COMMISSION DECISION

of 21 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty

(IV/33.218 — Far Eastern Freight Conference)

(Only the Danish, German, English, French, Italian and Dutch texts are authentic)

(Text with EEA relevance)

(94/985/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1], as last amended by the Act of Accession of Greece, and in particular Articles 2, 5 and 11 (1) thereof,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [2], and in particular Articles 3 and 11 (1) thereof,

Having regard to the complaint lodged pursuant to Article 10 of Regulation (EEC) No 1017/68,

Having regard to the Commission Decision of 18 December 1992 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission and to present any other comments in accordance with Article 26 of Regulation (EEC) No 1017/68 and with Commission Regulation (EEC) No 1630/69 of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968 [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry on 23 November 1994,

Whereas:

[1] OJ No L 175, 23. 7. 1968, p. 1 (Special Edition 1968 I, p. 302).
[2] OJ No L 378, 31. 12. 1986, p. 4.
[3] OJ No L 209, 21. 8. 1969, p. 11.

THE FACTS

I. The complaint

(1) On 28 April 1989, the Commission received a complaint from the Bundesverband der Deutschen Industrie (BDI), the Deutscher Industrie- und Handelstag (DIHT) and the Bundesverband des Deutschen Gross- und Aussenhandels (BGA), the sponsoring organizations of the Deutsche Seeverladerkomitee (DSVK or German Shippers' Council), concerning certain price-fixing activities of the members of the Far Eastern Freight Conference (FEFC) relating to multimodal transport. The Annex contains a list of the members of the FEFC. (The Commission was informed on 21 November 1994 that Lloyd Triestino had ceased to be a member of the FEFC on 31 January 1994 and that Croatia Line had ceased to be a member of the FEFC on 28 May 1994.)

(2) The complainants listed the following five elements as making up a door-to-door, or multimodal, transport service:

(a) inland transport to the port;

(b) cargo handling in the port (transfer from the mode of inland transport to the vessel);

(c) sea transport (maritime transport from one port to another);

(d) cargo handling in the port of destination (transfer from the vessel to the mode of inland transport);

(e) inland transport from the port of destination to the place of final destination.

(3) The BDI/DSVK complained that the block exemption for liner conferences, contained in Article 3 of Regulation (EEC) No 4056/86, covered only the third of these five elements, namely sea transport, but that the members of the FEFC agreed between themselves prices not only for sea transport but also for inland transport and cargo handling operations.

(4) The complainants argued that since the scope of Regulation (EEC) No 4056/86 is 'international maritime transport services from or to one or more Community ports, other than tramp vessel services' (see Article 1 (2) of that Regulation), the scope of the block exemption contained in Article 3 thereof could not be wider than the scope of the Regulation itself. In their opinion, the applicable regulation was Regulation (EEC) No 1017/68, Article 2 of which prohibits restrictive practices including price-fixing and which does not grant an exemption for the type of price-fixing in respect of inland transport in which the members of the FEFC engaged.

(5) The complainants requested the Commission to take appropriate action in order to put an end to the price-fixing activities of the FEFC relating to the provision of inland transport services.

II. The parties

(6) The parties to whom this Decision is addressed are members of one or more of the individual liner conferences included under the overall umbrella of the Far Eastern Freight Conference. The maritime transport services they provide fall within the following geographic scope:

Eastbound

From certain ports in the United Kingdom, Ireland, Norway, Sweden, Finland, Denmark, Germany, Holland, Belgium, France (English Channel and Atlantic coast), Iceland and Poland to certain ports in Malaysia, Singapore, Thailand, Hong Kong, Japan, Taiwan, Republic of Korea, Democratic People's Republic of Korea, People's Republic of China (with transhipment), Macau, Indonesia (with transhipment), Democratic Kampuchea, Vietnam, Laos, Myanmar, Brunei, and the Philippines.

Westbound

From certain ports in Malaysia, Singapore, Thailand, Hong Kong, Japan, Taiwan, Republic of Korea, Democratic People's Republic of Korea, People's Republic of China (with transhipment), Macau, Indonesia (with transhipment), Democratic Kampuchea, Vietnam, Laos, Myanmar, Brunei, and the Philippines to certain ports in Europe, the Black Sea ports (other than CIS ports), all non-European ports on the Mediterranean Sea (other than Israeli ports) and Moroccan ports on the Atlantic Ocean.

III. The services in question

(i) *Services and geographic market*

(7) The services offered by the members of the FEFC are the following:

(a) maritime transport services;

(b) port handling services; and

(c) inland transport services.

(8) The third of these three services is, in principle, optional: shippers may decide whether to use the inland transport services offered by members of the FEFC ('carrier haulage') or those offered by inland hauliers or freight forwarders ('merchant haulage'): see point 16.

(9) This Decision does not call into question the fact that the members of the FEFC are permitted, pursuant to Article 3 of Regulation (EEC) No 4056/86, to operate under common or uniform rates for the provision of liner maritime transport services. Moreover, this Decision does not address the question whether price-fixing agreements relating to port handling services fall within the scope of application of Article 3 of Regulation (EEC) No 4056/86.

(10) The services to which this Decision relates are the inland transport services provided within the territory of the European Community to shippers as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East by shipping lines which are members of the FEFC.

(11) For present purposes, the geographic market for the supply of the services in question is that in which the inland carriage of containers is undertaken by or on behalf of the members of the FEFC between ports of operation in those countries listed in paragraph 6 and inland points served by those ports.

(ii) *The provision of inland transport services by shipowners*

(12) Traditionally, shippers were offered transport on a mode-by-mode basis, that is to say that transport providers did not usually provide more than one mode of transport. All charges until cargo was received on board ship were for the account of the shipper and maritime transport services were generally contracted for without inland services.

