

*Case No IV/M.831 -
P&O / ROYAL
NEDLLOYD*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 19/12/1996

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.12.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.831 - P&O/Nedlloyd
Notification of 19 November 1996 pursuant to Article 4 of Council Regulation N° 4064/89

1. On 19 November 1996 the Peninsular and Oriental Steam Navigation Co (United Kingdom) ("P&O") and Royal Nedlloyd NV (Netherlands) ("Nedlloyd") notified to the Commission an intended operation whereby they acquire within the meaning of Article 3(1)(b) of Council Regulation (EEC) N° 4064/89 (the "Merger Regulation") joint control of P&O Nedlloyd Container Line Ltd (United Kingdom) ("P&O Nedlloyd").

I THE PARTIES

2. P&O engages in a broad range of activities, including passenger and cargo shipping, integrated transportation and warehousing.
3. Nedlloyd is an international logistics services company whose core activities are container logistics through a network of global shipping links; and transport, forwarding, stock management and distribution, primarily in Europe.
4. The activities of both P&O and Nedlloyd include ocean container shipping and related landside activities.

II THE OPERATION

(i) Introduction

5. P&O and Nedlloyd will establish P&O Nedlloyd. P&O will transfer to P&O Containers Ltd ("P&OCL") its ocean container shipping businesses and related landside activities. Nedlloyd will transfer to Nedlloyd Lines BV its ocean container shipping businesses and related landside activities. Nedlloyd will transfer Nedlloyd Lines and P&O will transfer P&OCL to P&O Nedlloyd. As a result P&O Nedlloyd will comprise the following assets of P&O and Nedlloyd: all the containerships owned or chartered by them; all the containers owned or leased by them; their ocean freight-forwarding businesses; the Containerbase Group (a P&OCL container packing operation); Roadways (a P&O business which provides road haulage services and arranges railway services for deep-sea containers in the United Kingdom); their minority interests in European Rail Shuttle BV ("ERS") (which operates rail shuttle services between Rotterdam and points in mainland Europe); and the minority interest of Nedlloyd in Europe Combined Terminals ("ECT") (which provides terminal services in Rotterdam). [A call option will enable Nedlloyd to re-acquire the interest in ECT in certain circumstances]

(ii) Joint control

6. P&O and Nedlloyd will each hold 50 per cent of the issued shares of P&O Nedlloyd. Nothing in the agreements creating P&O Nedlloyd conflicts with the joint control of the company which these shareholdings confer on P&O and Nedlloyd.
7. The board of P&O Nedlloyd will consist of four directors appointed by P&O and four appointed by Nedlloyd. P&O and Nedlloyd will each appoint a director appointed by it as a co-chairman but neither party will have a casting vote. The board will be responsible for all key strategic decisions, including the adoption of budgets and strategic plans.
8. The chief executive of P&O Nedlloyd will be appointed or removed only by the agreement of the parties. [Deleted - for publication] The chief executive and (through him) the executive committee will be responsible for the day-to-day management of the company and implementation of the budget and strategic plan.
9. P&O Nedlloyd will therefore be subject to the joint control of P&O and Nedlloyd.

(iii) Lasting, autonomous, economic entity

10. By transferring to it their shares in P&OCL and Nedlloyd Lines, P&O and Nedlloyd will provide P&O Nedlloyd with all the assets and resources relevant for carrying out container shipping and related activities on a permanent basis. They intend that P&O Nedlloyd will be capable of financing its future capital requirements without recourse to them either for direct funding or underwriting of borrowing.
11. P&O Nedlloyd will not have a comprehensive inland transportation network. But it will in this respect be no different from other shipping lines, which generally acquire all or most of those services from third parties, even if they can obtain some of their inland transportation requirements within their own corporate group. P&O Nedlloyd will obtain inland transportation services from P&O, Nedlloyd or third parties as commercially appropriate and on normal commercial terms.

12. P&O Nedlloyd will obtain some services such as property, payroll and pension services from the parties. It will also obtain from them inland transportation services - the carriage of containers from the customer's premises to and from the container terminal. But these services will constitute only a small part of its total requirements and will be supplied on a commercial basis. In particular its probable purchase of inland transportation services from P&O and Nedlloyd will be *de minimis*. Because the market for inland transportation of deep-sea containers in Europe is very fragmented, many operators acting on a local basis, there is no realistic possibility that the preferred supplier clause discussed in section V will increase the level of purchases significantly. P&O Nedlloyd will therefore not be dependent upon the parties for any services or other resources.
13. P&O operates or has interests in container terminals in several countries. Nedlloyd's minority shareholding in ECT will pass to P&O Nedlloyd; even if it exercises the call option Nedlloyd will not control ECT. P&O Nedlloyd's use of these facilities will be on normal commercial terms; this use will constitute less than 10 per cent of its requirement for container terminal services.
14. In the absence of certain events specified in the joint venture agreement (eg deadlock, insolvency, change of control) P&O and Nedlloyd are prevented from transferring their shares in P&O Nedlloyd for [more than three] years following the creation of the joint venture.
15. P&O Nedlloyd will therefore perform on a lasting basis all the functions of an autonomous legal entity.

