The TACA judgment: lessons learnt and the way forward

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Introduction

On 30 September 2003, the Court of First Instance (CFI) delivered a long-awaited judgment in the Transatlantic Conference Agreement (‘TACA’) case. (1) The case concerned the organisation of containerised liner shipping services between Northern Europe and the United States. Though the CFI annulled parts of the Commission's decision, including the fines, the judgment is a success for the Commission's policy in the maritime sector. This article summarises the key elements of the judgment concerning the maritime sector specific issues (2) and comments on its implications for future competition policy actions in this sector.

The case concerned a liner shipping conference in which 16 carriers provided regular container transport for freight between ports in Northern Europe and the United States. A liner shipping conference is a grouping of shipping companies which benefit from a block exemption contained in Council Regulation 4056/86 (the maritime equivalent to Regulation 17). The block exemption is both generous and exceptional. It is generous because it permits the liner conference, among other things, to collectively fix common freight rates and regulate the capacity offered by their members — something which is normally regarded as hard core restrictions of competition for which no exemption can be given. It is exceptional because it is contained in a Council Regulation which was adopted even though the Commission had gained no experience in granting individual exemptions in this sector. Furthermore, it contains no market share thresholds and it is unlimited in time. The justification given in the Regulation 4056/86 for this generous and exceptional block exemption is, in essence, that price fixing by liner conferences is assumed to lead to price stability, assuring reliable scheduled transport services.

Background

In a series of decisions and administrative actions, the Commission has sought to clarify the scope of the block exemption and rebut the industry's assumption that Regulation 4056/86 authorised ‘self-regulation’ of the liner shipping sector, leaving it outside the scope of the general competition rules. (3) The TACA case must be seen in the context of this policy development.

The TACA was the successor of the TAA, a transatlantic rate fixing arrangement which had been the subject of a Commission prohibition decision in 1994. (4) The TACA was notified to the Commission on 5 July 1994 under Council Regulation 4056/86. Shortly thereafter, the Commission informed the parties that it also intended to examine the application under Regulation 1017/68 (the inland equivalent of Regulation 17) since certain of the notified activities fell outside the scope of Regulation 4056/86. By a decision of 26 November 1996, the Commission removed the TACA parties' immunity for fines for the inland activities. The appeal against that decision was dismissed by the CFI on 28 February 2002. (5)

(1) Judgment of the Court of First Instance of 30 September 2003 in joined cases T-191/98 and T-212/98 to T-214/98 Atlantic Container Line AB and others v Commission. The judgment has not been appealed.
(2) The judgment also clarified certain important elements concerning access to file, rights of defence and the interrelation between Articles 81 and 82 EC which will not be addressed in this article.
(3) For a detailed overview of Commission actions and previous Court judgments, references are made to previous articles in the Competition Policy Newsletter, notably Competition in the maritime sector: a new era, Jean-François Pons and Eric FitzGerald (Competition Policy Newsletter 1/2002), Recent judgements in the liner shipping sector, Eric FitzGerald (Competition Policy Newsletter 2/2002) and The Revised TACA Decision — The end of the conflict?, Eric FitzGerald (Competition Policy Newsletter 1/2003).
(4) Commission decision of 19 October 1994 in Case No IV/34.446 — Trans-Atlantic Agreement (OJ L 376, 31.12.1994). Judgment of the Court of First Instance of 28.2.2002 in Case T-395/94 Atlantic Container Line and others v Commission. The CFI found that the TAA was not a liner conference (and could therefore not benefit from the block exemption) because it did not operate uniform or common freight rates as required under Regulation 4056/86.
(5) Judgment of the Court of First Instance of 28.2.2002 in Case T-18/97 Atlantic Container Line and others v Commission The CFI found that Regulation 1017/68 does not contain any provision granting immunity from fines. The appeal was consequently inadmissible, since the Commission decision did not alter the applicants' legal position.
The Commission's findings

In its decision of 16 September 1998, (1) the Commission found that the TACA parties had committed three separate infringements of Article 81 EC. Furthermore, it concluded that the TACA parties had held a joint dominant position on the market and identified two separate abuses constituting infringements of Article 82 EC.

