation No 4056/86, excluded from the scope of that regulation since, according to the fourth recital in the preamble thereto, rates for these services are freely negotiated on a case-by-case basis in accordance with supply and demand conditions. In Article 1(3)(a) of Regulation No 4056/86, the Council again emphasises the differences relating to the categories of goods transported, the nature of those services and the terms under which they are performed (goods in bulk, transport on demand, vessel chartered wholly or partly to one or more shippers, non-regularly scheduled or non-advertised sailings, freely negotiated freight rates).

287 Contrary to the applicants' submission, the Council's assessments in Regulation No 4056/86 also confirm that unscheduled transport services come within a

market separate from liner services, even if, in certain circumstances, they may exert a certain marginal competitive pressure which is very specific and very limited.

288 It follows that the applicants have not succeeded in proving to the required legal standard that the Commission erred in the assessments on which it based its exclusion of that type of transport from the definition of the relevant market.

289 It should further be noted that the Commission's analysis is supported by several extracts from the economic literature on maritime transport which are included in Annex III to the TAA decision.

290 It results from the foregoing that all the complaints about the definition of the relevant service market must be rejected.

(ii) Geographical dimension of the relevant market

291 The applicants criticise the Commission for having excluded the 'Mediterranean gateway' from its definition of the relevant market. The transatlantic transport services from the ports of Northern Europe can be substituted for those from the Mediterranean ports. They recall having set out, in their reply to the statement of objections, the nature and extent of competition from the sea routes between Southern Europe and Canada. As a result of those observations, the Commission is said to have modified its definition of the market in order to include the 'Canadian gateway', but to exclude the 'Mediterranean gateway'.

292 The applicants contest the Commission's reasoning on this point. In recital 66 in the preamble to the TAA decision, the Commission acknowledged that the Mediterranean ports offer a real alternative to the Northern European ports, at least for certain shippers. They rely on the Commission's findings about the TAA's impact on the market in order to demonstrate that there is a certain degree of substitutability between transatlantic transport services from the Northern European ports and the Mediterranean ports. They refer, in particular, to recital 219 in the preamble to the TAA decision, according to which '[t]he effects of the TAA have also made themselves felt in the trade through the Mediterranean' and to recital 220 in the preamble thereto, in which, after having noted that the trade to the United States had grown more from the Mediterranean ports than from the Northern European ports between 1992 and 1993, the Commission states that '[s]ome shippers, more particularly those based in the South of France catchment area, have decided to switch all or part of their cargoes to the Mediterranean ports because of the increases imposed by the TAA'. The applicants submit that the scale of the switching of trade from Northern European to Mediterranean ports demonstrates the existence of a high degree of substitutability between the transport services concerned.

293 It should be borne in mind that in their arguments the applicants contest the way in which the relevant market for transport services has been defined as regards its geographical scope. That aspect involves the defining of the points of origin and destination of transatlantic transport services.

294 There is no doubt that there is some degree of substitutability between the maritime transport services offered in the context of the TAA and the containerised liner transport services on the transatlantic route offered from or to Mediterranean ports. However, it is not the total lack of substitutability which justifies the exclusion of the latter services from the relevant market, but the fact that that substitutability is very limited.

295 In the TAA decision, the Commission found that the phenomenon of substitutability is effectively linked to the distance between the ports from which

companies offer the transatlantic maritime link and the points within the regions where the goods are delivered or loaded and to the cost of the inland carriage of those goods made necessary by that distance. Accordingly, that phenomenon concerns only operators established in regions which belong both to the catchment areas of the ports served by the TAA members and to those of the Mediterranean ports. The Commission placed such operators 'in the South of France' and took the view that, since they account for a relatively elastic portion of the demand, they exert only a 'very marginal' influence on the overall demand for those services, and it stated in that regard as follows:

'[C]ompetition from Mediterranean services is further reduced by the fact that the Mediterranean ports are less efficient and the services less frequent. This is why services via ports in Northern Europe occasionally attract shippers in Southern Europe (for example, Northern Italy), whereas, conversely, shippers in Northern Europe rarely use services via the Mediterranean.'

296 It must be said that the applicants have not provided evidence to demonstrate that, for shippers from Northern Europe, which is the catchment area of the services of TAA members, the services offered by the Mediterranean ports represent a reasonable alternative or even that the operators in the South of France represent a large, or at least not a negligible, part of the users of the services offered by TAA members.

297 Moreover, the finding of an increase in trade to the United States from the Mediterranean ports following the entry into force of the TAA cannot of itself cast doubt on the validity of the Commission's assessments. In spite of the substantial increases in the freight rates charged by TAA members, the trade through the Mediterranean grew, according to recital 220 in the preamble to the contested decision, only by 14% between 1992 and 1993, whereas it increased by 9% for the same period through the Northern European ports. Apart from the

fact that the increase in trade through the Mediterranean is not necessarily synonymous with a transfer of trade, but may result from other factors such as a growth in exports to the United States from the Southern regions of Europe, the moderate increase in trade from the Mediterranean ports only confirms the marginal nature of the substitutability of the transport services concerned. Since the applicants have not, moreover, adduced any further evidence which might cast doubt on the Commission's analysis, their arguments must be rejected.

298 It follows from the foregoing that all the complaints and arguments against the Commission's definition of the relevant service market must be rejected.

(b) The possibility of eliminating competition in respect of a substantial part of the services in question

299 In order to determine whether the price agreements on maritime transport and the CMP satisfied the fourth condition for the application of Article 85(3) of the Treaty, the Commission examined in turn whether the TAA made it possible to eliminate competition between the parties to that agreement, whether those parties accounted for a substantial part of the relevant market and, finally, whether external competition was not such as to prevent them from eliminating competition in respect of a substantial part of the services in question.

300 Before examining the various objections to the Commission's view raised by the applicants, following the same order of analysis, it should be noted that the possibility of eliminating competition in respect of a substantial part of the services in question must be assessed as a whole, taking into account in particular the specific characteristics of the relevant market, the restrictions of competition brought about by the agreement, the market shares of the parties to that agreement and the extent and intensity of external competition, both actual and potential. In the context of this comprehensive approach, those different elements

are closely interlinked or may balance each other out. Thus, the greater the restrictions of internal competition between the parties, the more necessary it is for external competition to be keen and substantial if the agreement is to qualify for exemption. Similarly, the larger the market shares of the parties to the agreement, the stronger the potential competition must be.

(i) Internal competition

301 The applicants seem to consider, first of all, that the Commission erred in law when it concluded that the fourth condition of Article 85(3)(b) of the Treaty was not satisfied for the sole reason that the TAA had eliminated internal competition.

302 That complaint must clearly be rejected. As was recalled above, the assessment of the condition laid down in Article 85(3)(b) of the Treaty requires a comprehensive approach, taking into account, in particular, internal and external competition. It is clear from the contested decision, and in particular from recital 437, that the finding that the TAA afforded its members the possibility of eliminating competition between themselves is only one of the factors on which the Commission based its conclusion in recital 461 in the preamble to the contested decision, to the effect that the TAA was an agreement which afforded its members the possibility of eliminating competition over a substantial part of the services in question.