(iv) Absence of coordination

16. P&O and Nedlloyd transfer to P&O Nedlloyd all their container shipping and related landside activities. Any overlap between P&O and Nedlloyd in activities related to the joint venture is minimal.
17. (a) Bulk transport services

P&O will continue to provide bulk transport services. Even if these services and container transport services are to some extent substitutable (see section VI - relevant markets - (i) containerisable cargo), the bulk cargoes which P&O carries cannot readily be carried by container. In any case Nedlloyd operates no bulk transport services.

18. (b) Container packing

P&O's container packing business will be included in P&O Nedlloyd. Nedlloyd does not operate this business.

19. (c) Inland transport

Through its subsidiary P&O European Transport Services (POETS) and P&O Trans European GmbH (a subsidiary of POETS) P&O will continue to provide inland transportation services in the United Kingdom and mainland Europe, principally in Germany. It will also retain its [...] interest in Rhenania Container Services, which operates barges on the Rhine. Nedlloyd will continue to provide inland transportation

services in mainland Europe, particularly the Netherlands and Germany, through its European Transport and Distribution Division.

20. P&O Ferrymasters (part of POETS) will continue to supply point-to-point trailer and container operations on the central sea corridor between the United Kingdom and mainland Europe (principally Scandinavia). Nedlloyd provides similar services on the central sea corridor to a very limited extent, through its subsidiary Mamoet Ferry Transport. Neither P&O Ferrymasters nor Mamoet Ferry Services is involved in the transportation of deep-sea containers carried by container shipping lines.
21. P&O Nedlloyd will supply deep-sea container inland transport services only in the United Kingdom. Neither P&O nor Nedlloyd will continue to supply these services in the United Kingdom. Their inland transportation services in mainland Europe include both services relating to deep-sea containers and a wide range of unrelated services - transport for roll-on/roll-off shipping, inland point-to-point transport, warehousing, distribution and a variety of value-added services - which the parties currently manage completely separately from their inland transportation activities. The turnover of each of P&O and Nedlloyd from the inland transportation of deep-sea container shipping represents an insignificant proportion of the total turnover both of the activities which they will each retain and of the turnover of the activities which will be transferred to the joint venture.

22. (d) Container terminals

P&O, but not Nedlloyd, will operate or have interests in container terminals in various countries.

23. The operation therefore does not give rise to coordination of the competitive behaviour of the parties amongst themselves.

(v) Conclusion

24. The operation accordingly constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III CONCENTRATION OF A COMMUNITY AND EEA DIMENSION

25. The aggregate worldwide turnover of P&O is ECU 7 928 million. That of Nedlloyd is ECU 3 223 million. The combined aggregate worldwide turnover of the parties therefore exceeds ECU 5 000 million. P&O has an aggregate Community-wide turnover of ECU [...] million. Nedlloyd has an aggregate Community-wide turnover of ECU [...] million. Each of them therefore has a Community-wide turnover in excess of ECU 250 million. Neither of them achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
26. The operation therefore has a Community dimension within the meaning of Article 1(1) of the Merger Regulation.

IV COMPATIBILITY WITH THE COMMON MARKET AND THE FUNCTIONING OF THE EEA AGREEMENT

Relevant markets

27. In earlier decisions relating to maritime transport under Article 85 EC [e.g. TAA OJ 1994 L 376/1; FEFC OJ 1994 L 378/17] the Commission has defined the relevant market as a service supplied between a range of ports on either the northern European or the Mediterranean coast and a range of ports in another continent or region. Consequently, in the present case attention must be paid to both the definition of this service and to its geographic aspects.

(i) Containerisable cargo

28. The parties contend that in the present case the definition of the product market should be the transport of containerisable cargo and its related landside activities from European ports to ports in other regions or continents.

29. According to the notifying parties a large proportion of cargoes, with exceptions such as crude and mineral oils, can be transported either in bulk or in containers. A shipper will base his choice of transport on a combination of economic factors - principally freight rates, but also volume and the number of ports involved. Some goods - eg vehicles, frozen and chilled foods and forest products such as paper and board - can be carried, where volume justifies it, on bulk vessels especially designed for such cargoes. Furthermore, the parties submit that substitution is possible between break-bulk transport and specialized containers which have been developed to ensure the necessary ventilation and moisture control for the transport of e.g. coffee and cocoa; these products were traditionally transported in bulk. Substitution between bulk and container transport, they say, is particularly common for low-value goods, for example when a container shipping line offers low rates in order to offset the costs of re-positioning empty containers.

30. The Court of Justice in the Tetra Pak judgement [Case C-333/94 P, of 14/11/1996, par 13-15] states that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that when different products are, to a marginal extent, interchangeable this does not preclude the conclusion that these products belong to separate product markets. On this basis, while it is possible that in exceptional circumstances some substitution may occur between break-bulk and container transport, the Commission's enquiries do not indicate that there is in fact any lasting substitution from container towards bulk for the vast majority of cases.

(ii) Liner shipping

31. P&O Nedlloyd will provide liner shipping services which is the provision of scheduled services operating to a fixed timetable. The parties contend that non-liner shipping, either in the form of chartering the whole or the part of vessels by individual customers; "tramp" operations, being unscheduled sea transport, and specialized transport i.e. ships developed for transporting specific goods, compete with liner shipping services.