(13) This meant that, as a rule, shippers undertook the organization of the initial inland segment of a journey (namely delivery to the ship's rail) by obtaining their own road or rail transport or by turning to freight forwarders. Either the shipper or the consignee would do likewise in the country of destination.

(14) In the 1960's, containerization (and other forms of unitization) brought about a cargo-handling revolution. The use of containers made easier the

transfer from one mode of transport to another, thereby facilitating loading and unloading operations. This encouraged liner shipping companies to become involved in other modes of transport and to begin to offer door-to-door services, by adding inland services to maritime services. The cargo handling revolution had complicated the question of the attribution of liability, since damage to cargo was frequently only discovered once the container was opened at the place of destination. For this reason, shippers were in favour of door-to-door transport being carried out by a multimodal transport operator, such as a shipping line, as this solved the question of liability.

(15) Apart from the unitization of cargo and the consequent development of specialized equipment, one of the main characteristics of multimodal transport is a single through bill of lading covering the transport from door-to-door. This document records the terms of the contract between the shipper and the carrier and provides for clear attribution of liability, as well as clearly setting out total transport costs.

(16) The cargo-handling revolution has affected all modes of transport, but especially liner shipping. It has affected not only shippers and shipowners but also intermediaries such as freight forwarders which, since the development of widespread multimodal transport, are now in direct competition with shipping lines in the organization of all or part of a multimodal transport service. Inland carriage by or on behalf of shipping lines is known as 'carrier haulage' and inland carriage arranged by shippers, or by freight forwarders acting on behalf of shippers, is known as 'merchant haulage'.

(17) The choice between merchant haulage and carrier haulage is left open to shippers. This was described in the following terms in the expert report prepared for the FEFC and presented to the Commission during the course of the administrative proceedings in this case [1].

> '4.41. Optionality: Although carrier haulage is often the preferred option, the availability of merchant haulage has a number of very important aspects, many of which go back to the early days of containerization.
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> 4.42. First, when the conferences first offered through-transport services in the late 1960's and early 1970's, they still carried the vast majority of liner cargoes on their respective routes and were in a dominant position. It was important that shippers did not consider that they were being asked to support services which abused this position. In addition, where the conferences moved into new commercial fields, such as inland transport, it was important that the service was offered under conditions which would attract customers and expand the idea of integrated distribution services. This included the offer of reasonable rates for carrier haulage. But this was not enough, and it was important that shippers should retain the option to carry on as before and continue to arrange their own merchant haulage if they so wished.
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> 4.43. A second important point concerns foreign exchange costs. All importers of goods incur foreign exchange costs when buying abroad, and this includes sea freight costs. However, under the conventional system local inland transport costs were paid for in the national currency. Traders and national governments could reasonably have been expected to object to a system which, as a result of incorporation of local movements into a unified tariff system, inland costs would be transferred into a foreign currency. A separate inland tariff allows import legs to be invoiced separately and to be paid in local currency, without disturbing the physical and commercial through-transport attributes of the through journey and through bill of lading.
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> 4.44. A third aspect concerns the position of fob buyers. Some importers, usually very large and powerful ones, choose to nominate their own ocean carriers, usually national lines of their own country. In choosing the carrier on the sea leg of a through journey, they influence the inland leg in their own country. They are not usually interested in how the exporter moves the goods to the port of exit in the exporting country, leaving it to him to determine whether to do it himself by merchant haulage or to arrange for the through-transport operator to do it by carrier haulage. Fob buying is neutral with respect to the choice between carrier or merchant haulage at either end of the route, but separate inland tariffs are necessary to make available this option.'

(18) One of the obligations attached to the group exemption for liner conferences is that shippers must have freedom of choice with respect to who carries out their inland haulage. This obligation is

[1] The Case for Conference Rate Making Authority in the Inland Sector, Report prepared for the FEFC by Professor S. Gilman and M. Graham, July 1990.

contained in Article 5 (3) of Regulation (EEC) No 4056/86 which provides as follows:

> 'Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.'

(19) Where a shipper chooses carrier haulage, the transport of the container from the point of origin to the ship's rail is not normally physically carried out by the shipping line concerned or even by an associated undertaking of the shipping line concerned. Although the planning and tracking of the container's inland journey is carried out by the shipping line, the transport service itself is almost always subcontracted to an independent road or rail operator by the shipowner. A small number of maritime companies have also set up land transport subsidiaries.

(20) In the case of the FEFC, the price paid by the shipper for the inland movement is not that negotiated between the shipping line and the land transport undertaking to which it has subcontracted the task, but the rate which appears in the conference's inland tariff. That tariff also reflects charges for other inland activities undertaken for the shipper by or on behalf of the members of the FEFC. Customarily, inland rates are calculated in the local currency of the country where inland haulage takes place, and not in US dollars, the currency most commonly used for calculating sea rates.

(21) Merchant haulage, on the other hand, is undertaken in a variety of different ways. Unless a shipper carries out the inland transport itself, delivering the container to a terminal operator for loading onto a vessel, dealing with the paperwork and contracting directly with the shipping line for the maritime leg, it may use the services of a freight forwarder, a road haulier or a railway company.

(22) Freight forwarders offer a variety of services ranging from the preparation of documentation and the booking of cargo space on vessels to acting as fully-fledged non-vessel operating multimodal transport operators (NVO-MTOs). In the latter case, the freight forwarders offer the same services as liner shipping companies which offer multimodal services, but instead of operating vessels they charter slots from vessel operating carriers.

(23) The increase in competition between freight forwarders and liner shipping companies since the advent of containerization has been a marked feature of the industry and has been, in large part, brought about by the existence of excess vessel capacity which the lines have been willing to dispose of to freight forwarders at favourable rates.

