The Revised TACA Decision — The end of the conflict?

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1. Introduction

On 14 November 2002, the Commission adopted a long-awaited decision (1) granting exemption to those aspects of the revised Trans-Atlantic Conference Agreement that fall within the scope of either Regulation 4056/86 (but outside the scope of the liner conference block exemption contained therein) or Regulation 17. The exemption was granted for a period of six years from 6 May 1999. (2)

The background to the decision has been described in a previous article (3) and need not be repeated here.

2. What does the decision say?

First, it should be noted that as important as what the decision says, is what it does not say. In the light of certain third party comments, which, while purporting to express concern about the Revised TACA, in fact amount to thinly veiled criticism of the EU liner conference block exemption as such, it should be recalled that the latter forms part of existing Community legislation which the Commission is bound to apply. A review of that legislation falls outside the scope of the Commission’s examination of the application for exemption of the Revised TACA. The decision accordingly contains no assessment of the extent to which the block exemption may continue to be justified under current market conditions. This is a matter that will be dealt with in the context of the Commission’s recently launched review of Regulation 4056/86. (4)

It follows that to the extent that the activities of the Revised TACA fall within the scope of Article 3 of Regulation 4056/86 and fulfil the condition and obligations set out in Articles 4 and 5, (5) they are automatically exempt. In defining the scope of the block exemption, the Commission has been guided by the findings of the Court of First Instance (CFI) in the TAA (6) and FEFC (7) cases. In the TAA judgment, the CFI had reason to recall once again the basic precept applicable to any provision derogating from Article 81(1) of the Treaty — namely that it must be interpreted strictly. This precept, the Court found, must apply with even greater force to the liner conference block exemption, inasmuch as the latter has an unlimited duration and authorises what would otherwise be considered very serious restrictions of competition (a horizontal agreement having the object of price-fixing). (8) The Court went on to state that the block exemption could not 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 current market conditions’. (9) In the Revised TACA decision, (10) the Commission concludes from these and other findings in the TAA judgment (11) that the block exemption cannot be interpreted as covering, for instance, joint service contracts. It does not however follow that these agreements are prohibited (see further below).

In the FEFC judgment, the CFI provided guidance as to the substantive scope of Regulation 4056/86. Citing the judgment of the European Court of Justice in Centro Servizi Spediporto, (12) it found that the scope of the Regulation ‘is limited to maritime transport services properly so called, that is,
to transport by sea from port to port’. (\(^1\)) It follows from this finding that services that do not constitute ‘transport by sea from port to port’ fall outside the scope of Regulation 4056/86 and the block exemption contained therein. This has had consequences for the Commission’s assessment of the Revised TACA Tariff charges relating to cargo-handling services in ports (see below).

Secondly, the decision concludes (\(^2\)) that the Revised TACA, following the introduction of amendments designed to circumscribe the exchange of commercially sensitive information, no longer places any restriction on the terms and conditions under which the members of the conference may enter into individual service contracts. That this conclusion is consistent with developments ‘on the ground’ is evidenced by the dramatic increase in the number of individual service contracts entered into by the TACA lines since the inception of the Revised TACA.

Thirdly, the decision provides guidance as to the limits within which, in the Commission’s view, conference members may engage in the collective regulation of vessel capacity. Article 3(d) of Regulation 4056/86 provides that conferences may engage in ‘the regulation of the carrying capacity offered by each member’. In the TAA and EATA decisions, the Commission concluded that this provision should be interpreted as permitting conferences to withdraw vessel capacity in order to address a short-term fluctuation of demand. It could not be interpreted as permitting a ‘freeze’ on capacity without any actual vessel withdrawals (that might provide cost savings which could be passed on to transport users). While the point was in issue in the TAA’s appeal to the CFI, the fact that the latter concluded that the TAA’s capacity management programme would have fallen within the scope of the liner conference block exemption had the TAA been a conference. (\(^3\)

The Revised TACA decision describes the amendments that have been made to the text of the conference agreement in order to establish safeguards against abuse. These amendments consist of (a) an undertaking to provide reports to the Commission so that the latter may monitor any Revised TACA capacity regulation programme and (b), an undertaking not to increase any tariff rates in conjunction with a capacity regulation programme on any trade covered by such programme or to create an artificial peak season.

Subject to the observance of these undertakings, the Commission considers the capacity regulation provisions of the Revised TACA to be covered by the liner conference block exemption.