32. Liner shipping services may be distinguished from these other modes of transport in three ways: firstly customers demand scheduled transport in order to meet production runs and delivery deadlines. Secondly, the vast majority of customers require flexibility in available space - something unavailable when whole or parts of ships are to be chartered.

Finally, specialized transport constitutes a reasonable alternative only for a few shippers who have large quantities of only a few categories of goods to transport for which such ships have to be available.

33. While it is possible that in exceptional circumstances some substitution on a limited number of routes may occur between these forms of transport, the Commission's enquiries do not indicate that there is in fact any substitution for the vast majority of cases.

(iii) Geographic aspect of the service

34. It is generally accepted that transport to and from northern Europe constitutes a relevant service market for liner shipping services. However the parties contend that on certain trades the geographic scope of the service can not be distinguished between northern Europe and the Mediterranean. This is because, due to improved land transport links with the rest of the continent, Mediterranean ports have become substitutable with those of northern Europe.
35. Furthermore, the parties contend that the catchment area of the northern European ports covers Ireland, the UK, Austria, Sweden, Finland, Denmark, the Netherlands, Belgium, Luxembourg, most of Germany, northern and central France, Portugal and northern Italy. Similarly that the Mediterranean catchment area covers, at least, southern and central France, Spain, Italy and Portugal. The ability for shippers to change between these ports depends on inland transport costs and the adequacy of infrastructure (rail, canal and road links). As regards cost, a shipping line can offer equalisation of the freight rate to compensate a shipper who would otherwise incur an additional cost in inland haulage because the shipping line does not call at his nearest or otherwise most convenient port of departure. This equalisation applies only with respect to harbours located in one and the same area, so either to the northern Europe area or to the Mediterranean but not between the two areas.
36. As regards substitution between northern European and Mediterranean ports, the Commission's enquiries indicate that the possibility of inland transport or maritime transshipment between northern Europe and the Mediterranean does not lead to substitution to a considerable extent. This distinction is reinforced by, for example, northern European ports, such as Antwerp being cheaper to use than their Mediterranean counterparts, for example, La Spezia (Drewry-Global Container Markets). Finally the Commission's enquiries indicate that there is only limited substitution between ports in these regions and it can therefore be concluded that northern Europe and the Mediterranean do not belong to the same relevant market.
37. Turning to the question of the equalization mechanism, it appears that the ports in the northern European area and those in the Mediterranean are sufficiently interchangeable, within each of these regions, to enable the conclusion to be drawn that the geographic market is not narrower than the whole of each region. In the absence of this mechanism, it is possible that shippers would use their closest port being the cheapest, as regards inland transport costs. Consequently this would have the effect of narrowing the geographic aspect of the service and therefore the relevant market definition.
38. Shipping lines do not serve every port in a region but serve a selection of ports and have the possibility of switching between ports in relation to a certain service. The relevant market is determined by the range of ports which are served at both ends of the service;

the service between two ranges of ports is called 'a trade'. Trades from and to ports in northern Europe and the Mediterranean in which P&OCL and/or Nedlloyd are active include: northern Europe-Far East, Mediterranean-Far East, northern Europe-US, Mediterranean-US, northern Europe-Indian sub-continent etc. According to the Commission's enquiries the above examples of trades are recognised as distinct relevant markets by customers.

(iv) Conclusion

39. It can be concluded that the relevant markets for the present case comprise the provision of the service of the carrying of containerized cargo by liner shipping between ports in either northern Europe or the Mediterranean and ports in each of the non-European areas examples of which are mentioned in the previous paragraph.

Competitive assessment

(i) Affected markets

40. On the basis of the information supplied by the parties, from their own and independent sources, and in the light of the above market definitions the following affected markets have been identified:
- northern Europe/Far East;
 - northern Europe/Red Sea;
 - northern Europe/southern Africa;
 - northern Europe/Australia and New Zealand; and,
 - Mediterranean/Australia and New Zealand.
41. Each of these affected markets are assessed separately below. However, prior to completing this exercise it is appropriate to appraise the market position of the parties in world terms and the effect of conferences and consortia on the competitive environment in the industry.

(ii) Worldwide position of P&O Nedlloyd

42. Following the creation of the joint venture, P&O Nedlloyd will become the world's third largest liner operator (and Europe's second largest) when measured in terms of volume carried. It is estimated that P&O Nedlloyd will carry [case C-333/94 P, of 14/11/1996, par 13-15] TEU in 1997, behind Maersk ([...] TEU) and Evergreen ([...] TEU). At this level the joint venture will account for an estimated [Between 5% and 10%] of cargo carried worldwide.
43. Similarly, when measured in slot capacity (taking into account current capacity and confirmed new building) P&O Nedlloyd will also rank third behind Maersk and Evergreen. P&O Nedlloyd will command some [Between 0 and 500,000] slots following the creation of the joint venture being some [Between 0% and 5%] of world capacity; in fact the largest 20 operators will control less than 50% of the total available capacity.

(iii) Conferences and consortia

44. Conferences and consortia are contractual arrangements between shipping lines that play an important role in the organisation of the liner shipping industry and restrict competition between their members. Furthermore, the combined market position of the members of conferences, and to a lesser extent consortia, can be substantial. Consequently, conferences and consortia often have a considerable influence on the degree of competition on the different trades. Therefore, in the assessment of the consequences of the present operation on the affected markets, the parties' membership of the conferences and consortia has to be taken into consideration.