(24) Freight forwarders may or may not operate inland transport services themselves: if they do not, they subcontract these services in the same way as do vessel operating multimodal transport operators. Freight forwarders play a particularly important role with respect to the consolidation and transport of smaller shipments (less-than-container-loads) into full container loads.

(25) The parties have argued in their reply to the Statement of Objections and at the oral hearing that the product that the FEFC lines provide is not an inland transport product but is either a port-to-port product or, more commonly, a through-transport product. In particular, the parties point out that they do not offer land transport services unless they are also supplying maritime transport services and terminal handling services.

(26) It is clear that for door-to-door or through-transport, shippers are free to choose whether to use merchant haulage or carrier haulage (see paragraphs 17 to 20). In making this choice they will take into account a number of factors, including price. As indicated above, the price of carrier haulage is always quoted in the tariff separately from the price of other services and indeed is quoted in another currency. However, the physical and technical characteristics of the two types of haulage are such that they are functionally interchangeable.

(27) The shipper is therefore uninterested in the question whether shipping lines supply carrier haulage services other than as part of a through-transport multi-modal service but chooses between what appear to him to be two substitutable products. In this respect, the FEFC lines are supplying to shippers an inland transport product.

(28) This analysis is borne out by the fact that the parties have emphasized the competitive nature of carrier haulage and merchant haulage prices. According to the FEFC [1], some 70 % of shippers using FEFC members for the maritime transport of containers use carrier haulage, although this proportion varies from time to time and from country to country. Gilman and Graham state at paragraph 6.04 of their Report that:

[1] Reply to the Statement of Objections, 31. 3. 1993, p. 104.

'The carrier haulage offered by conference lines has to remain broadly competitive in terms of the combination of service quality and price, with independent lines and merchant haulage.'

(29) This indicates that the responsiveness of sales of one type of haulage to price changes in the other is high, demonstrating that their demand substitutability is also probably high. The parties have argued that because of this pressure from merchant haulage, inland transport rates agreed within the framework of the FEFC tend to be those of the most efficient member.

(iii) *Competitive conditions in the provision of inland transport services*

(30) The FEFC tariff for maritime transport services sets different rates for different products on a basis related to their value, although the range of tariffs is considerably narrower than the range of commodity values. In other words, freight rates are higher for high-value commodities than for low-value commodities. On the other hand, inland rates are not quoted by commodity and do not vary according to the value of the contents of the container, although variations may be encountered, depending on whether the container is a 20-foot equivalent unit (TEU) or a 40-foot equivalent unit (FEU).

(31) Except for an exemption for certain agreements between small and medium-sized transport undertakings, no group exemption for price fixing by inland carriers has been granted pursuant to Regulation (EEC) No 1017/68. Moreover, competition has not permitted the maintenance of differentiated or discriminatory rates in those few cases in which they were imposed, such as national regulation of railway rates, where such rates had to be abandoned because of competition from road transport.

(iv) *The inland activities of the members of the FEFC*

(32) Apart from the collective fixing of prices and conditions for carrier haulage, no inland transport activities are directly or indirectly organized through the medium of the FEFC. The member lines of the FEFC negotiate individually the terms and conditions on which they buy inland transport. Until now, only some member lines of the FEFC have invested in an own inland transport infrastructure (such as depots) or equipment (such as tractors), the most notable being P&O's inland depots in the United Kingdom and the various carrier-owned road haulage companies (such as Nedlloyd, Maersk). However, many of them have made considerable investments in containers and logistical control systems which are used not only for the maritime transport services the lines provide but also for the inland transport services.

(33) According to the FEFC [1], its share of the liner trade for the routes within its geographic scope in 1992 was about 58 %. Again according to the FEFC, some 70 % of this share (that is to say, some 38,5 % of the whole trade) was in 1993 moved inland by carrier haulage. In 1991, carrier haulage in northern Europe by the member lines of the FEFC accounted for some 1 015 208 TEUs or approximately 9 276 653 weight tons. Approximately 89 % of this was carried wholly or in part within the territory of the European Community.

(34) The Commission has analysed data supplied by 10 of the largest members of the FEFC [2] in order to assess the importance of inland transport operations in relation to overall costs of providing multimodal transport services. The following table sets out an average for their cost structures on the north Europe/Far East trades:

Sea	36,5 %
Inland	18,6 %
Terminals	27,1 %
Sales	13,9 %
Others	3,9 %

(35) For the 10 lines whose data has been analysed the overall cost of supplying inland transport services in 1992 amounted to some ECU 477 200 000 (using exchange rates as at August 1994).

(36) In addition to direct inland transport costs, the figure for inland transport costs given above includes the capital costs of containers on land (typically, some 60 % of all containers) as well as the management of those containers on land and the costs of providing container yards. The direct inland transport costs probably account for some 8 % of total costs.

(37) Some part of the figures for terminals, sales and other costs should also be apportioned to the cost of supplying inland transport services since, for example, terminal costs include the cost of hauling containers between ports. Also, sales costs include the cost of selling carrier haulage services and other costs include administration costs.

[1] Reply to the Statement of Objections, pp. 38 and 105.
[2] CGM, Hapag-Lloyd, K Line, Lloyd-Triestino, Maersk, MISC, Mitsui, NYK, OOCL, P&O.

IV. The Agreement

(38) The Far Eastern Freight Conference is the name given to a series of associated liner shipping conferences [1] with a secretariat in the United Kingdom and area offices in Hong Kong, Korea, Tokyo, Singapore, Paris and Rotterdam.