303 The applicants submit, next, that they have not eliminated competition between themselves. They claim, first, that cooperation on rates under the TAA was less restrictive of competition than charging identical freight rates and that they had the freedom to take independent action and, second, that they competed with

each other on service offerings. In the reply, the applicants provided, by way of evidence, information submitted to the Commission in the course of the administrative procedure from which it is clear, first, that their relative shares of total TAA cargo carryings between September 1992 and March 1994 fluctuated between 11% and 81% and, second, that shippers switched between the applicants substantial volumes of cargo carried under service contracts. Finally, in the reply, the applicants also complained that the Commission had failed to state the reasons for its refusal to grant an exemption.

304 First, as regards internal price competition, it should be recalled that TAA members jointly fixed the rates whose application was permanently monitored by a 'Rate Committee'. Those agreements fixing transport rates clearly had the effect of eliminating price competition between the parties for the purposes of Article 85(1)(a) of the Treaty.

305 The question whether the TAA's dual tariff structure was less restrictive of competition than a liner conference fixing uniform or common freight rates is irrelevant. It has already been held above that the TAA was not a liner conference and the only issue relevant to this part of this judgment is whether it afforded its members the possibility of eliminating competition between themselves.

306 Furthermore, it cannot be disputed that the TAA eliminated normal price competition between its members even though it provided for a dual tariff structure. The tariff flexibility granted to the unstructured members and the fixed discount which they were allowed to offer (USD 100 per container) were decided by all the members of the TAA.

307 Similarly, the option of derogating, subject to certain conditions, from the tariff discipline of the price-fixing agreements for maritime transport by means of independent action cannot alter the present analysis. First, that option, imposed by the legislation of a non-Member State, is an exception to the principle of joint price-fixing. Next, it is clear from Article 13 of the TAA, as amended, that, in spite of its name, independent action was supervised and restricted, in the sense that the TAA secretariat had to be informed 10 days before it was taken, which afforded the other members the opportunity to follow or to persuade the member concerned not to take that action. Independent action was 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 with the object or effect 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 (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 173 and 174).

308 In addition, it is clear from the information provided by the applicants themselves that the use of independent action has, in practice, been exceptional. Thus, it is clear from that information that there were only 824 cases of independent action in 1993, which can be characterised as negligible in the light of the approximately 1 500 000 containers transported by TAA members or the number of cases of independent action in 1988 by the parties to the 'transpacific' agreements operating between the West and East coasts of the United States and Asia, namely 98 573.

309 It is, moreover, common ground that independent action did not, in practice, constitute an obstacle to the increase in prices made by the members of the TAA.

310 It follows that neither the dual tariff structure nor the possibility of taking independent action demonstrates the existence of real price competition between the parties to the TAA.

311 It should also be borne in mind that the TAA also made service contracts subject to a series of rules requiring, notably, that they be negotiated in common for most members and relate only to a minimum quantity of containers and a maximum period. The Commission also noted in the contested decision, without its being disputed in the present action, that the role of the TAA secretariat was evidence of the degree of commercial integration of the companies within that agreement.

312 Second, as regards service offerings, the Court finds, first, that in the application the applicants merely asserted that they competed on that point and that shippers acknowledged the existence of differences in quality between the services offered by the former members of the Neusara and Usanera conferences and the former independent companies which justified the difference in prices. They have not, however, adduced any evidence to substantiate those assertions or even indicated what might be the alleged differences other than those relating to the frequency of sailings and the type of vessel used, which had already been taken into consideration by the Commission.

313 It must be noted, next, that that argument seeks only to justify the practice of differentiated prices or, at most, to show that there is a difference between the two categories of TAA members, but not to demonstrate the existence of competition between the members of the TAA. It is not, therefore, material.

314 Moreover, the Commission has demonstrated that, as regards the market in containerised liner transport services, such as those offered by the members of the

TAA, quality of service was of secondary importance compared with price. Any difference in quality of service could not therefore offset the disappearance of the price-setting mechanism peculiar to the competing markets, which is brought about by the conclusion of a horizontal price-fixing agreement. That secondary importance is the result, first, of the homogeneous and completely substitutable nature of the services offered by the members of the TAA. The Commission stated, in recital 339 in the preamble to the contested decision, that some of the lines covered by the TAA are operated jointly by former members of the Neusara and Usanera conferences and members which were formerly independent. That factor, confirmed by Annex 4 to the application in which the applicants provided examples of such services, demonstrates the high degree of substitutability between the services offered by each of the members of the TAA.

315 Next, the Commission took the view, without being challenged, that the competitive impact of the difference in the quality of services offered by TAA members was largely negated by the CMP. The Commission referred, on that point, to an extract from one of the TAA documents according to which, when a TAA member reaches its quotas under the CMP, it is much more likely that it will subcontract the carriage to another TAA member rather than exceed its quotas and pay the corresponding fine.

316 Third, as regards the market shares of TAA members, it should be recalled that the Commission found in recital 436 in the preamble to the contested decision that the lack of competition between the TAA members was also clear from the lack of substantial shift in the respective positions of companies in the TAA. Since that finding was not disputed in the application, the assertion that the market shares of TAA members fluctuated, which was made for the first time in the reply, must be regarded as a new plea in law within the meaning of Article 48(2) of the Rules of Procedure and that plea is inadmissible in the absence of evidence that it is based on matters of law or of fact which have come to light in the course of the present procedure.

317 Furthermore, as regards the first table included in Annex 21 to the reply, which is said by the applicants to show fluctuations in the shares of TAA members, the

figures reproduced therein are neither reliable nor conclusive. First, the base index is not meaningful since it is fixed on the basis of data corresponding to a very brief period (three months) which does not allow for seasonal fluctuations. In that regard, the example of MSC, the only company whose market share, according to the figures in that table, grew in a way that was not negligible, is particularly revealing. Most of that growth took place over the nine months following the period of three months used to calculate the base index, so that if that index had been calculated not over three months, but over a whole year, the market share of the company concerned would not have grown so substantially. Second, the disappearance of one company and the accession of three others to the TAA over the period of analysis falsifies the figures in the table. Third, apart from MSC, the fluctuations in the market shares of the different members are fairly minor. Fourth, it is not clear that the figures in the table in Annex 21 to the reply relate to actual market shares. It is stated at the foot of the table that those figures are taken from data on the CMP, which has its own objectives and does not therefore necessarily take account of all the activities of the parties to the TAA. Fifth, the trend in market shares revealed by those figures is not confirmed by the figures in the table included as Annex 22 to the reply. Thus, the first line of that table shows that a part of the cargo carried by P & O was gained by Sea-Land and OCCL, whereas, according to the table in Annex 21 to the reply, P & O's market share grew whilst that of the other two companies fell.

318 Similarly, the table included as Annex 22 to the reply which, according to the applicants, shows the transfer between TAA members of significant volumes of cargo under service contracts, is utterly ambiguous. Thus, as the Commission observes, although that table shows that a part of the cargo carried by P & O was gained by Sea-Land and OCCL, the latter company does not operate any vessels on the North Atlantic, but has concluded an agreement to share the vessels of P & O, Sea-Land and Nedlloyd, and those companies have also concluded an agreement to share their vessels between themselves. Furthermore, and above all, most of the examples cited concern structured members of the TAA, which were allowed to enter into only collective service contracts, that is, contracts in respect of which there is no competition between them, because they must be negotiated in common.