(a) Liner conferences

45. The commercial organisation of liner shipping has for many years been based largely upon a system of liner conferences. Each trade has one or more conferences. Liner conferences are defined in Council Regulation (EEC) n° 4056/86 [OJ L378 of 31/12/1986] as "a group of two or more vessel-operating carriers which provides international 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." Not all carriers are members of a conference; on some trades substantial carriers, like Evergreen, operate outside the relevant conferences. Conference members agree to apply uniform freight rates and other terms and conditions and sometimes establish common scheduling. Scope exists on some conferences for individual members to quote a lower freight rates, but in principle members of a conference compete with each other, if at all, on quality of service (eg frequency, reliability and ports served).
46. Conferences are exempt from the application of Article 85(1) EC insofar that agreements, decisions and concerted practices amongst some or all of their members have the following objectives:
- the coordination of shipping timetables, sailing dates or dates of calls;
 - the determination of the frequency of sailings or calls;
 - the coordination or allocation of sailings or calls among members of the conference;
 - the regulation of the carrying capacity offered by each member;
 - the allocation of cargo or revenue among members."
47. Accordingly liner conferences have the effect of limiting competition amongst their members in respect of pricing, timetabling, frequency of service, ports called at, carrying capacity and allocation of cargo and revenue.

(b) Consortium agreements

48. Consortium agreements are defined in Commission Regulation (EC) n°870/95 [OJ L89 of 21/04/1995] as "agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to a particular trade and the object of which is to bring about cooperation in the joint operation of a maritime transport service, which improves the service which would be offered individually by each of its members in the absence of the consortium, in order to rationalize their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing."

49. As such they are exempt from the application of Article 85(1) EC insofar as the agreements contain terms relating to:

- "- the joint operation of liner shipping transport services which comprise solely the following activities:
 - (i) the coordination and/or joint fixing of sailing timetables and the determination of ports of call;
 - (ii) the exchange, sale or cross-chartering of space or slots on vessels;
 - (iii) the pooling of vessels and/or port installations;
 - (iv) the use of one or more joint operations offices;
 - (v) the provision of containers, chassis and other equipment and/or rental, leasing or purchase contracts for such equipment;
 - (vi) the use of a computerized data exchange system and/or joint documentation system;
- temporary capacity adjustments;
- the joint operation or use of port terminals and related services (e.g. lighterage or stevedoring services);
- the participation in one or more of the following pools: tonnage, revenue or net revenue;
- the joint exercise of voting rights held by the consortium in the conference within which its members operate, in so far as the vote being jointly exercised concerns the consortium's activities as such;
- a joint marketing structure and/or the issue of a joint bill of lading;
- any other activity ancillary to those referred to above in the aforementioned points which is necessary for their implementation".

50. Consequently consortium agreements may limit the competition amongst the members of consortia by, for example, capacity planning, the operation of joint sailing timetables and determination of ports of call and the establishment of joint marketing structures.

(c) Relevance of conferences and consortia for the assessment of the present operation

51. It has to be considered to what extent consortia and conferences, and the membership of P&OCL and Nedlloyd thereof, must be taken into account in the assessment of the operation. In such a situation the structural link which results from the merger must also be seen in relation to the contractual links with the co-members of the consortia and conferences.

52. As a result of these contractual arrangements P&O Nedlloyd will, after the merger, be contractually linked to other shipping lines with which they are consequently not in full competition. For this reason, in the assessment of the impact of the operation on competition in the affected markets, the market shares of the merged entity and those of the relevant conferences and consortia are considered. In the appraisal of these market shares it must be recalled that there is a certain degree of internal competition within consortia and conferences.

53. In the Cewal case [joined cases T-24/93, T-25/93, T-26/93 and T-28/93 of 8/10/96] the Court of First Instance concluded that the members of a conference may, under certain conditions, be jointly dominant in the meaning of Article 86 EC. It is not necessary to decide in the course of this procedure whether certain conferences are in a position of dominance as a consequence of their already existing economic links in the light of the above judgement. However there is a need to assess whether, for example, the present operation gives rise to

a strengthening of the cohesion within an existing conference or consortium which would create dominance or would reinforce already existing dominance, thereby significantly impeding effective competition in the common market. These matters are dealt with on a trade by trade basis in the assessment of each of the affected markets.

54. Finally, mention must also be made of consortia in which neither of the parties participates. In the present operation this concerns consortia between third parties, e.g. Maersk/Sea-Land. Such combinations are an element of the competitive environment for the merged entity and must be taken into account accordingly. It could normally be taken for granted that the competitive pressure on the merged entity will result from these combinations, unless a market has become so concentrated that the question of oligopolistic dominance arises.

(iv) Competitive assessment of affected markets

(a) Northern Europe/Far East

55. The northern Europe/Far East trade is the world's second largest trade, after the Trans-Pacific, with an estimated total capacity, in 1995, exceeding 6 million TEU and a volume carried of some 4 million TEU.

Market shares

56. The following table sets out, for 1995, details of the volume carried, the share of this volume subject to the rules of the Far East Freight Conference ("FEFC"), being the relevant conference on the trade, and the volume carried by the consortia, of which the parties are members, on the trade.