(39) The shipping lines which are members of the FEFC have an agreed tariff as well as other matters such as agreed conditions of entry. The FEFC's tariff is currently contained in a document entitled NT90 which was introduced with effect from 1 January 1990. That document sets out the general terms and conditions of carriage including payment terms.

(40) NT90 sets out rates for the services provided by the members of the FEFC, including rates for maritime transport, inland transport and terminal handling and other charges. In respect of some charges, a rate is not specified but it is stated that member lines should not charge below the cost they incur in providing the service.

(41) Conference price fixing for maritime transport — the tariff — was extended to inland rates by the FEFC in a general manner at the outset of containerization, in around 1971. NT90 reflects this by setting out the tariff in five parts, two of which concern the inland transport components of a door-to-dor transport operation (that is, inland transport in the countries of origin and destination).

LEGAL ASSESSMENT

I. Article 85 (1)

(42) The member shipping lines of the FEFC are undertakings within the meaning of Article 85 (1) of the Treaty. Their price-fixing role in the inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East [2] by shipping lines which are members of the FEFC ('carrier haulage services'), as set out in NT90, constitute an agreement between those undertakings falling within the scope of application of Article 85 (1).

(i) *Restriction, prevention or distortion of competition*

(43) Agreements which *directly or indirectly fix selling prices or any other trading conditions* are specifically referred to as a restriction of competition in Article 85 (1) (a). The European Court of Justice has held on the subject of price competition:

> 'The function of price competition is to keep prices down to the lowest possible level and to encourage the movement of goods between the Member States thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.' [3]

(44) There is no need to wait to observe the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition [4].

(45) In the present case, the restriction of competition between the members of the FEFC with regard to prices for the inland leg of a multimodal transport operation is likely to be appreciable because of the very large number of containers and the consequent costs involved (see paragraphs 33 to 37).

(ii) *Effect on trade between Member States*

(46) According to the case-law of the Court, the test of effect on trade between Member States is met whenever it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade in goods or services between Member States [5].

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[1] Far Eastern Freight Conference, Europe/Japan & Japan/Europe Freight Conferences, Hong Kong/Europe Freight Conference, Philippines/Europe Conference, Sabah, Brunei & Sarawak Freight Conference.

[2] The scope of these services is described in paragraph 6 of this Decision.

[3] ICI-Dyestuffs, Case 48/69, [1972] ECR, p. 619, paragraph 115.

[4] Grundig/Consten, Joined Cases 56 and 58/64, [1966] ECR p. 299, paragraph 342. Zinc Producer Group, Commission Decision 84/405/EEC (OJ No L 220, 17. 8. 1984, p. 27): 'In any case, for Article 85 (1) to be applicable, it is sufficient for there to have been the intention to restrict competition; it is not necessary for the intention to have been carried out, in full or only in part, that is to say, for the restriction of competition to have been put into effect.'

[5] Grundig/Consten, cited above, p. 341.

(47) The Commission considers that the agreement between the members of the FEFC to fix prices for carrier haulage services is capable of appreciably affecting, and has appreciably affected, trade between Member States in the following ways. Such services frequently involve the carriage of goods between Member States.

(48) The agreement involves shipping lines operating in several Member States and restricts competition between such lines in respect of the price at which each of them offers transport services involving an element of inland carriage. The elimination or restricton of price competition in inland transport services between those companies reduces significantly the advantages which would accrue to the more efficient of them.

(49) This affects the number of multimodal transport operations undertaken by each shipping line which would be expected in the absence of the agreement. This restriction of competition between shipowners operating in several Member States consequently influences and alters trade flows in transport services within the Community, which would be different in the absence of the agreement.

(50) Those changes in the normal pattern of competitive behaviour by which more efficient companies enjoy increases in market share may also influence competition between ports in different Member States, by artificially increasing or decreasing the volume of cargo which flows through them [1] and the market shares of shipping lines operating out of those ports.

(51) The system of port equalization is likely to increase or decrease cargo flows at certain ports. Under this system carrier haulage rates are based on transport to the nearest conference-approved port regardless of the actual port of loading or unloading. This system may bring about changes in the capacity made available at each port. This may in turn cause deflections of trade between points in Europe and ports in northern Europe from some ports to other ports and may, in so doing, be capable of affecting trade between Member States.

(52) The effect on the supply of carrier haulage services described in the preceding paragraphs is likely to have repercussions on the supply of services ancillary to the supply of maritime transport and carrier haulage services. Such services include port services and stevedoring services. The effect on these services will principally be brought about by the alteration in the flow of transport services between Member States.

(53) The Commission thus considers that the agreement affects trade between Member States in relation to the supply of carrier haulage services and the supply of services ancillary to the supply of carrier haulage services. This effect is likely to be appreciable in view of the very large number of containers involved.

(54) An agreement such as the agreement of the members of the FEFC with respect to prices for inland transport, which has an effect on the cost of exporting to other countries goods produced within the Community, may affect the trade in those goods within the Community. This effect arises from the fact that manufacturers seek to find alternative markets to which the cost of transporting their goods is lower. Such alternative markets include the manufacturer's domestic market as well as other Community countries [2].

(55) The Commission therefore considers that the price fixing activities of the members of the FEFC relating to inland transport also has an effect on trade in goods between Member States.

II. Appropriate procedural regulation

(56) The FEFC has argued that all its price fixing activities, including those relating to inland transport services, are covered by Article 3 of Regulation (EEC) No 4056/86, which grants a group exemption to liner conferences. For the reasons set out in this Decision, the Commission does not consider that Regulation (EEC) No 4056/86 is the applicable regulation for the purpose of examining the complaint and has accordingly examined the complaint, and the

[1] See sixth recital of Regulation (EEC) No 4056/86 describing the effect which restrictive practices concerning international maritime transport may have on Community ports.