Reiterating the position already taken under the TAA and FEFC decisions, the Commission objected against the TACA parties' collective fixing of inland prices, arguing that the block exemption did not cover the extension of the rate setting activities of conferences to cover the inland leg of intermodal transport operations. (2) The Commission also found that the TACA parties had infringed Article 81 EC by agreeing on the level of reward which conference members should pay to freight forwarders, including the terms and conditions for the payment and the designation of persons eligible to act as brokers. As with the inland arrangements, the Commission concluded that these arrangements did neither fall within the block exemption, nor did they qualify for an individual exemption.

Also in dispute in the TACA case was the arrangements concerning service contracting. (3) The Commission found that the TACA had sought to prohibit the inclusion of individual service contracts. It had also regulated the inclusion of both conference and individual service contracts by inter alia imposing binding guidelines concerning the content of service contracts and the circumstances in which they may be concluded (such as duration, confidentiality, the level of liquidated damages for non-performance of the contract and conditional clauses). The Commission found that the TACA parties had infringed Article 81 EC by agreeing the terms and conditions under which they could enter into service contracts with shippers. (4) In reaching that conclusion, the Commission rejected the TACA parties' view that joint service contracts fell within the scope of the block exemption and concluded that the agreements did not fulfil the conditions of Article 81(3) EC. (5) The Commission furthermore took the view that, by placing restrictions on the availability and contents of service contracts, the parties had abused their joint dominant position and thereby also infringed Article 82 EC (the first abuse). (6)

The last infringement identified in the TACA decision concerned a finding that the TACA parties had taken steps to induce potential competitors wishing to enter the market to do so only as parties to the TACA. The Commission found that the TACA had thereby abused its dominant position by altering the competitive structure of the market so as to reinforce the dominant position of the TACA (the second abuse).

The Commission did not impose fines for the three infringements under Article 81 EC. It did however impose fines in an aggregate amount of EUR 273 million for the two infringements of Article 82 EC.

The CFI Judgment

In a detailed and comprehensive judgment (consisting of more than 1600 paragraphs) the Court upheld the Commission decision as regards

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(2) See footnote 5 and Commission decision of 21 December 1994 in Case No IV/33.218 — Far Eastern Freight Conference (OJ L 378, 31.12.1994). The Commission based its objections on the wording of Article 1(2) of Regulation 4056/86 which provides that the Regulation ‘shall apply only to international maritime transport services from or to one or more Community ports’, arguing that the block exemption contained in Article 3 could not go beyond the scope of the Regulation itself.
(3) A service contract is a contract between a shipper (customer) and carrier(s) or a conference in which the shipper undertakes to provide a minimum quantity of cargo over a fixed period of time and the carrier or the conference commits to a certain rate or rate schedule as well as a defined service level (including for example assured space, transit time or port rotation). A shipper can enter into a service contract either bilaterally with one carrier (individual service contracts (ISC)), with a conference (conference service contracts or ‘agreement service contracts’ (ASC)) or with several, but not all members of a conference (multi-carrier service contracts (MSC)). The two latter categories are also referred to as joint service contracts.
(4) As was confirmed by the Commission at the hearing, the decision did however not prohibit the TACA parties from entering into conference service contracts or from determining the content of such contract, as long as the agreement did not prevent the members from entering into individual service contracts, from departing from the terms of conference service contracts by way of independent action or restricted the terms which may be included in individual service contracts.
(5) The Commission considered that the agreements neither contributed to the productivity of the shipping lines concerned nor promoted technical or economic progress. Moreover, they did not allow shippers a fair share of the benefits arising from it and it had in any event not been shown not to have been indispensable (TACA decision paragraphs 472-502).
(6) The practices making up the abuse consisted in (a) the prohibition of individual service contracts in 1994 and 1995 and (after these had been authorised with effect from 1996), the application of certain terms and conditions collectively agreed by the TACA parties and the mutual disclosure of their terms, as well as (b) the application in conference service contracts of certain terms collectively agreed by the TACA parties (prohibition of contingency clauses, the duration of service contracts, the ban on multiple contracts and the amount of liquidated damages).
all three of the Article 81(1) infringements as well as the main findings on the first abuse pursuant to Article 82 EC. The Court however annulled the findings of the second abuse and the fines in their entirety.