	<u>TEU</u>	<u>%</u>
Total estimated volume carried	[Between 4 and 5 million]	100
FEFC (including P&O and Nedlloyd)	[Between 2 and 3 million]	[Between 60% and 65%]
Grand Alliance (including P&OCL)		
[Other member are Hapag-Lloyd, Neptune Orient Line and Nippon Yusen Kaisha]	[Between 1 and 2 million]	[Between 25% and 30%]
Global Alliance (including Nedlloyd)		
[Other members are American President Lines, Malaysian International Shipping Corporation, Mitsui OSK Lines and OOCL]	[Between 0 and 1 million]	[Between 15% and 20%]

57. The estimated individual market shares of the parties and their main competitors (holding more than 5%) on the trade were as follows in 1995: P&OCL [between 5% and 10%], Nedlloyd [Between 0% and 5%], and with Maersk, Hapag-Lloyd, Hanjin, NYK, Evergreen, Sea-Land, MOL and OOCL all holding between 5% and 10% each. These ten lines held, in total, [Between 65% and 70%] of the market in 1995. It should be noted that the parties' competitors, identified above, with the exception of Evergreen and Hanjin, are all members of the FEFC.

Actual competition

58. The FEFC, which currently comprises 16 members, provides for the lines to set common or uniform tariffs and rates, charges and surcharges. In addition the member lines may agree upon the coordination of shipping timetables, the frequency and coordination of sailings, the regulation of carrying capacity and the allocation of cargo. Each member of the FEFC has one vote and the above items are either decided by a simple or 75% majority as applicable. Consequently, actual competition amongst the FEFC members is restricted due to the existence of the conference. On the other hand a number of lines operate on the trade which are independent of the FEFC, the largest of which is Evergreen; the market presence of the remainder of the independents is fragmented.
59. The Global Alliance has five members and the underlying agreement allows the lines to exchange either slots or the vessels operated under the agreement. Furthermore, the lines may agree vessel rotation and ports of call together with the use of joint terminal facilities. However, each member is free to market their own services. All decisions have to be reached unanimously.
60. The Grand Alliance, with four members, coordinates the chartering and exchange of space on vessels and allows for the coordination of sailing patterns, ports of call and frequency of sailings and visits. However the agreement precludes the lines' operations being held out as a joint service. Each member of the Grand Alliance has one vote and all decisions normally require unanimity of voting.
61. It would appear that the Global and Grand Alliances lead to a restriction of competition due to the fact that they allow for the coordination of sailing patterns, the frequency of sailings and the ports of call for the lines involved. The remaining competition is further restricted because, in addition, a number of smaller consortia groupings also exist on the trade: Maersk/Sea-Land, DSR-Senator/Cho Yang/Hanjin and K-Line/Yang Ming with some 10-15% of the trade's volume each.
62. Given the fact that some [Between 60% and 65%] of the volume on the trade is subject to the rules of the FEFC and that an estimated [between 80% and 85%] of the volume is subject to consortia agreements it is concluded that actual competition is restricted.

Creation or strengthening of a dominant position

63. The combined market share of P&O Nedlloyd on the trade is expected to amount to some [Between 10% and 15%] and the concentration is not considered to have any appreciable effects on the competitive structure of the conference. However both parties belong to different consortia. As explained above, the Court of First Instance has concluded that the membership of conferences and, by inference, consortia leads to economic links being established between their members. Such links do not currently exist between the Global and Grand Alliances. The overlapping membership of the consortia that arises from the creation of the joint venture is not sufficient to create the economic links that are envisaged by the Court of First Instance.
64. Moreover the parties have indicated that they intend to withdraw from one or other of these consortia as it is not commercially feasible to remain in both.[...] While the parties have publicly announced their intended withdrawal from one or the other Alliances it is not apparent which Alliance this will be or how this withdrawal will be completed. [...].

65. In the event of a withdrawal there will be no links between these two consortia and thus it is only appropriate to envisage the worst possible case being P&O Nedlloyd's withdrawal from the Global Alliance leaving the joint venture in the Grand Alliance alone. In such circumstances, the market presence of the parties, plus the Alliance, would amount to [Between 30% and 35%]. Due to the existence of the other consortia, together with the independents on the trade, it is not considered that a [...] market share would give rise to the creation of a dominant position. This conclusion is supported by the fact that competition takes place between the lines within the consortia which compete by, firstly, marketing their services separately and, secondly, in the quality of their service e.g. the availability of specialist equipment; the provision of logistic (e.g. container packing) and intermodal services and by the speed and quality of documentation including data processing.

(b) Northern Europe/Red Sea

66. The northern Europe/Red Sea trade is small in world terms accounting for less than 5% of the volume carried on the northern Europe/Far East trade. Most operators serve Red Sea ports as part of a wider operation serving areas such as the Indian sub-continent etc. However some lines have ceased a service to the Red Sea due to deteriorating port handling facilities at Jeddah. Consequently while P&OCL still provides such a service, Nedlloyd only services this port by way of slot-charter.

Market shares

67. The following table sets out, for 1995, details of the volume carried, the share of this volume subject to the rules of the UK/Assab and Djibouti Lines Agreement ("UADLA") and the Jeddah Service Group Agreement ("JSGA"), the conferences on the trade, and the volume carried by the consortia, of which the parties are members, on the trade.