319 It follows that the tables included in Annexes 21 and 22 to the reply do not establish the existence of competition between the parties to the TAA. The tables had indeed already been presented to the Commission in the course of the administrative procedure and, after examining them, the Commission concluded, in recital 436 in the preamble to the contested decision, that there was no substantial shift in the respective positions of companies in the TAA.

320 It should also be borne in mind that, in recital 428 in the preamble to the contested decision, the Commission noted yet another restriction of competition between the parties to the TAA, namely the establishment in common of the capacity offered by each of them on the market.

321 It follows from the foregoing that the objections raised by the applicants must be rejected and that the Commission was correct to consider that the TAA afforded its members the possibility of eliminating competition between themselves.

(ii) The substantial part of the relevant market held by the members of the TAA

322 The Commission noted, in recitals 438 to 440 in the preamble to the contested decision, that the TAA accounted for a substantial part of the relevant market and concluded, in recital 441, that the TAA afforded its members the possibility of eliminating competition within the meaning of Article 85(3) of the Treaty.

323 The applicants claim that the Commission erred in law in that its analysis leads to the conclusion that a liner conference with a market share of 50% eliminates competition for the purposes of Article 85(3) of the Treaty.

324 Admittedly, as the applicants rightly point out, a liner conference, by definition, restricts competition between its members and can achieve its objective of stabilising the market only if it accounts for a market share which is not negligible. The fact that Regulation No 4056/86 provides for a block exemption for liner conferences does not, therefore, lead automatically to the conclusion that every liner conference holding a 50% market share does not satisfy the fourth condition of Article 85(3) of the Treaty.

325 However, it should be borne in mind, first, that the TAA was not a liner conference. The applicants cannot therefore rely on the positive assessment from which that type of agreement benefits under the terms of Regulation No 4056/86. Additionally, in that regard, according to the eighth recital in the preamble to that regulation, beneficial results cannot indeed be achieved without the collaboration promoted within liner conferences.

326 Second, the applicants' reasoning is factually incorrect to the extent that it is based on the existence of a 50% market share, which is founded on an expanded definition of the relevant market set out above. It has been held above that the applicants' objections about the definition of the relevant market are not well founded. Consequently, the Commission's assessment is based on the premiss not that TAA members held a 50% market share, but rather, as stated in recital 439 in the preamble to the TAA decision, that that share was of the order of 75% in 1992, and between 65% and 70% in 1993. On the direct transatlantic route between Northern Europe and the United States, thus excluding the Canadian ports, the market shares held by the parties to the TAA were even, according to

the figures in recital 146 in the preamble to the contested decision which were confirmed by the applicants, 81% in 1992, 71.3% in 1993 and 69.6% in 1994.

327 Third, it is common ground that, before the conclusion of the TAA in 1992, the members of the Neusara and Usanera conferences accounted for 55.7% and 52.9%, respectively, of the transatlantic trade. Subsequently, the TAA made it possible to bring together, in the same structure, the members of the Neusara and Usanera conferences and certain companies which had until then remained independent. The TAA therefore had the effect of appreciably increasing the concentration of the offer controlled by companies linked by price-fixing agreements.

328 Fourth, even if a dominant position cannot be treated, purely and simply, as the elimination of competition for the purposes of Article 85(3) of the Treaty, it should be recalled for guidance that, according to the case-law, very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation when there is a market share of 50% (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60).

329 It follows that the objection relating to the alleged error of law committed by the Commission is not well founded and must be rejected.

330 At this stage of the examination, it must be noted that, in order to determine whether an agreement affords its signatory parties the possibility, in respect of a substantial part of the products in question, of eliminating competition within the meaning of Article 85(3)(b) of the Treaty, the Commission cannot, in principle, rely merely on the fact that the agreement in question eliminates competition between those parties and that they account for a substantial part of the relevant market. First, the prohibition on eliminating competition is a narrower concept

than that of the existence or acquisition of a dominant position, so that an agreement could be regarded as not eliminating competition within the meaning of Article 85(3)(b) of the Treaty, and therefore qualify for exemption, even if it established a dominant position for the benefit of its members (see, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 113; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 39; and *Matra Hachette* v *Commission*, paragraphs 153 and 154). Second, potential competition must be taken into consideration before concluding that an agreement eliminates competition for the purposes of Article 85(3) of the Treaty (see, to that effect, *Europemballage and Continental Can*, paragraph 25).

331 It must be added that taking into account and analysing external competition, both actual and potential, is all the more necessary where it is a question of examining whether an agreement between shipping companies qualifies for individual exemption under Article 12 of Regulation No 4056/86. As is clear from the eighth recital in the preamble to Regulation No 4056/86, the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned. Furthermore, the fact that the Council provided in Article 3 of Regulation No 4056/86 a block exemption for the rate-fixing agreements of liner conferences, which may, in principle, produce the beneficial stabilising effects recognised by Regulation No 4056/86 only if they hold significant market shares, confirms that the condition prohibiting the elimination of competition imposed in Article 85(3) of the Treaty must be examined with most particular care.

332 However, it must be said that, even if in recital 441 in the preamble to the contested decision the Commission wrongly concluded that it was clear from the findings on the elimination of competition within the TAA and the holding by the parties to that agreement of a substantial part of the market that the TAA afforded its members the possibility of eliminating competition in respect of a substantial part of the services in question within the meaning of Article 85(3)(b)

of the Treaty, it did, none the less, go on to examine in recitals 442 to 460 in the preamble to the contested decision whether the possibilities of external competition were not such as to prevent TAA members from eliminating competition in respect of a substantial part of the services in question.

(iii) External competition

333 Before concluding that the possibilities of external competition were not such as to prevent TAA members from eliminating competition in respect of a substantial part of the services in question, the Commission examined in turn competition on the direct transatlantic trade and competition from other quarters (potential competition).

334 Indeed, the Commission also examined, in recitals 451 and 452 in the preamble to the contested decision, competition from the trade between Northern Europe and ports in Canada. However, since the applicants have not raised any objection on that point, the finding that the independent companies operating on that trade offered only very limited competition must be considered to have been established.

Competition on the direct transatlantic trade

335 On this point, the applicants have merely claimed that the market shares of the independent companies operating on the direct transatlantic trade grew, as evidenced by the fact that the market shares of TAA members fell from 81.1% in 1992 to 71.3% in 1993, and then to 69.6% in 1994 (while the market share of the independent companies rose from 18.9% in 1992 to 28.7% in 1993, and then to 30.4% in 1994).

336 First, that growth in the independent companies' market share was taken into account by the Commission. In recital 448 in the preamble to the contested decision, the Commission found that the substantial price increases imposed by TAA members on 1 January 1993 resulted in the immediate loss of part of the trade, which switched to the few independent companies whose market share increased. Thus, in respect of westbound trade, Evergreen's market share rose from 7.7% in 1992 to 14.1% for the first quarter of 1993, Lykes Line's from 6.4% to 7.1%, ICL's from 2.1% to 2.6% and Atlantic Cargo's from 3.0% to 3.9% (namely a rise in market share from 19.2% to 27.7% for the four companies together).