In line with its judgements in the TAA and FEFC case, the Court noted the exceptional nature of the block exemption and emphasised that it, as a derogation of Article 81(1) EC, must be strictly interpreted. (1)

**Article 81 EC**

**Collective fixing of inland prices and freight forwarder remuneration**

While the Commission's position regarding the collective fixing of inland prices had already been entirely endorsed by the Court in the **FEFC** judgment, (2) the TACA judgment also confirmed the Commission's findings on the collective fixing of freight brokerage and freight forwarder remuneration. In doing so, the Court pointed out that the block exemption could not be extended to services which, even if they could be considered to be ancillary to or even necessary for maritime transport to and from ports, were not maritime transport services as such. (3)

**Service contracts**

Concerning the important issue of service contracting, the CFI confirmed the Commission's position that the block exemption for conference tariff price fixing should not be interpreted in such way that it encompassed also the different concept of contract carriage. Applied to the facts in the case at hand, the Court consequently found that the Commission was entitled to find that the ban on individual service contracts and the restrictions on the availability and contents of individual service contracts are not covered by the block exemption. Likewise, the Court held that, with one exception, none of the practices in relation to service contracts constituting the first abuse was capable of qualifying for block exemption. (4)

**Article 82 EC**

**Collective dominance**

In the **CEWAL** case, the ECJ had found that a liner conference, by its very nature and in the light of its objectives, could be described as a collective entity presenting itself as such on the market and was therefore capable of holding a dominant position within the meaning of Article 82 EC. (5) In the TACA judgment, the CFI carefully considered the evidence of internal competition put forward by the applicants and concluded that this was not sufficient to preclude a collective assessment of the TACA parties' position on the market. Likewise, the Court endorsed the Commissions' findings that the TACA parties held a dominant position on the relevant market. (6)

**The abuses**

In its assessment of the two abuses identified in the Commission decision, the Court stressed that abusive practices are prohibited regardless of the advantages they may allegedly bring to the concerned undertakings or third parties and that a conduct cannot cease to be abusive merely because it is the standard practice in a particular sector. (7) The Court confirmed that the TACA parties had abused their joint dominant position by restricting

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(1) TACA judgment, paragraph 1381.
(2) Judgment of the Court of First Instance of 28.2.2002 in Case T-86/95 **Compagnie Générale Maritime and others v Commission**.
(3) Following its findings in the FEFC case, the Court noted that the service in question constituted a separate market on which the freight forwarders were competing with other economic operators, which showed that the block exemption was not applicable. The Commission took a similar position when finding that certain cargo-handling activities fell outside the scope of Regulation 4056/86 (and hence the block exemption) in its Revised TACA decision (Commission decision of 14.11.2002 in Case COMP/37.396/D2 — Revised TACA (OJ L 26, 31.1.2003, p. 53), paragraphs 93-96).
(4) TACA judgement paragraph 1380. The exception concerned the mutual disclosure of the availability and content of individual service contract, which is also further addressed below.
(6) The Court found that the dominant position was sufficiently made out by the TACA parties’ extremely high market share, as well as their ability to discriminate on prices and to the absence of effective external competition (as evidenced by their share of available capacity on the trade in question), by the foreclosure effect created by the service contracts, by the TACA’s leadership in pricing matters and by the role of follower played by their competitors in pricing matters (TACA judgment paragraph 1085).
(7) TACA judgment paragraphs 112 and 1124.
the availability and content of service contracts. While upholding all Commission's findings regarding the lack of objective justifications for the ban on individual service contracts and the application of collectively agreed terms and conditions, the Court did however not uphold the findings in relation to the exchange of information on individual service contracts. The Commission had objected to the TACA parties' practice to disclose the existence as well as the content of individual service contracts to other carriers that were not party thereto. The Court found that, as a result of US legislation in force at the time of the relevant facts, (1) the information in question was in the public domain or could easily be deduced from the information which was. In these circumstances, the Court considered the disclosure between the TACA parties of that information to be an exchange of public information which, in the view of the Court, could not infringe EU competition rules.

The Court also annulled the findings of the Commission as regards the infringement concerning the alteration of the competitive structure of the market and the fines related thereto. In doing so the CFI concluded that the Commission's finding was partly based on inadmissible evidence (the parties had not been given an opportunity to comment on certain evidence relevant to a finding that they had taken specific measures to alter the competitive structure of the market) and that such evidence would in any case not be sufficient to support the claim. The Court also found that there was insufficient evidence of general measures to alter the competitive structure.