	<u>TEU</u>	<u>%</u>
Total estimated volume carried	[Between 0 - 1 million]	<u>100</u>
UADLA & JSGA (including P&OCL)	[Between 30% and 35%]	[Between 35% and 40%]
Grand Alliance (including P&OCL)	[Between 30% and 35%]	[Between 35% and 40%]
Global Alliance (including Nedlloyd)	[Between 30% and 35%] ¹⁾	[Between 25% and 30%]

68. The estimated individual market shares of the parties and their main competitors (holding more than 5%) on the trade were as follows in 1995: P&OCL [between 10% and 15%], Nedlloyd [Between 0% and 5%], and with Hapag-Lloyd, Maersk and the United Arab Shipping Co. all holding between 5% and 10% each. These five lines held, in total [between 40% and 45%] of the market in 1995. It should be noted that all three of the parties' competitors, identified above, are members of the JSGA conference.

Actual competition

69. The UADLA has five members and the JSGA six and both conferences allow members to agree on rates and, in principle, both conferences give each member line one vote. It is estimated that the conference members have [between 35% and 40%] of the volume on the trade. As described in the section above, the Global Alliance has five members and the

Grand Alliance four; the main purpose of these consortia is to coordinate the use of space on vessels, sailing patterns etc. Furthermore Maersk is a member of the Maersk/Sea-Land consortium on this trade and it is estimated that at least [between 70% and 75%] of the volume on the trade is governed by competing consortia agreements.

70. The effect of the conferences and consortia operating on this trade is to limit price competition and capacity.
71. Actual competition is provided by lines outside both the conference and the consortia, an example being MSC. However this line's share of the market is estimated as being less than 5%.
72. Given the presence on the trade of the conference and consortia and the fact that no independent line has a significant market share outside these arrangements, it is considered that actual competition on the trade is limited.

Creation or strengthening of a dominant position

73. The linking of the two individual lines' market shares does not give rise to the creation or strengthening of a dominant position on the trade. Similarly the linking of Nedlloyd's market share to that of the conferences (giving a total of market share of [between 35% and 40%]) does not lead to the conference holding a dominant position. As regards the Alliances, the arguments explored in relation to the northern Europe/Far East trade are similarly relevant for this trade. In the worst case position, of P&O Nedlloyd leaving the Global, but remaining in the Grand Alliance, it is not considered that the market share which arises (some [Between 30% and 35%]) would give rise to the creation or strengthening of a dominant position.

(c) Northern Europe/southern Africa

74. The northern Europe/southern Africa trade is small in world terms, being less than 10% of the volume carried on the northern Europe/Far East trade. As it is a north/south trade there is a significant requirement for refrigerated containers to transport perishable products.

Market shares

75. The following table sets out, for 1995, details of the volume carried, the share of that volume subject to the rules of the European Southern Africa Conference ("ESAC") and the volume carried by the consortium, SAECS, of which the parties are members, on the trade.

	<u>TEU</u>	<u>%</u>
Total estimated volume carried	[Between 0 and 1 million]	<u>100</u>
ESAC (including P&OCL and Nedlloyd)	[Between 30% and 35%]	[Between 60% and 65%]
SAECS (including P&OCL and Nedlloyd)		

[Other members are GGM, Safmarine, DAL, Ellerman Harrison Container Line] [Between 30% and 35%] [Between 45% and 50%]

76. The estimated individual market shares of the parties and their main competitors (holding more than 5%) on the trade were as follows in 1995: P&OCL [between 10% and 15%],

Nedlloyd [Between 0% and 5%] and with Safmarine, MSC and DAL all holding between 10% and 25% each. These five lines held, in total, [Between 75% and 80%] of the market in 1995. It should be noted that Safmarine and DAL are members of the ESAC.

Actual competition

77. The ESAC conference comprises 19 members and the parties, due to P&OCL controlling the Ellerman Harrison Container Line Limited, have three votes in this conference. Each member otherwise has one vote and all matters concerning freight policy require a 75% majority. The conference enables its members to set uniform and common freight rates and charges.
78. The SAECS consortium comprises six members with the parties having three votes due to P&OCL controlling the Ellerman Harrison Container Line Limited. Each member has one vote and decisions require a simple majority. The consortium implements sailing programmes, patterns and frequencies and regulates the capacity deployed. In addition the consortium operates a common financial pool whereby revenues earned and costs incurred are redistributed among the members according to their respective trade shares. Finally the consortium allows cooperation on marketing. No other consortia are believed to exist on the trade although slot charter agreements do exist.
79. The presence of the conference with [Between 60% and 65%] of the volume on the trade and of the consortium with [Between 45% and 50%] of the volume, in 1995, would appear, in the first instance to give rise to a significant lack of competition.
80. However competition is provided by two other lines one of which only started trade in mid-1995. Neither of these two companies, MSC and KHL, are members of the conference nor the SAECS consortium but MSC does have a slot charter agreement with DSR-Senator. During 1995 MSC attained a market share of between 20% and 25% due to an aggressive pricing policy undercutting conference rates. Similarly, KHL has followed a policy of lower prices but at present is not considered to meet the same quality standards as the consortium members. Despite this, KHL has acquired some 10% of the whole market in 1996. In fact freight rates (southbound) have increased only 2% p.a., on average, during the period 1993-1995 and northbound rates have been stable. However rates in both directions have fallen in 1996 due to the presence of KHL.
81. In conclusion, despite the presence of the consortium and the conference on the trade, actual competition would appear to exist due to the existence of MSC and KHL. Together these independent line may have up to 30% of the share on the trade.