337 Second, according to the undisputed information in recital 203 in the preamble to the contested decision, a large number of shippers were faced with 'very large price rises, generally between 30% and 100%, but in one case amounting to as much as 175%'. Moreover, according to recital 204 in the preamble to the contested decision, the content of which has not been disputed, those increases were imposed in a particularly short space of time compared with the usual practices in the trade. Such large and sudden price increases were inevitably to have the effect of making some of TAA's clients turn to other carriers on the transatlantic trade. In that regard, the argument based on the fact that those price rises did not enable shipowners to return to the level of profitability achieved in 1989 is not relevant, because that last fact does not in any way change the substantial nature of the rises imposed on clients.

338 Third, after having immediately risen in the first quarter of 1993, following the price increase imposed by TAA members, the independent companies' market shares rapidly stabilised and even fell. As is clear from recital 449 in the preamble to the contested decision, Evergreen's market share rose to 13.1%, Lykes Line's to 5.4%, Atlantic Cargo's to 3.7% and ICL's to 2.5%, in other words a market share of 24.7% over the whole of 1993 for the four companies, instead of 27.7% for the brief period which immediately followed the severe price rises imposed by the members of the TAA.

339 Fourth, the limits to the competitive pressure exerted by those independent companies are also clear from the fact that, during 1993, despite the increase in the volume of cargo carried, those companies did not bring any significant new capacity to the market.

340 Fifth, the finding that the parties to the TAA accounted for a substantial part of the relevant market, and thus that external competition was weak, is based, principally, on the independent companies' market share in 1993 and account was therefore taken of the increase in their market shares following the price rise implemented by the members of the TAA.

341 Sixth, according to the case-law, the weaker and smaller the competitors, the less capable they are of exerting real competitive pressure on the dominant undertaking (see, to that effect, *United Brands* v *Commission*, paragraphs 111 and 112; and *Hoffman-La Roche* v *Commission*, paragraphs 51 to 58).

342 In that regard, it should be noted that one single independent company, Evergreen, held a relatively large market share (13.1% for 1993). Moreover, as is clear from recitals 150 to 156, 215 and 443 to 445 in the preamble to the contested decision, several factors strongly reduce the competition to which that company was able to subject TAA members. Thus, it does not operate on all the segments of the market, since it does not offer, for example, certain specialised equipment (open top, flat top) on the transatlantic trade, which deprives it of access to a whole series of shippers. Of yet greater consequence is the fact that Evergreen is party to the Eurocorde Agreement to which the members of the TAA were also parties and under which freight rates and other conditions of transport are discussed. It is also significant that Evergreen was initially supposed to participate in the TAA and that, even though it remained independent, it

maintained regular contacts with certain members of the TAA 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. It thus appears that Evergreen, which is the principal, if not the only, independent company with sufficient power on the market in liner shipping services on the transatlantic trade, was not in fact able to exert real competitive pressure on TAA members.

343 As stated in recital 446 in the preamble to the contested decision, 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. Furthermore, Lykes Line, the largest of the abovementioned companies, is also party to the Eurocorde Agreement.

344 It is clear from that evidence that the Commission was correct in taking the view, in recital 454 in the preamble to the contested decision, that 'the independent lines, after having profited from the very rapid price increases implemented by the TAA to saturate their capacity, have no longer been able to cope with the new demands during 1993. Either in collusion with the TAA, or due to incapacity owing to their weak position in relation to the TAA market share, these companies have not sought to engage in real competition with the TAA and have been obliged to pursue a "follow-my-leader" strategy'. The Commission was also right in concluding that the competition facing TAA members from the independent lines on the direct transatlantic trade had not offset the possibility created by the TAA of eliminating competition for the purposes of Article 85(3) of the Treaty.

Competition from other quarters (potential competition)

345 The applicants submit that the Commission failed to take account of the potential competition from carriers which were already operating on the transatlantic trade

and capable of expanding their offer of containerised transport services (substitution on the supply side) and from containerised shipping operators which were absent from the transatlantic trade but capable of entering that market. Furthermore, they criticise the Commission for having refused to evaluate the cumulative effect of the various sources of competition to which they were subject.

346 Prior to examining the objections raised by the applicants, it should be noted as a preliminary point that their arguments on the two sources of potential competition mentioned above are effectively based, as they indeed acknowledge themselves, on the acceptance of the theory of the contestable market defended in an expert's report (Summary of Economic Issues prepared jointly by Professor John Davies, Dr Craig Pirrong, Dr William Sjostrom and Mr George Yarrow, included as Annex 5 to the application).

347 The Commission disputed the relevance of that report produced by the applicants and, in support of its own arguments, also relied on reports by experts (Report of Dr J. Reitzes on the Economic Effects of the Trans-Atlantic Agreement and Report of Dr Lévêque, 'Self-regulation in the Liner Shipping Industry: Shortcomings of the Market and the Regulatory System', included as Annexes D and E to the defence) whose reputation and knowledge of the relevant market is beyond doubt. Thus, the experience of Dr Reitzes in the application of the competition rules to the maritime transport sector is clear, in particular, from the fact that he is the principal author of the Federal Trade Commission's 'Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act'.

348 A reading of the different expert reports produced by the parties and the references therein to economic theory lead to the finding that, at the very least, the contestability of the liner shipping market is still today a very controversial topic, but most commentators agree that, in any event, contestability is certainly not perfect. It follows from the expert reports relied on by each side that the degree of contestability of the market in containerised liner shipping on the transatlantic route raises complex economic issues. The Commission has for that

reason a broad discretion in such matters and the Court may criticise its decision on that point only if a manifest error of assessment is identified. Without its being necessary to rule on the merits of the opposing theories, it does not appear, prima facie, that the Commission's view, that potential competition, if not non-existent, was none the less insufficient to prevent the TAA from affording its members the possibility of eliminating competition within the meaning of Article 85(3) of the Treaty, may be regarded as founded on a manifest error of assessment (see, to that effect, Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 161).

— Supply-side substitutability

349 The applicants submit that, as is clear from the Dynamar Report already submitted to the Commission during the administrative procedure, numerous carriers on the transatlantic trade are capable of making their capacity, which equals approximately 20% of the total capacity of the parties to the TAA, available for the carriage of containers in direct competition with those parties. They claim in that respect that the two reasons relied on by the Commission in the contested decision in order to reject the Dynamar Report's conclusions are wrong. First, the capacity of those carriers could be used for the carriage of containerised cargo without the need for the actual physical conversion of vessels into cellular vessels (that is to say, specialised container ships), so that the change could be made at an insignificant cost. Second, by relying on the fact that those carriers provide a less complete service, the Commission does not take into consideration the possibility of shippers shifting some of their demand to a potential competitor.

350 In response to those two arguments it should be noted, first, that although, according to recital 166 in the preamble to the contested decision, the cost of the

conversion of the services offered by those carriers seems to be a ground for rejecting the conclusions of the Dynamar Report, it is not because the cost was deemed excessive, but because the parties to the TAA had not provided any information about it.

351 Although, according to the clarification provided by the applicants in the course of the judicial proceedings, the cost of adapting vessels is insignificant, it should be observed, none the less, that in order to offer a containerised transport service it is still necessary to acquire and manage a very large number of containers. Indeed the applicants themselves stated in their application (point 2.4):

'Containers come in many types, sizes and specifications and represent a huge investment for the ocean carriers who own them. The constant movement of containers means that three containers must be provided for each slot on a vessel, so that a 3 000 TEU vessel will require 9 000 containers.'