[2] Case 136/86, BNIC v. Aubert, [1987] ECR, p. 4789, paragraph 18. Similarly, the Court ruled pursuant to Article 92 in Joined Cases 67, 68 and 70/85, Kwekerij Gebroeders Van der Kooy BV and Others v. Commission (Dutch Natural Gas Prices I), [1988] ECR, p. 219, at paragraph 59, that subsidization of the price of natural gas to Dutch glasshouse crop producers by 5,5 % affected trade between Member States because of the importance of energy costs (25 to 30 % of the selling price) and of the market share (65 %) and the exports (91 %) of the firm receiving the State aid.

practices to which it relates, under the provisions of Regulation (EEC) No 1017/68.

(57) Article 1 of Regulation (EEC) No 1017/68 set out the scope of the Regulation, stating that it applies to certain agreements, decisions and concerted practices as well as to abuses of a dominant position 'in the field of transport by rail, road and inland waterway'.

(58) Carrier haulage is the transport of containers by rail, road or inland waterway (or by a combination of these modes of transport) by or on behalf of shipping lines in combination with other services as part of a multimodal transport operation. Consequently, agreements, decisions and related practices of the type described in the Regulation which concern carrier haulage fall within the scope of the Regulation.

(59) For the reasons set out below, the Commission considers that the price-fixing activities to which this Decision relates concerning the inland transport services supplied within the territory of the European Community to shippers in combination with other services and as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East by shipping lines which are members of the FEFC fall within the scope of Regulation (EEC) No 1017/68 and not Regulation (EEC) No 4056/86.

III. Regulation (EEC) No 1017/68

(i) *Relationship between Regulation (EEC) No 1017/68 and Articles 85 and 86 of the EC Treaty*

(60) Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway was the first regulation implementing competition rules in the transport sector. Having been adopted before the Court of Justice's express confirmation that the competition rules contained in the Treaty apply to the transport sector [1], Regulation (EEC) No 1017/68 reproduces with little variation the text of Articles 85 and 86 of the Treaty [2].

(61) As part of the Community's secondary legislation, Regulation (EEC) No 1017/68 cannot derogate from the provisions of the Treaty. Consequently, Regulation (EEC) No 1017/68 must be intepreted in the light of the case law of the Court [3], as providing the Commission with the necessary means to enforce Articles 85 and 86 of the Treaty in inland transport, without deviating from the basic competition rules contained in the Treaty [4].

(62) An agreement which does not comply with Article 85 (3) cannot be exempted pursuant to Regulation (EEC) No 1017/68. Articles 2, 5, 7 and 8 of Regulation (EEC) No 1017/68 should therefore be interpreted in the same way as Articles 85 and 86, in the light of the case law, and construed as adding nothing to them.

(ii) *Article 2 of Regulation (EEC) No 1017/68*

(63) Article 2 of Regulation (EEC) No 1017/68 is based on and reflects Article 85 (1) of the Treaty. It does not depart from the substantive content of Article 85 (1), and the comments made at paragraphs 42 to 55 concerning the applicability of Article 85 (1) apply equally to the applicability of Article 2 of Regulation (EEC) No 1017/68.

(64) According to Article 2 of Regulation (EEC) No 1017/68, agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, including, *inter alia*, those which directly or indirectly fix transport rates and conditions, shall be prohibited as incompatible with the common market, no prior decision to that effect being required.

(65) For the reasons set out in paragraphs 42 to 55 and in the light of the comments made in paragraphs 56 to 59, the agreement between the members of the FEFC with respect to the prices they charge for carrier haulage services (the inland tariff) provided in combination with other services as part of a multimodal transport service, is an agreement falling within the prohibition contained in Article 2 of Regulation (EEC) No 1017/68.

[1] French Seamen's Case No 167/73, [1974] ECR, p. 359, paragraph 32; Nouvelles Frontières, Cases, No 209—213/84, [1986], ECR, p. 1425, paragraphs 42 to 45; Ahmed Saeed, Case No 66/86, [1989] ECR, p. 803, paragraphs 32 to 33.

[2] Tariff Structures in the Combined Transport of Goods, Commission Decision 93/174/EEC of 24 February 1993, OJ No L 73, 26. 3. 1993, p. 38, paragraph 19.

[3] Ahmed Saeed, see footnote 15, paragraph 12 in relation to Regulation (EEC) No 3975/87.

[4] Ahmed Saeed, see footnote 15, paragraph 25.

(iii) *Article 3 of Regulation (EEC) No 1017/68*

(66) The agreement between the members of the FEFC concerning prices for carrier haulage services does not fall within the exception for technical agreements contained in Article 3 of Regulation (EEC) No 1017/68. Article 3 of Regulation (EEC) No 1017/68 is merely declaratory and lists a number of different kinds of agreement which do not fall within the scope of Article 85 (1) of the Treaty when their sole object and sole effect is to achieve technical improvements or technical cooperation [1].

(67) Agreements made between competitors concerning prices for the services they offer are commercial agreements and do not have the sole object and sole effect of applying technical improvements or of achieving technical cooperation.

(68) Article 3 (1) (c) refers exclusively to 'successive, complementary, substitute or combined transport operations' between inland modes, and not between inland transport and sea transport. The scope of Regulation (EEC) No 1017/68 — 'transport by rail, road and inland waterway' — means that the exception does not apply when the transport operations in question are not performed wholly inland.

(iv) *Article 4 of Regulation (EEC) No 1017/68*

(69) The exemption for groups of small and medium-sized undertakings which is contained in Article 4 of Regulation (EEC) No 1017/68 is not applicable for the following reasons:

(70) Firstly, the members of the FEFC do not, for the most part, carry on themselves (or wish to carry on themselves) inland transport activities. They do not therefore have the purpose described in the first indent of Article 4 (1) of the Regulation.