Fourthly, the decision finds that the provisions of the Revised TACA relating to agreement service contracts (ASCs) and multicarrier service contracts (MSCs), to the extent that they may be restrictive of competition, fall outside the scope of the liner conference block exemption, but qualify for individual exemption. An ASC, also known as a conference service contract, is a joint service contract between all of the members of a conference on the one hand and an individual shipper on the other. An MSC is a service contract between two or more — but not all — members of the conference and an individual shipper.

While acknowledging that joint service contracts constitute only a very small proportion of all the service contracts entered into by the members of the Revised TACA, the Commission nevertheless notes that there appears to be continuing demand from shippers for such contracts in an environment where an alternative form of contract, i.e. an individual service contract, is now freely available. It concludes that joint service contracts provide benefits to shippers and, in the market environment in which the members of Revised TACA currently operate, will not lead to the elimination of competition within the meaning of Article 81(3) of the Treaty.

It should be noted that the ASCs and MSCs entered into by the members of the Revised TACA do not — and may not — cover inland transport services within the European Economic Area.

Finally, the decision deals with the issue of cargo-handling services in ports. Citing the FEFC judgment, (\(^4\)) the Commission concludes that the Revised TACA Tariff charges for these operations can fall within the scope of the liner conference block exemption only to the extent that these operations are indivisible from the sea voyage. However, the Commission then goes on to find that to the extent that the Revised TACA Tariff covers cargo-handling services which fall outside...

\(^{(1)}\) FEFC judgment, paragraph 241.

\(^{(2)}\) See recitals 61 to 72.

\(^{(3)}\) The Court did however find that the capacity management aspects of the TAA would lead to the elimination of competition and could for that reason not qualify for individual exemption.

\(^{(4)}\) At paragraphs 239-241.
the scope of Regulation 4056/86, but within that of Regulation 17, it can be considered exemptable. In reaching this conclusion, the Commission recognises that the interposition of carriers between the original service provider (the stevedoring company or terminal operator) and the end-user (the shipper) may have benefits for the latter.

The Commission makes clear however that exemption can be granted only in the very special circumstances that are an essential feature of the Revised TACA case. These circumstances include the fact that only a very small proportion of Revised TACA cargoes are carried under the conference tariff, while by far the greatest part are carried under individual service contracts, and that the members of the Revised TACA have a collective market share of no more than 50%.

3. The end of the conflict?

The Revised TACA decision does not deal with all of the issues that at one time or another have given rise to conflicting interpretations of Regulation 4056/86 and other regulations applicable to liner shipping activities. Nor does it necessarily represent the final word on those issues with which it does deal.

The Revised TACA notification was submitted ‘without prejudice’ to the Parties’ view that all elements of the notified agreement fell within the scope of the liner conference block exemption. Following the TAA and FEFC judgments, that position is obviously no longer tenable as regards, inter alia, the inland transport aspects of the agreement. A number of other issues of relevance for the Revised TACA agreement have however not yet been the subject of a Court ruling. Chief among these issues is perhaps the question of where to draw the dividing line between the scope of Regulation 4056/86 and that of Regulation 17. That point may be settled, or at least clarified further, by the CFI when it rules on the FETTCSA appeal (1). Another issue is whether joint service contracts are covered by the liner conference block exemption. While the TAA judgment does not deal directly with this point, it does contain a number of findings which, in the Commission’s view, indicate that that is not the case. The matter may eventually be settled conclusively by the CFI in its ruling on the TACA appeal. (2)

Other points yet to be decided by the Court, but not in issue in the Revised TACA decision, include whether conferences may fix freight forwarder commissions and whether, and in what way, a dominant conference may induce independent potential competitors to enter the market as members of the conference. Both matters are pending before the CFI in the context of the TACA appeal.

4. Conclusion

The above catalogue of unresolved legal issues should not obscure the fact that the adoption of the Revised TACA decision represents a major step towards creating a competitive business environment for liner shipping operators and their customers. And although some of the decision’s conclusions are quite specific to the market on which the TACA lines operate, there are many findings that should give food for thought to other conferences operating on EU trades. The TACA parties have made considerable progress in adapting their practices to the requirements of a modern marketplace — it is now up to the other EU conferences to do the same.

(1) Case T-213/00 CMA CGM and Others v Commission.
(2) Joined Cases T-191/98, etc. Atlantic Container Line and Others v Commission.