352 Finally, and above all, the cost of adapting vessels is only one of the reasons, and an ancillary one, on which the Commission based its assessment. In addition to the cost and time required to make that change, the Commission primarily highlighted, in recitals 166 to 172 in the preamble to the contested decision, the fact that those services, once modified, would not be economically competitive with those offered by TAA members. It thus noted, without being challenged, that the transatlantic trade is a very high-volume trade with regular services allowing a continuous flow of goods, so much so that the major world operators tend more often than not to group together in order to operate such services jointly and they need a sufficient number of large, modern vessels. In those circumstances, it is highly unlikely that operators which own vessels which are prima facie not designed for containerised transport and only adapted for that purpose could compete effectively.

353 It should be noted, second, that in the application the applicants did not in any way dispute the Commission's finding to the effect that the operators referred to in the Dynamar Report do not offer, contrary to what is required of a competitive transport service, weekly services and call at only a limited number of ports in Northern Europe or the United States. In the reply, without disputing that finding, the applicants state, however, that when the reply to the statement of objections was made only one of them was by itself in a position to offer a weekly service. That objection must clearly be rejected. It is evident from the documents on which the applicants rely that for all the itineraries between the different ports of Northern Europe and the United States an effective weekly service was offered by TAA members and that this is indeed an essential factor, since the parties to the TAA themselves insist on having secured, in the context of the attempt to rationalise the services offered, the maintenance of weekly services. The fact that those weekly services are offered jointly by several TAA members rather than by each company individually is not material and only serves to illustrate the high degree of integration between the companies within the TAA which provided combined services by means of ships which, from the users' point of view, are substitutable. The operators referred to in the Dynamar Report are not, prima facie, associated with each other by very complex agreements and cannot therefore, unlike the members of the TAA, be taken together, because they do not offer those weekly services jointly. Furthermore, the possibility for shippers, which was pointed out by the applicants, to shift some of their demand to one of those operators does not offset insufficiency in capacity and the frequency of sailings.

354 Finally, the applicants have not challenged the observation, in recitals 171 and 172 in the preamble to the contested decision, that the lack of effective competitive pressure from those operators is confirmed by the fact that they do not even have a presence on the most profitable part of the market (maritime transport prices varying considerably according to the goods shipped), as is evidenced by the maintenance of the differentiated rating system.

355 It follows from the foregoing that the Commission was correct to find that the carriers already present on the transatlantic route, but offering non-containerised

transport services, do not exert effective competitive pressure on the market in containerised liner shipping services.

— Competition from operators absent from the transatlantic route, but capable of entering it

356 As is clear from the eighth recital in the preamble to Regulation No 4056/86, carriers offering scheduled services on other trades are, as a rule, in a position to offer potential competition. However, the Commission found, following the detailed analysis set out in recitals 165 to 188 and 458 to 461 in the preamble to the contested decision, that, in the present case, potential competition is limited, mainly because of the special characteristics of the transatlantic trade and of the TAA.

357 As regards, first, the special characteristics of the transatlantic trade, it should be borne in mind, first of all, that the Commission correctly found that, because of the high volume of freight carried and the need to have a sufficient number of large, modern vessels specially equipped for container transport, only the major world operators are in a position to provide competitive services. Furthermore, of the 10 scheduled services offered by the parties to the TAA, only that of Maersk is operated individually, the other nine being covered by agreements to share vessels and capacity between the different TAA members.

358 The applicants do not challenge the Commission's assertion, which is indeed well founded, that because of those features only a few large international shipowners, or possibly certain large groups of shipowners, are able to exert effective competitive pressure. The criticism made by the applicants in their application

relates only to the consequences which the Commission attributes to the fact that most of those large international shipowners, who are not in the transatlantic trade, have close links with certain TAA members in connection with other maritime trades. According to the applicants, it is usual for shipping companies to belong to conferences or to enter into other cooperative agreements and it has never prevented a company from entering a trade on which carriers with which it has links elsewhere are operating. The alleged characteristics of the transatlantic trade are in fact only characteristics common to all maritime trades across the world.

359 That objection must be dismissed. It has been found that the transatlantic trade has particular characteristics such that, in the present case, the arrival of new operators was highly unlikely and that, in any event, it could involve only a limited number of major international shipowners, possibly acting in a group. The Commission was therefore correct in taking the view that the participation of those same shipowners in stabilisation agreements concerning the other two major westbound maritime trades (Europe Asia Trade Agreement and Trans-Pacific Stabilisation Agreement), agreements which are very broad and are similar to the TAA in terms of structure and objectives, showed the propensity of such companies to participate in agreements of that type and their lack of interest in engaging in competition which might destabilise those other major agreements in force around the world. It is thus the conjunction of the limitation of the sources of potential competition to a few specific operators and the existence of close links of interdependence between those same operators and the TAA members dominating the transatlantic trade which renders unlikely the entry, by definition destabilising, of such operators into the transatlantic trade. Although it is admittedly possible that those characteristics may correspond to those of other worldwide trades, it does not appear that they are common to the majority of the different markets in maritime transport services. In any event, the only material question in the present case is whether potential competition was sufficient in kind and intensity to prevent the possibility of competition's being eliminated as a result of the TAA. The special features of the transatlantic trade, on the one hand, and the community of interests and the risk of collusion between TAA members and potential competitors, as a result of a common presence both on several other markets and within various agreements, on the other, warrant a negative answer.

360 As regards, second, the characteristics of the TAA, it cannot be disputed that artificially maintaining excess capacities on the transatlantic trade, by means of the CMP, created a situation likely to discourage a potential competitor from penetrating a market, even if it was momentarily profitable. Not only would the competitor's entry onto the market aggravate the phenomenon of excess capacities, thus forcing down rates rapidly to unprofitable levels, but the new entrant would be faced with the threat of TAA members placing on the market considerable means hitherto held in reserve by the CMP. The argument that the price war linked to that intrusion would lead to the exit from the market of certain operators and rapid price rises, so that a real, financially well-supported potential competitor could succeed in fully integrating into the market, is not credible. Apart from the lack of consideration given to the existence of barriers at the entry to the market and the comparative advantages enjoyed by the operators already in place, that argument amounts to submitting that every market can always be penetrated by a competitor with almost unlimited resources which is more efficient than all other operators. Furthermore, that argument disregards the considerable market power wielded by the TAA members and the collective nature of their defence against potential competitors.

361 Moreover, the Commission found, without being contradicted, that there were in the present case barriers to exit from the market which were likely also to reduce the temptation for a shipowner to enter the trade. Withdrawal from a major trade such as the transatlantic trade damages the commercial reputation of a large shipowner and affects its competitive position in other trades.

362 Next, amongst the characteristics of the TAA which render very unlikely the entry on the relevant market of potential competitors as independent operators, in recitals 183 to 186 in the preamble to the contested decision the Commission also noted the fact that the TAA was an agreement providing a price-fixing system that was flexible enough to permit the integration of independent companies already present on the market and new entrants, so that shipowners interested in the transatlantic trade would have been tempted to enter it within

the framework of the TAA. That was indeed true of the only two companies, NYK and NOL, which entered the transatlantic trade after the entry into force of the TAA and of TMM and Tecomar which, although already present on that route, joined the TAA in 1993 by forming an alliance with Hapag Lloyd. Although an entry of that type was admittedly not completely without impact on the members of the TAA who were thus in danger of having their volume of business somewhat reduced, the accession of new members to the TAA did not impose any constraint on the commercial conduct of the TAA as a group of shipowners.