(71) Secondly, most of the members of the FEFC do not have the purpose described in the second indent of Article 4 (1) of Regulation (EEC) No 1017/68 of providing inland transport services, nor do most of them finance or acquire on a joint basis inland transport equipment or supplies.

(72) Thirdly, the thresholds of Article 4 (1) are not satisfied. On one hand, some of the FEFC members have no carrying capacity of their own, as would be necessary to fulfil this condition. On the other hand, if hired or subcontracted capacity is to be taken into account, the joint capacity of FEFC members would exceed the limits specified (see paragraph 33 for TEU and weight tons transported by or on behalf of FEFC members in 1991).

IV. Regulation (EEC) No 4056/86

(i) *Article 3 of Regulation (EEC) No 4056/86*

(73) The members of the FEFC have argued that multimodal transport falls within the scope of application of Regulation (EEC) No 4056/86 and that Article 3 of that Regulation (entitled 'Exemption for agreements between carriers concerning the operation of scheduled maritime transport services') exempts price fixing for inland transport services provided in combination with other services as part of a multimodal transport operation.

(74) The Commission does not accept this argument, for the following reasons:

(75) The scope of the exemption contained in Article 3 of Regulation (EEC) No 4056/86 cannot be wider than the scope of Regulation (EEC) No 4056/86 itself. Article 1 (2) of the Regulation provides that:

> 'it shall apply *only* to international maritime transport services from or to one or more Community *ports*' (emphasis added).

(76) It is clear from this wording that inland transport, including the inland leg of a multimodal transport service, does not fall within the scope of application of the Regulation and cannot therefore be covered by the group exemption contained in Article 3.

(77) In any event, the group exemption contained in Article 3 is restricted to port-to-port operations, as shown by the reference to maritime transport in its title: 'Exemption for agreements between carriers

[1] HOV SVZ/MCN, Commission Decision 94/210/EC of 29 March 1994, OJ No L 104, 23. 4. 1994, p. 34, paragraph 91. The English language version of Article 3 of Regulation (EEC) No 1017/68 has omitted the word 'sole', which is included in the original language versions of Regulation (EEC) No 1017/68 as well as in Regulations (EEC) No 4056/86 (Article 2) and (EEC) No 3975/87 (Article 2).

concerning the operation of scheduled maritime transport services' [1].

(78) This conclusion also follows from the wording of the 11th recital of Regulation (EEC) No 4056/86, which states that:

> 'whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference since in the case of inland transports organized by *carriers* the latter continue to be subject to Regulation (EEC) No 1017/68 [2] (emphasis added).

(79) At the oral hearing in this case, it was suggested by Counsel for the FEFC that the 11th recital of Regulation (EEC) No 4056/86 could have been intended to address the question whether conferences which acted collectively as buyers of inland transport services were covered by the group exemption, by making it clear that such activities fall within the scope of Regulation (EEC) No 1017/86.

(80) The recital could not override the clear wording of Article 1 (2) of the Regulation. In addition, this interpretation of the recital could not be accepted. It does not make sense to suggest that shippers must 'be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference' because those shipping lines may be acting as a cartel in the purchase of inland transport services.

(81) On the contrary, Article 5 (4) of Regulation (EEC) No 4056/86 is to be interpreted as imposing a formal requirement on the members of the conference to make available their terms and conditions, including their terms for carrier haulage, for the purpose of transparency in view of the fact that the price charged by individual shipping lines for inland transport services is not permitted to be a conference set price. Such prices would not therefore be apparent from the conference tariff.

(82) Moreover, there is nothing in Regulation (EEC) No 4056/86 which suggests that conferences which collectively negotiated the purchase of inland transport services would be covered by the group exemption. The wording of Article 3 of the Regulation is quite clear in this respect: the 'fixing of rates and conditions of carriage' can only refer to the setting of a selling price and not to the negotiation of a buying price in another kind of transport.

(83) These conclusions are fully supported by the fact that at the time of the consultations leading to the adoption of Regulation (EEC) No 4056/86, the European Parliament proposed the addition of the following words to Article 3 of the draft regulation proposed by the Commission:

> 'the aforesaid exemption shall also apply to "intermodal transport" (i.e. maritime transport including transport to and from ports)' [3].

(84) This proposed amendment was not adopted by the Council, indicating that it was the intention of the Council that price fixing agreements for inland transport services should not be covered by the group exemption contained in Article 3 of Council Regulation (EEC) No 4056/86.

(85) Provided that they satisfy the conditions set out in Article 5 of Regulation (EEC) No 1017/68 (that is to say, the four conditions of Article 85 (3)), the parties to such arrangements may, however, be granted individual exemption by the Commission pursuant to Article 11 (4) or Article 12 of Regulation (EEC) No 1017/68.

(ii) *Article 5 of Regulation (EEC) No 4056/86*

(86) An argument has been put forward by the FEFC to the effect that Article 5 (3) and (4) of Regulation (EEC) No 4056/86 contains indications that

[1] See Case T-9/92, Automobiles Peugeot SA, Judgment of 22 April 1993, not yet reported, paragraph 37. '...having regard to the general principle of the prohibition of agreements inhibiting competition contained in Article 85 (1) of the Treaty, derogating provisions in a regulation granting exemption by category could not be interpreted broadly...' See also the opinion of Advocate-General Van Gerven in Case C-234/89, Delimitis, [1991] ECR I, p. 955, point 5. '...when an agreement is not covered by the terms of the block exemption regulation, that block exemption, in itself a derogation from the prohibition pursuant to Article 85 (1), and therefore to be strictly interpreted, may on no account be extended.'