Creation or strengthening of a dominant position

82. The combined market share of P&ONedlloyd on the trade would amount to an estimated [Between 15% and 20%]. As the parties are both members of the same conference and consortium on the trade these bodies' market shares do not require linking with any other market shares.
83. The ESAC conference accounts for [Between 60% and 65%] of the volume on the trade and will, following the establishment of the joint venture, still retain 18 members. Therefore the concentration will have no material effect on the market position of the conference.

84. SAECS, with a market share of [Between 45% and 50%], will have five members following the creation of P&O Nedlloyd and the joint venture will have two out of five votes; all five will be members of ESAC. The concentration has not changed the total market share of the consortium nor will the parties control the consortium in the future. The market presence of the consortium does not give cause for concern given the existence of two competitors operating outside the conference and the consortium bringing competition to bear both in the form of prices and of services. Therefore the concentration will have no material effect on the market position of the consortium.

(d) Northern Europe/Australia and New Zealand and the Mediterranean/Australia and New Zealand

85. It is difficult to separate the northern Europe/Australia and New Zealand trade from the Mediterranean/Australia and New Zealand trade due to the fact that conference and consortium lines from northern Europe call at Mediterranean ports when southbound to Australia and vice versa. This has the consequence that separate data are unavailable in respect of the two trades but does not affect the conclusion that the two trades are in fact separate markets. The total volume on the northern Europe/Australia and New Zealand and the Mediterranean to Australia and New Zealand trades amounts to less than 10% and 5% respectively of that on the northern Europe/ Far East trade.

Market shares

86. The following table sets out, for 1995, details of the volume carried, the share of this volume subject to the rules of the Europe to Australia and New Zealand Conference ("EANZC") and the Australia/New Zealand to Europe Liner Association ("ANZELA") and the volume carried by the consortium, of which P&OCL is a member, on the trade. These market shares are a combination of both the direct trade and the transshipment trade. Transshipment at Singapore is a relatively common feature of the trade lines plying the east/west Europe/Far East trade which use spare capacity to off-load containers in Singapore. A subsidiary service then takes the containers from Singapore to Australia and New Zealand.

	<u>TEU</u>	<u>%</u>
-Northern Europe/Australia and New Zealand	[Between 0 and 1 million]	
-Mediterranean/Australia and New Zealand	[Between 45% and 50%]	
-Total estimated volume carried	[Between 45% and 50%]	<u>100</u>

EANZC and ANZELA (including P&OCL) [Between 45% and 50%] [Between 55% and 60%]
P&O/Contship

[Other members are Consortium Hispania Line, Contship Containerlines, HSDG, Hapag-Lloyd, Lloyd Triestino and Wilhelmsen Lines]
[Between 45% and 50%][Between 50% and 55%]

As stated above neither the conference nor the consortium volumes can be analyzed separately between the northern Europe and Mediterranean/Australia and New Zealand trades. Therefore, these percentages relate to the total volume on both these trades.

87. The estimated individual market shares of the parties and their main competitors (holding more than 5%) on each trade were as follows in 1995:

- Northern Europe: P&OCL [Between 25% and 30%], Nedlloyd [Between 0% and 5%] and with MSC, Contship, ABC Container Lines and Hapag-Lloyd holding between 5% and 20% each. In total these six lines held, in total, [Between 70% and 75%] of the market in 1995.

- Mediterranean: P&OCL [Between 15% and 20%], Nedlloyd [Between 5% and 10%] and with MSC, Contship, Lloyd Triestino and ANL holding between 10% and 20% each. In total these six lines held, in total, [Between 75% and 80%] of the market in 1995.

88. It should be noted that Contship, Hapag-Lloyd, Lloyd Triestino and ANL are in both the EANZC and ANZELA conferences. Both ABC and ANL exited these trades at the end of 1995.

Actual competition

89. At present two conferences operate on these trades and these have, on the combined northern Europe and Mediterranean/Australia and New Zealand trades some [Between 55% and 60%] of the volume transported. The EANZC conference sets rates and conditions of carriage, coordinates timetables, sailing dates and frequencies and regulates carrying capacity. Each member line has one vote. The AZELA conference fixes common rates and service standards and can pool earnings, expenses, losses and traffic. Each member line has one vote.
90. The P&OCL/Contship Joint Service accounts for [Between 50% and 55%] of the traffic on the combined northern Europe and Mediterranean/Australia and New Zealand trades. This consortium provides for the sharing of space on the lines' vessels and authorises members to agree on port coverage and rotation. All its members belong, also, to the EANZC and ANZELA conferences.
91. Accordingly, with the operation of the consortium and conferences at least half of the trade on these routes is subject to price and quantity restrictions. It should be noted, however, that the EANZC trade has a large number of service contracts for small volume shippers when southbound.
92. Competition is provided on the trade from independent operators e.g. MSC which is neither a member of P&O/Contship nor of the conferences, and which have achieved market shares of up to [Between 15% and 20%] on both trades. Furthermore price competition is provided by the existence of service contracts in EANZC conference when travelling southbound. Competition also arises due to transshipment. This is because the lines (e.g. Cosco and Nedlloyd) operating the second leg of the trade from Europe (i.e. that part from Singapore to Australia) are providing the service outside the conferences. Consequently they have limited any upward pressure of the freight rates of lines operating the direct trade.
93. Given these factors there would appear to be a degree of actual competition on the trade at present.