363 Finally, the fact noted in recital 187 in the preamble to the contested decision that TAA members were able to make substantial price increases at short notice and that, despite the profound dissatisfaction amongst the shippers, new operators did not enter the market confirms the lack of real competition, both actual and potential.

364 In the light of the foregoing, the Court concludes that the Commission was correct in finding that, although there is a certain amount of potential competition, it is limited and, since the entry into force of the TAA, has not been able to exert real pressure on the members of the agreement at issue, however the different sources of potential competition are defined, whether separately or together, taking account of a cumulative effect.

365 It is clear from the examination undertaken by the Court that all the objections raised by the applicants against the Commission's analysis of the elimination of competition within the TAA, the holding of a substantial part of the relevant market and external competition must be rejected.

366 In any event, the Commission's conclusion to the effect that the TAA, which grouped together companies accounting for a market share of the order of 75%;

afforded its members the possibility of eliminating competition between themselves and which, due to both its characteristics and those of the relevant market, was subject only to very limited pressure from external competition, both actual and potential, was an agreement which afforded its members the possibility of eliminating competition in respect of a substantial part of the services in question, within the meaning of Article 85(3) of the Treaty, cannot be regarded as vitiated by a manifest error of assessment. It should be noted that that assessment relates to both the TAA provisions on agreements fixing maritime rates and those on the CMP.

367 Since the fourth condition laid down in Article 85(3) of the Treaty is not fulfilled, the plea based on the refusal to grant individual exemption to the maritime transport agreements on price and capacity must be rejected as unfounded and it is not necessary to examine the applicants' and the interveners' objections against the Commission's analysis of the other three conditions laid down by that article.

The individual exemption of the agreements fixing inland transport rates

368 The Court finds that the applicants' objections are founded on a misconceived reading of the contested decision. They are mistaken in considering that the refusal to grant an individual exemption to the agreements fixing inland transport rates is based solely on the ground that the maritime transport agreements did not qualify for an exemption.

369 The Commission in fact set out in detail in recitals 463 to 489 in the preamble to the contested decision its specific reasons for considering that the agreements fixing inland transport rates could not, as such, qualify for individual exemption. It is quite clear from those recitals that the Commission's conclusion is not based

solely on the fact that the maritime transport agreements did not qualify for exemption. The Commission found, in particular, that the inland transport agreements did not lead to any improvement in productivity and did not bring any economic advantage which could justify the exemption of those agreements.

370 Since the applicants have not disputed any of the specific reasons on which the contested decision is based, the plea based on the refusal to grant individual exemption to the agreements fixing inland transport rates must be rejected.

371 Furthermore, given that the applicants' arguments are founded on the premiss that the Commission wrongly refused to grant exemption to the TAA agreements fixing maritime transport rates and it has been found above that the Commission rightly took the view that those agreements were covered by neither a block exemption nor an individual exemption, the plea must also be rejected.

372 Finally, for the sake of completeness, the Court finds that, since the true objective of the agreements fixing inland transport rates was to prevent the adverse effect on maritime transport rates of intermodal transport rates which did not take account of the total cost of inland transport, the applicants have not demonstrated that the power to fix inland transport rates was necessary to achieve that objective and that that result could not have been obtained by a less restrictive means such as the undertaking not to invoice the transport, for the inland segment, below its cost price.

373 It follows that the plea based on the refusal to grant individual exemption must be rejected.

The infringement of Article 190 of the Treaty

374 As regards the various objections relating to the reasoning of the TAA decision, which were raised in the context of the principal claims for annulment, the Court finds that the decision contains detailed and structured arguments in support of the Commission's assessment. The reasoning enabled those concerned to know the justifications for the measures adopted and the Community judicature to exercise its review of legality. Those objections must, as a consequence, be rejected.

Breach of the Agreement on the European Economic Area

I — *Arguments of the parties*

375 to 381 ...

II — *Findings of the Court*

382 Clearly, the plea based on breach of the EEA Agreement was not raised by the applicants and must, consequently, be dismissed as inadmissible. In view of the fact that interveners must, under Article 116(3) of the Rules of Procedure, accept the case as they find it at the time of their intervention and that their submissions in an application to intervene are, under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, limited to supporting the submissions of one of the main parties, the ECSA is not, as an intervener, entitled to raise that plea in law (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission*, paragraph 75).

383 In addition, suffice it to say that the relevant provisions of the EEA Agreement were not applicable to the administrative procedure which culminated in the contested decision. Those provisions entered into force on 1 January 1994, at which date the procedural steps requiring cooperation between the Commission and the EFTA Surveillance Authority, namely the hearing of the undertakings and the consultation of the Advisory Committee, had already taken place (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* [1999] ECR II-931, paragraph 259).

The claims in the alternative

384 In the alternative, the applicants claim that the Court should annul, first, Articles 1, 2, 3 and 4 of the TAA decision in so far as they prohibit the possibility of fixing intermodal transport rates, second, Article 5 of that decision and, third, Articles 1, 2, 3 and 4 of the contested decision in so far as they prohibit the conclusion of joint service contracts.

I — *Annulment of Articles 1, 2, 3 and 4 of the TAA decision in so far as they prohibit the possibility of fixing intermodal transport rates*

A — *Arguments of the parties*

385 to 388 ...

B — *Findings of the Court*

389 It should be borne in mind, first, that Article 3(1) of Regulation No 17 provides that, where the Commission finds that there is an infringement of Article 85 or 86 of the Treaty, it 'may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'.

390 According to settled case-law, that provision may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful (Joined Cases 6/73 and 7/73 *Istituto chemioterapico italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45; and *RTE and ITP* v *Commission*, paragraph 90), and also at prohibiting the adoption of similar conduct in the future (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 220; and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 241).

391 Article 11(1) of Regulation No 4056/86 and Regulation No 1017/68, which are applicable in the present case, are almost identical to Article 3(1) of Regulation No 17, with the result that the interpretation of the latter article may inform that of the abovementioned provisions.

392 After having found, in Article 1 of the contested decision, that the agreements fixing transport rates and the CMP which were entered into under the TAA were prohibited by Article 85(1) of the Treaty, the Commission ordered the undertakings to which that decision was addressed to bring an end forthwith to those

infringements. In Article 4 of the contested decision, it required them 'to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the agreements and practices referred to in Article 1 [of that decision].'

393 The sole purpose of that direction is to prevent the undertakings to which the TAA decision is addressed from committing further infringements identical to those identified in that decision, by entering into a new agreement or by taking part in a concerted practice having the same or a similar object or effect to that of the provisions of the TAA on fixing transport rates and the CMP. The direction comes within the power conferred on the Commission by Article 11(1) of Regulations No 4056/86 and No 1017/68.

394 As regards the scope of that direction, it does not have the effect of an absolute prohibition on any agreement having the object of fixing inland transport rates in the context of an intermodal transport operation, but only agreements which, for the reasons set out in the contested decision, do not satisfy the conditions under Article 85(3) of the Treaty.