**The fines**

Despite upholding the findings of the first abuse, the CFI found that the abusive practices which fell within Regulation 4056/86 were covered by immunity under Article 19(4) of the Regulation since they had been a part of the notified TACA arrangement. (2) As regards the abusive practices falling under Regulation 1017/68 (for which no immunity can be given, see above) the CFI identified five factors which, according to the Court, should be viewed as mitigating factors for the purposes of applying the Fines Guidelines and should lead to annulment of the fines. The factors identified where the fact that (i) the TACA parties themselves had brought the activities to the attention of the Commission, (ii) the lawfulness of the practices were assessed for the first time in the decision, (iii) the practices raised complex legal issues and (iv) the practices did not constitute a 'classic' abuse. Finally (v), the Court took the view that the TACA parties had had every reason to believe that no fines would be imposed in respect of those activities. (3)

As a final remark, it should be noted that the Court — despite the annulment of parts of the findings and the fines — ordered the TACA parties to pay their own costs. The Court reasoned this rather unusual finding by noting that the pleas were for the most part unfounded and their number so great (almost 100) as to amount to an abuse. The Court therefore held that the conduct of the applicants had substantially added to the burden of dealing with the case and thereby needlessly added in particular to the costs of the Commission. (4)

**Lessons learnt**

The liner industry has changed considerably since the TACA decision was adopted in September 1998. The decision sparked an initiative of constructive discussions between Commission officials and industry representatives resulting in an indicative set of guiding principles for future conference agreements. The industry demonstrated their willingness to abandon their traditional practices and to put the guiding principles into practice when the remaining TACA parties notified an amended version of the TACA agreement in 1999. The Commission subsequently

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(1) The US legislation required the TACA parties to notify their individual service contracts to the Federal Maritime Commission, together with a summary of the essential terms of such contracts (including ports, commodities, minimum volumes, duration, service commitments and liquidated damages for non-performance). This summary was published by the FMC and therefore made available to the industry.

(2) Court thereby rejected the Commission’s argument that immunity under Regulation 4056/86 only applied to Article 81 EC (TACA judgment paragraph 1442-1444.).

(3) In reaching that conclusion, the Court noted that there existed genuine uncertainty at that time as to whether there was any immunity from fines under Regulation 1017/68. Moreover, the Commission did not inform the TACA parties prior to issuing the statement of objections that it intended to treat the practices also as an abuse of a dominant position. Lastly, the Commission had conceded in earlier decisions that where the same conduct was contrary to Article 81 and 82 EC, no fines should be imposed where that conduct had been notified to the Commission with a view of obtaining individual exemption. (TACA judgment paragraphs 1623-1633).

(4) TACA judgment paragraphs 1646-1657.
cleared both the inland and maritime aspects of this amended agreement, known as the Revised TACA (see further below). (1)

Even if the judgement will not require the TACA conference carriers to change the way they are organising their services today, the judgement is another welcome endorsement of the Commission's current policy in the sector. This refers notably to the Commission's firm opposition against any restrictions on the content and availability of individual service contracts — be it contractual or in practice. The latter aspect was thoroughly analysed and addressed in the Revised TACA decision, following concerns expressed by transport users. (2) In its decision, the Commission noted that the Revised TACA does not contain any of the restrictions set out in the TACA decision. Moreover, the Revised TACA parties agreed to place limits on the exchange of information within the conference of commercially sensitive information relating to service contracting. They also undertook to provide the Commission with periodical reports on their contract activity in order to allow the Commission to assure itself that the information exchange does not lead to a decrease in the number of individual service contracts. On the working assumption that the tariff arrangements would not effectively determine the individual service contracts rates, the Commission took the position that the amended Revised TACA provisions, including the concessions, were sufficient safeguards to prevent future restrictions in the availability and content of individual service contracts.

The findings of the CFI concerning the TACA parties' information exchange practices would not appear to be a reason for the Commission to change its policy in this respect. At this place, it should suffice to note that the US legislation, being the only factor upon which the Court classified the conference disclosure as an exchange of public information, has changed. (3) Furthermore, it is obvious that the assessment of an information exchange system under EU competition rules must be made on a case-by-case basis in the light of all elements of the specific arrangement, including the structure of the market, the nature and type of information exchanged as well as the frequency and organisation of the information exchange system.