[2] The English language version of Regulation (EEC) No 4056/86 incorrectly uses the word 'shippers' instead of the correct word 'carriers'. That this is an error is clear for at least two reasons:
(i) the recital does not make sense in the English language version; and
(ii) the other language versions of the Regulation are unequivocal in referring to 'carriers' (e.g. 'transporteurs maritimes', 'trasportatori marittimi', 'Seeverkehrsunternehmen').

[3] See amendments to the proposal for a Council Regulation laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ No C 255, 13. 10. 1986, p. 176, paragraph 177.

multimodal transport organized by liner conferences falls within the scope of Regulation (EEC) No 4056/86 and, by extension, within the scope of the group exemption contained in Article 3.

(87) This argument is not well-founded and arises from a misunderstanding on the part of the FEFC as to the nature of the obligations contained in Article 5 (3) and 5 (4). Those two provisions should not be interpreted as referring to a conference tariff but to the terms offered by individual shipping lines. They should not be interpreted as implying that price fixing for inland transport services supplied in combination with other services as part of a multimodal transport service is permitted pursuant to Article 3 of the Regulation. Those provisions simply contain express obligations on individual shipping lines which wish to have the benefit of the group exemption: they must allow merchant haulage, and they must publish their individual terms and conditions for carrier haulage.

(88) Article 5 therefore contains obligations which, as the heading of Article 5 and the 11th recital of the Regulation make clear, are obligations attached to the group exemption. It does not contain any express or implied extension to the group exemption contained in Article 3.

(iii) *Article 2 of Regulation (EEC) No 4056/86*

(89) The FEFC has also argued that a statement made by the Commission and noted in the minutes of the Council at the time of the adoption of Regulation (EEC) No 4056/86 [1] leads to the conclusion that price fixing for multimodal transport falls within the scope of Regulation (EEC) No 4056/86. Once again the FEFC has confused the question of the group exemption for liner conferences with a statement concerning the application of the Community's competition rules to individual shipping lines.

(90) The statement of the Commission expressly refers to the technical exceptions pursuant to Article 2 of Regulation (EEC) No 4056/86 and Article 3 of Regulation (EEC) No 1017/68. The statement, therefore, does not refer to the question of the group exemption, but conforms that both regulations apply in cases of multimodal sea/land operations; Regulation (EEC) No 4056/86 to the maritime segment and Regulation (EEC) No 1017/68 to the inland segment.

(91) Moreover, the statement relates only to agreements between individual sea carriers and individual inland carriers. This is because collective price fixing agreements with competitors for inland or for sea rates are commercially restrictive arrangements and do not have as their sole object and sole effect the achievement of technical improvements or technical cooperation within the meaning of Article 3 (1) of Regulation (EEC) No 1017/68 and Article 2 (1) of Regulation (EEC) No 4056/86. Since such agreements do, as a general rule, restrict competition, it follows, *inter alia* from the seventh recital of Regulation (EEC) No 4056/86, that they do not fall within the exception for technical agreements.

V. Possibility of individual exemption

(92) No application for individual exemption has been made in respect of price fixing by the members of the FEFC for carrier haulage services supplied in combination with other services as part of a multimodal transport service. However, in view of the Commission's obligation pursuant to Article 11 (4) of Regulation (EEC) No 1017/68 to issue a decision applying Article 5 of the Regulation where, whether acting on a complaint received or on its own initiative, it concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 2 and Article 5 of the Regulation, it is necessary to assess whether the conditions of Article 5 are met in the present case.

(93) The Commission has set out at paragraphs 63 to 65 its reasons for considering Article 2 of Regulation (EEC) No 1017/68 to be applicable in the present case and sets out below its assessment as to the applicability of Article 5 of the Regulation.

(94) In carrying out this assessment, the Commission has had to distinguish between the arguments of the members of the FEFC as to:

— the merits of multimodal transport generally,

[1] 'The Commission states that multimodal sea/land transport operations are subject to the rules of competition adopted for land transport and to those laid down for sea transport. In practice, non-application of Article 85 (1) will be the rule as regards the organization and execution of successive or supplementary multimodal sea/land transport operations and the fixing or application of inclusive rates for such transport operations, since both Article 2 of this Regulation (Regulation (EEC) No 4056/86) and Article 3 of Regulation (EEC) No 1017/68 state that the prohibition laid down by Article 85 (1) of the Treaty shall not apply to such practices'. (Council Doc. No. 11584/86 MAR 84, Annex III, p. 5 (19. 12. 1986)).

— the necessity of conference inland rate fixing for the provision of multimodal transport services, and

— the necessity of conference inland rate fixing for the preservation of the conference system.

(95) The members of the FEFC have submitted extensive arguments on the merits of multimodal transport and the benefits which flow from multimodal transport; the Commission does not, however, dispute those benefits [1]. This Decision is concerned with price fixing, and the Commission has therefore considered only the second and third of these main themes of the FEFC regarding the possibility of an individual exemption.

(96) Article 5 of Regulation (EEC) No 1017/68 contains provisions which are modelled on and are essentially the same as the provisions of Article 85 (3) of the Treaty [2]. They are cumulative and each must be satisfied for the Commission to be able to grant an individual exemption.

(97) The equivalent provision in Article 5 of Regulation (EEC) No 1017/68 to the first and second conditions of Article 85 (3) of the Treaty [3], provides that the prohibition in Article 2 of the Regulation may be declared inapplicable by the Commission if the agreement, decision or concerted practice in question:

'contributes towards:

— improving the quality of transport services, or

— promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or

— increasing the productivity of undertakings, or

— furthering technical or economic progresses,

and at the same time takes fair account of the interests of transport users. . .'