395 In that regard, it should be made clear that, contrary to the applicants' submissions, the Commission's refusal to grant exemption to the agreements having the object of fixing inland transport rates does not refer only to the fact that the TAA was not a liner conference or to the alleged role of those agreements as a supplement to those having the object of fixing maritime transport rates, but in fact to all the reasons set out in detail in recitals 462 to 491 in the preamble to the contested decision. The Commission there stated, in particular, that the agreements fixing inland transport rates did not lead to any improvement in

productivity and did not bring any economic advantage which could justify the exemption of those agreements. The contested decision does not therefore prevent the applicants from submitting to the Commission another cooperative agreement on inland transport liable to promote greater efficiency in intermodal transport services in respect of the inland segment and from demonstrating that that agreement satisfies the requirements of Article 85(3) of the Treaty.

396 Consequently, as regards the abovementioned directions, the Commission cannot be criticised for having infringed Article 11(1) of Regulations No 4056/86 and No 1017/68 or been in breach of its obligation under Article 190 of the Treaty or of the rights of the defence.

397 Accordingly, the applicants' arguments in support of those first alternative claims must be rejected in their entirety and, consequently, those claims themselves.

II — *Annulment of Article 5 of the TAA decision concerning service contracts*

A — *Arguments of the parties*

398 The applicants submit that Article 5 of the contested decision, according to which they are required 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', must be annulled.

399 They recall, as a preliminary point, that a service contract is an agreement under which the shipper undertakes to ship a minimum volume or value of cargo during the period of the contract. In return, the carrier undertakes to provide to the shipper specific service guarantees, such as a capacity guarantee, and negotiates a price lower than that which is normally applicable. Approximately 60% of all products carried by the applicants come under such contracts.

400 In support of their request, the applicants claim, first, that the TAA decision contains no reasoning relating to Article 5.

401 Second, Article 5 of the TAA decision is not necessary either for re-establishing compliance with the law or for bringing to an end the infringement identified in Article 1 of the TAA decision. The applicants state that Regulations No 4056/86 and No 1017/68 do not confer on the Commission the power to issue directions the terms of which exceed what is necessary for re-establishing compliance with the law or for bringing declared infringements to an end (*Istituto chemioterapico italiano and Commercial Solvents* v *Commission*, and Case T-70/89 *BBC* v *Commission* [1991] ECR II-535). According to the applicants, although recitals 13 to 15 and 286 in the preamble to the contested decision deal cursorily with the provisions of the TAA relating to service contracts, that decision does not address individual service contracts actually concluded with shippers. Therefore such contracts are not the subject of the finding of infringement in Article 1 of the TAA decision. According to the applicants, such contracts are lawful.

402 Third, Article 5 of the contested decision is in breach of the principle of legal certainty. In particular, the applicants stress the uncertainty regarding the extent of the obligation to inform their customers of the possibility afforded to them of renegotiating or terminating service contracts.

403 Fourth, the Commission failed to mention in the statement of objections the possibility of its addressing to the parties to the TAA an order in the terms of Article 5 of the contested decision. Since the applicants had no opportunity to make known their views on that order, Article 5 of the decision infringes 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, p. 47) (*Wood pulp II*, paragraphs 152 to 154).

404 In response to those objections, the Commission recalls, first of all, that the TAA prohibited the member companies from offering individual service contracts to certain customers and states that that prohibition was in effect a policing measure to prevent cheating, by preventing companies from offering what may be regarded as discounts on the maritime tariff.

405 The Commission contends, next, that Article 5 of the contested decision is intended to prevent the applicants from continuing to enjoy the benefits of long-term contracts entered into on the basis of a price-fixing agreement regarded as unlawful. Although these contracts are not themselves void, customers must be entitled to renegotiate them under normal conditions of competition.

406 In the Commission's view, an order such as that contained in Article 5 of the TAA decision is a necessary and inherent part of a 'cease and desist' order under

Article 11 of Regulations No 4056/86 and 1017/68 where the conduct which constitutes an infringement takes the form of contractual relations with third parties which continue into the future. To allow the members of a cartel to continue to apply unlawfully fixed prices simply because these prices are incorporated in long-term contracts would make nonsense of a finding of unlawfulness. Article 5 of the contested decision is therefore intended to re-establish compliance with the law or to bring infringements to an end and is essential for that purpose. The fact that individual service contracts are not themselves contrary to Article 85(1) of the Treaty is not relevant to the matter at issue.

407 The Commission contends that, in so far as an order such as that contained in Article 5 of the TAA decision is an essential part of the order bringing an end to an infringement, there is no need to give specific reasons or to draw it to the attention of the parties concerned in the statement of objections. Once the applicants were informed that the Commission intended to require them to bring an end to the activities regarded as contrary to Article 85 of the Treaty, they could not have expected to be allowed to carry on enjoying the effects of those activities.

408 The Commission denies that there is a contradiction between the view that Article 5 of the TAA decision is an inherent part of the order to cease the infringements and the requirement of clear reasoning in that decision. It notes, in that respect, that the service contracts entered into before publication of the contested decision are not void as a matter of civil law since they were not agreements contrary to Article 85(1) of the Treaty, but that they are none the less 'tainted' by the unlawfulness of the TAA in so far as they were not freely negotiated, but reflected the TAA's provisions on price-fixing. Article 5 of the contested decision is thus necessary and valid, since its purpose is to ensure that competition on the market in services connected with liner shipping is returned as soon as possible to the conditions which would have prevailed in the absence of the unlawful coordination under the TAA. Furthermore, it prevents the applicants from continuing to enjoy the fruits of their unlawful arrangement.

409 Finally, the Commission denies that Article 5 of the contested decision lacks clarity and observes that it provides only that TAA members must afford to the shippers still bound by individual service contracts the opportunity to renegotiate those contracts under normal conditions of competition, but does not impose the slightest condition with regard to the outcome of those negotiations. The Commission contends that the order in Article 5 of the TAA decision is clear, precise, necessary and justified. Where an arrangement prohibited by Article 85 of the Treaty takes the form of long-term contractual relations with third parties, an order such as that in Article 5 of the contested decision is essential to bring an end to the infringements identified. The Commission thus takes the view that it acted within the limits of its powers under Article 11(1) of Regulations No 4056/86 and No 1017/68.

B — *Findings of the Court*

410 It is clear from the case-law that, in the context of its power for the purpose of applying Article 3 of Regulation No 17, and thus also Article 11(1) of Regulations No 4056/86 and No 1017/68, the Commission may specify the scope of the obligations imposed on the undertakings concerned in order to bring an end to the infringements identified. That power must however be implemented according to the nature of the infringement declared (see, by analogy, *Istituto chemioterapico italiano and Commercial Solvents* v *Commission*, paragraph 45; *RTE and ITP* v *Commission*, paragraph 90; and Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraph 74) and the obligations imposed must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (see *RTE and ITP* v *Commission*, paragraph 93).

411 Article 5 of the TAA decision provides that the parties to the TAA must 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'.

412 The Commission acknowledges that the service contracts entered into by the applicants are not, in themselves, contrary to Article 85(1) of the Treaty. Those contracts do not therefore form part of the infringements identified in the TAA decision. The Commission contends, however, that the order to the applicants to allow their customers to renegotiate or terminate those contracts was necessary, because the effects of the infringements identified in the contested decision might continue to exist if the addressees of that decision were able to continue to enjoy the economic advantages secured by ongoing contracts entered into on the basis of the horizontal agreement to fix prices and limit supply to which the TAA amounted.