Creation or strengthening of a dominant position

94. Prima facie the combined market shares of the parties would amount to some [Between 30% and 35%] on the northern Europe/Australia and New Zealand trade and some [Between 20% and 25%] on the Mediterranean/Australia and New Zealand trade. However it must be recalled

that Nedlloyd provides its service to Australia and New Zealand by way of transshipment at Singapore.

95. Both the EANZC and ANZELA conferences have 10 members and they count together for [Between 55% and 60%] of the volume on the trade; P&O Nedlloyd will continue to have three out of nine conference votes because of P&OCL's control of Associated Container Transport (Australia) Limited and the Shipping Corporation of New Zealand Limited.
96. Nedlloyd is not a member of these conferences because they only relate to the direct trade and not the transshipment service which Nedlloyd currently operates. If P&O Nedlloyd was to retain a separate transshipment service post-concentration, this service would be operated outside the conference vis-à-vis the Singapore/Australia/New Zealand leg of the trade. The question as to whether this service would compete or not can be left open as effective competition remains on the trade.
97. On the other hand if the transshipment service was discontinued, only part of Nedlloyd's market share would be transferred to the conferences as some customers would still prefer the cheaper, but slower, transshipment service. On the conservative assumption that 50% of Nedlloyd's volume transferred to the conferences, their market share would rise to some [Between 60% and 65%] and P&O Nedlloyd would have three out of nine votes. On this basis, the concentration will have no material effect on the market position of the conferences.
98. The same reasoning applies to the P&O/Contship consortium: Nedlloyd is not a member, because it only relates to the direct trade, and P&O is only one of seven lines present. If P&O Nedlloyd was to retain a separate transshipment service post-concentration, this service would be operated outside the conference vis-à-vis the Singapore/Australia/New Zealand leg of the trade. The question as to whether this service would compete or not can be left open as effective competition remains on the trade.
99. On the other hand if Nedlloyd's transshipment service was discontinued some of its market share would be transferred. On the conservative assumption that this was 50%, the consortium's market share would rise to some [Between 55% and 60%] and P&O Nedlloyd would have one out of seven votes.
100. At present the consortium on these trades is under competitive pressure from both independent direct shipping lines and from transshipment operators. Despite the greater market share it is considered that transshipment will remain a competitive force which will continue to grow. Consequently the creation of the joint venture will have no appreciable effect on the market position of the consortium.
101. Finally given the lack of links between the consortium and MSC, and the price and service competition between them, the creation of the joint venture cannot be considered as leading to the creation or the strengthening of an oligopolistically dominant position.

(e) Comments by third parties

102. Few adverse comments were received by the Commission during the course of the procedure. Those that were, concerned the parties' role on the north Atlantic and their membership of the Trans-Atlantic Conference Agreement ("TACA"). It was considered

that as the lines comprising the TACA are already collectively dominant, the creation of the joint venture would strengthen that dominance.

103. While it is appreciated that the TACA holds some 60-70% of the US/northern Europe trade (both direct and via the Canadian Gateway) it should be noted that there are, at present, 18 members of the conference with the parties being two of these members. A reduction to 17 members of which one is P&O Nedlloyd is not considered to increase materially the dominance of the TACA.

(f) Conclusion

104. The establishment of the joint venture would not appear to create or strengthen a position of dominance.

Vertical effects

105. The operation will have vertical effects insofar that Nedlloyd's minority interest in ECT, which provides terminal services in Rotterdam, will be transferred to P&O Nedlloyd. In addition, the parties' interests in haulage companies (Roadways and ERS) will be transferred to the joint venture company.
106. It is not considered that the creation of the joint venture will lead to any foreclosure at Rotterdam due to current or future restrictions on capacity. Similarly the fragmented nature of the road haulage industry would mean that the operation does not produce any anti-competitive effects.

V ANCILLARY RESTRICTIONS

107. The parties have requested that certain provisions in the joint venture agreement, if they are restrictions under the Article 85 EC, be considered as ancillary to the concentration.
108. The parties will not compete with P&O Nedlloyd while they are shareholders in it. They will not seek to do or do business with any person who has been a customer of P&O Nedlloyd during the previous two years. They will attempt to employ or employ any person who has been an employee of P&O Nedlloyd (except a seconded employee) during the previous two years. These provisions express the reality of the parties' withdrawal from the market and are thus directly related to and necessary for the concentration.
109. P&O Nedlloyd will use P&O or Nedlloyd as preferred suppliers of services or products supplied by them, unless the price, delivery terms or quality offered by P&O or Nedlloyd are less favourable than those offered by suppliers of comparable services or products. Although this provision appears directly related to the concentration, it is not necessary for the concentration to take place. Accordingly it cannot be considered as an ancillary restriction.

VI CONCLUSION

110. For the foregoing reasons the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation N° 4064/89.

For the Commission,