**The way forward:**

It is clear that the TACA judgment has effects beyond the facts of the case. Once again has the Court stated that the block exemption — despite its exceptional nature — cannot derogate from the Treaty competition provisions and — because of its exceptional nature — must be given a strict interpretation. The findings of the Court with regard to the competition policy principles guiding the sector will naturally have to be taken into account by the Commission — both in its monitoring of conference activity in the current legal framework and in its analysis of the current regime in the review of Regulation 4056/86.

Currently there are around 27 liner shipping conferences operating on shipping routes to and from Europe. With the Court's endorsement of the TACA findings, the policy established in the Revised TACA decision concerning not only inland price-fixing but also individual service contracts continues to be entirely valid. The Commission views the presence of individual service contracts as one of the main guarantees of competition and customer-friendly services under the current framework and has made it clear to the industry that it expects all conferences to apply to the Revised TACA principles. (4)

Until recently, the Commission's actions in the liner sector have been limited to applying existing Community legislation to the individual case before it, without questioning or endorsing the ground for the existing block exemption. With the launching of the review of Regulation 4056/86, the Commission's analysis has entered into a broader

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(1) See footnote 14. The decision has been thoroughly explained in a previous article, *The Revised TACA Decision — The end of the conflict?*, Eric FitzGerald, Competition Policy Newsletter 1/2003.

(2) See Revised TACA decision (footnote 14), paragraphs 64-72.

(3) With the entry into force of the Ocean Shipping Reform Act (OSRA) in May 1999, carriers were no longer required to make public all essential terms of service contracts.

(4) The principles identified by the Commission are the following: (a) conferences should refrain from inland price-fixing, (b) no restrictions should be placed on the right of conference members to enter into confidential individual contracts with transport users and (c) the collective regulation of capacity by members of a conference is only permissible where it is necessary in order to adapt to a short-term fluctuation of demand, and it must not be combined with a price increase. That being said, it needs not be repeated here that the clearance of the Revised TACA conference was made possible due to the very special circumstances of the case, notably the very competitive conditions on the transatlantic liner shipping market.
and deeper concept. (1) The Commission is now also in particular analysing whether the block exemption for liner conferences has worked as it was intended to work and whether it is still justified in a modern liner shipping market. The Courts' findings in the TACA case as well as previous judgments in the sector will obviously be an important element in such a review. The Commission has taken notice of the Court's general findings concerning the ‘wholly exceptional nature of the block exemption’ (2) as well as its reasoning in various specific issues which might be of relevance in the review exercise. (3) Most noteworthy, the Court has made it clear that ‘[I]n Regulation 4056/86 the Council did not intend to derogate, and indeed could not have derogated, from Article 81(3) of the Treaty. On the contrary, the Council refers on several occasions, in particular in the 13th recital in the preamble to Regulation 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 81(3)’. (4) The findings of the Court in this and other issues are so clear and thoroughly reasoned that neither the industry, nor the Commission can ignore them in the review of Regulation 4056/86.

(1) For a detailed background of the review, see A time for a Change? Maritime competition policy at the crossroads, Mario Monti, Antwerp (2003) and Recent developments in EU competition policy in the maritime sector, Joos Stragier, London (2002). Both speeches are available on http://europa.eu.int/comm./competition/speeches. In March 2003, the Commission took the first step in the envisaged three-stage approach of the review by publishing a consultation paper, inviting comments from governments and the industry on a number of issues relating to, mainly, the liner conference block exemption. The written consultation phase was followed up by a public hearing, which took place in Brussels on 4 December 2003. All documents related to the public hearing can be found at http://europa.eu.int/comm./competition/antitrust/other/antitrust_maritime, including a link to the Commission’s consultation paper and the submissions received in response thereto.

(2) TACA judgment paragraph 1118.

(3) This concerns for example the question of comity considerations, where the Court held that ‘national practices, even if common to all the Member States cannot be allowed to prevail in the application of the competition rules set out in the Treaty. A fortiori, therefore, the practices of certain non-member States cannot dictate the application of Community law’. (TACA judgment, paragraph 569).

(4) TAA judgement, paragraph 162.