413 It should be observed, in that respect, that most horizontal agreements to fix prices or divide up a market have such effects, more or less long-term, on third parties, but the Commission does not usually deem it necessary to include in its decisions declaring infringements an obligation comparable to that contained in Article 5 of the contested decision. The applicants asserted, without being contradicted, that the Commission had imposed an obligation identical to that contained in Article 5 of the TAA decision only in Decision 93/50/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.745 — Astra) (OJ 1993 L 20, p. 23) and that it had taken care to give detailed reasons for that obligation in that decision. Furthermore, the contracts concerned in the present case, entered into for a year, cannot be regarded as particularly long-term.

414 Moreover, apart from the penalty of nullity expressly provided for in Article 85(2) of the Treaty, the case-law establishes that the consequences in civil law attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 50), subject, however, to not undermining the effectiveness of the Treaty.

415 It follows that, in any event, the measure contained in Article 5 of the contested decision was not obviously necessary and does not correspond to an established line of Commission decisions. In those circumstances, it fell to the Commission to explain its reasoning (see, to that effect, Case 73/74 *Papiers peints and Others* v *Commission* [1975] ECR 1491, paragraph 31). Not only did the Commission not explain in the contested decision the reasons for which, even if the said contracts are not contrary to Article 85(1) of the Treaty, in order to bring to an end the infringements identified it would be necessary for the applicants to afford their customers the opportunity to renegotiate them but, furthermore, no part of the TAA decision deals with the issue of the fate of those service contracts entered into with shippers.

416 It follows that Article 5 of the TAA decision must be annulled on the ground of breach of the obligation to state reasons.

417 Moreover, according to Article 23 of Regulation No 4056/86, before taking a decision as provided for in Article 11 of that regulation, requiring undertakings to bring an infringement identified to an end, or a decision as provided for in Article 19 of the same regulation, imposing a fine, the Commission is required to give the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection. That right of the undertakings to submit their observations on all the objections which the Commission intends to raise against them is defined by Commission Regulation (EEC) No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Regulation No 4056/86 (OJ 1988 L 376, p. 1) and, in particular, by Articles 6 to 8 thereof, Article 8 of that regulation corresponding to Article 4 of Regulation No 99/63. The case-law on the latter provision and, in particular, that to the effect that the Commission is not entitled to impose a fine on an undertaking without having previously informed it in the statement of objections that it intended to do so (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 20; *Cimenteries CBR*, paragraph 480) is thus applicable by analogy to the present case. The Court of Justice has also held that the exercise of an undertaking's right to be heard before a decision is taken regarding it is chiefly incorporated in legal or administrative procedures for the termination of an infringement or for a declaration that an agreement, decision or concerted practice is incompatible with Article 85, such as the procedures referred to by

Regulation No 99/63 (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 21).

418 It follows that even if, as the Commission contends, the directions given in Article 5 of the contested decision could be regarded as necessary for re-establishing compliance with the law and as coming within the limits of the Commission's power to order the undertakings concerned, in accordance with Article 11 of Regulations No 1017/68 and No 4056/86, 'to bring such infringement to an end', the statement of objections should in any event have set out, even briefly, but in sufficiently clear terms, the measures which the Commission intended to take in order to bring an end to the infringements and should have given the applicants all the information necessary in order to enable them properly to defend themselves before the Commission adopted a final decision on that point. That conclusion is all the more necessary since individual service contracts accounted for a substantial part of the applicants' turnover and the obligation to renegotiate with customers could thus have significant consequences for the applicants, and could even amount to a penalty more serious than a fine.

419 It is clear that point 390 of the statement of objections, in which the Commission merely indicated that it was envisaging ordering that the infringements of Article 85 of the Treaty should be brought to an end, cannot be regarded as informing the applicants to the required legal standard of the Commission's intention to make the order in Article 5 of the contested decision. Since, by that article, the Commission imposes on the applicants an obligation about which they have not had the opportunity properly to make known their view, the applicants' arguments alleging breach of the rights of the defence are also well founded.

420 It follows that, without its being necessary to examine whether the order in Article 5 of the TAA decision exceeds the limits of what is appropriate and necessary to re-establish compliance with the rules in Article 85 of the Treaty, Article 5 of the contested decision must be annulled.

III — *Annulment of Articles 1, 2, 3 and 4 of the TAA decision in so far as they prohibit joint service contracts*

A — *Arguments of the parties*

421 to 423 ...

B — *Findings of the Court*

424 According to Article 1 of the contested decision, '[t]he provisions of the TAA relating to price-fixing and capacity infringe Article 85(1) of the EC Treaty'. In the part of the TAA decision containing the legal assessment of the price-fixing agreements in respect of maritime transport, recitals 285 and 286 state: '[t]he price-fixing agreements in respect of maritime transport between the shipping companies which are members of the TAA are agreements between undertakings within the meaning of Article 85(1) [of the Treaty]. These agreements, which are described at recitals 11 to 15, have as their object or effect the restriction of competition within the common market.' It follows that the agreements referred to in Article 1 of the TAA decision are the agreements 'described at recitals 11 to 15 [of that decision]'.

425 Although it is true that recitals 13 to 15 in the preamble to the TAA decision concern service contracts, those recitals merely state that the TAA made the conclusion of service contracts by conference members subject to a series of rules and conditions as to their duration, the minimum quantities to which they had to relate and the arrangements for their negotiation.

426 It must therefore be said that it cannot be inferred from the reference in recital 286 to those passages of the TAA decision that that decision prohibits the conclusion of joint service contracts.

427 It follows, as the Commission has rightly submitted, that the applicants' claim for annulment of Articles 1 to 4 of the TAA decision in so far as they prohibit joint service contracts is devoid of purpose and must therefore be rejected.

Conclusion

428 It is clear from the whole of the examination undertaken by the Court that Article 5 of the TAA decision must be annulled and that the application must be dismissed as to the remainder.

Costs

429 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. According to the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

430 Since the applicants have failed in their main submissions, they must be ordered to bear their own costs and to pay four fifths of the costs, including those relating to the interlocutory proceedings in Case T-395/94 R and in Case T-395/94 R II, incurred by the Commission and the interveners, the ECTU, the AUTF and the FTA, in accordance with their submissions to that effect.

431 Pursuant to Article 87(4) of the Rules of Procedure, the interveners, the ECSA and the JSA, must bear their own costs, including those relating to the abovementioned two sets of interlocutory proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls Article 5 of Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement);

2. Dismisses the remainder of the application;

3. Orders the applicants to bear their own costs and to pay four fifths of the costs incurred by the Commission and the interveners, the Freight Transport Association Ltd, the Association des utilisateurs de transport de fret and the European Council of Transport Users ASBL, including those relating to the interlocutory proceedings in Case T-395/94 R and in Case T-395/94 R II;

4. Orders the Commission to bear one fifth of its own costs;

5. Orders the interveners, the Freight Transport Association Ltd, the Association des utilisateurs de transport de fret and the European Council of Transport Users ASBL, to bear one fifth of their own costs;

6. Orders the interveners, the European Community Shipowners' Association ASBL and the Japanese Shipowners' Association, to bear their own costs, including those relating to the interlocutory proceedings in Case T-395/94 R and in Case T-395/94 R II.

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung M. Jaeger

Registrar President

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