(98) The third and fourth conditions of Article 85 (3) are to all intents and purposes reproduced in the second part of Article 5 of Regulation (EEC) No 1017/68.

(99) For the following reasons, the Commission does not consider that the price fixing practices of the FEFC with regard to inland transport fulfill the conditions set out in the first part of Article 5 of Regulation (EEC) No 1017/68 since they do not contribute to any of the objectives described in relation either to the provision of land transport services or in relation to the provision of maritime transport services. Furthermore, even if they did contribute to any of those objectives, the Commission does not consider that the conditions set out in the second part of Article 5 would be fulfilled since the practices in question involve restrictions of competition which would not be indispensable to the attainment of any of those objectives.

(a) *Improvement in the quality of transport services*

(100) As emphasized at paragraph 94, it is necessary to distinguish between the merits and benefits of multimodal transport generally and the contribution which price fixing by the members of the FEFC in respect of carrier haulage services supplied as part of a multimodal transport service is alleged to make to improving the quality of transport services. An assessment as to the applicability of Article 5 of Regulation (EEC) No 1017/68 concerns the latter.

(101) There is no evidence that the charging of a collectively agreed price for the provision of the carrier haulage services contributes to improving the quality of inland transport services. In this respect, it is important to note that, as was discussed at paragraph 19, the members of the FEFC do not, on the whole, undertake the inland carriage themselves but subcontract this task to inland carriers.

(102) Further, although the price for carrier haulage is established within the forum of the FEFC, the individual members negotiate with inland carriers on an individual basis. Improvements to the quality of the service in response to demand from shippers are not brought about by the price-fixing activities of the conference but by negotiations between individual shippers and individual lines.

[1] See for example the Report of the Commission to the Council dated 8 June 1994 concerning the application of the Community's competition rules to maritime transport where it is stated at paragraph 3.1 — 'The Commission is wholly in favour of the development of multimodal transport, a modern mode of transport that meets a specific demand from shippers, and wishes to contribute to its development.' Doc. SEC(94) 933 final.

[2] Tariff Structures, see footnote 16.

[3] '. . .which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. . .'

(103) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contributes to improving the quality of the maritime transport services provided by the members of the FEFC.

(b) *Promotion of continuity and stability in markets with considerable temporal fluctuation*

(104) The question of stability in the market for containerized liner shipping services is discussed at paragraphs 123 to 137.

(105) No evidence has been supplied by the members of the FEFC to show that the market in which carrier haulage services are supplied is a market where supply and demand are subject to considerable temporal fluctuation. Even if the market in question could be so categorized, it has not been shown that the collective fixing of rates for inland transport by members of the FEFC would contribute to continuity and stability in that market.

(c) *Increase in the productivity of undertakings*

(106) No evidence has been supplied by the members of the FEFC to show that conference price-fixing for carrier haulage has led or is likely to lead to increases in productivity of the undertakings concerned. Once again, it is important to distinguish between the provision of multimodal transport services and price fixing in respect of the inland transport element of those services.

(107) So far as the actual providers of the inland transport services are concerned, price fixing by the FEFC has no direct bearing on the service they provide or the way in which they are provided, since they sell their services to members of the FEFC at prevailing market rates and not at the conference set price. So far as the members of the FEFC are concerned, they are not, on the whole, engaged in inland haulage themselves and the price-fixing agreement as to carrier haulage does not therefore directly affect any service which they actually provide themselves.

(108) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contribues to increasing the productivity of the members of the FEFC with regard to the maritime transport services they provide.

(d) *Furthering technical or economic progress*

(109) No evidence has been furnished by the members of the FEFC to show that price fixing for carrier haulage contributes to furthering technical or economic progress, either in the provision of inland transport services or in the provision of multimodal transport services.

(110) The FEFC lines have argued that price fixing for carrier haulage permits them to invest in those elements of a through transport service which they undertake themselves (logistics, tracking etc. — see paragraph 19) because of the increased certainty this creates with regard to a return on the investments concerned.

(111) This argument is one which could be made for any price-fixing agreement. However, it is unsound. It is possible that rather than encouraging the introduction of new technology, the restrictions on competition resulting from the price-fixing activities of the members of the FEFC will discourage new investment by reducing the competitive advantages which would otherwise accrue to those companies which exploited their investments more successfully.

(112) This situation arises from the fact that the reduction or elimination of competition between the members of the FEFC with regard to prices is likely to prevent shipping lines from passing on cost savings resulting from new equipment and new technologies to their customers. Equally the fact that more efficient lines are less likely to benefit from their efficiencies and are less likely to increase market share as a result means that efficient lines are less likely to invest in new technologies.

(113) Accordingly, it has not been shown that the price-fixing activities of the members of the FEFC with regard to carrier haulage contribute to furthering technical or economic progress.

(114) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contributes to furthering technical or economic progress with regard to the maritime transport services provided by those members.

(e) *Fair account of the interests of users*

(115) The Commission is of the opinion that the FEFC agreement does not take fair account of the interests of users [1] in so far as it concerns price fixing for inland haulage. Agreement by the

[1] Article 1 (3) (c) of Regulation (EEC) No 4056/86 refers to 'shippers, consignees and forwarders', among others, as transport users.

members of the FEFC of the price for carrier haulage services, without more, does not take adequate account of the interests of shippers and other transport users. It simply serves to ensure that prices are maintained at levels higher than they would otherwise be. This is directly contrary to the interests of users.

(116) Where individual carries are able to reduce their costs by organizing their container fleets more efficiently than other carriers, conference price fixing for carrier haulage services prevents the more efficient lines from passing on cost savings. This again is contrary to the interests of users.

(117) In considering whether the practices in question take fair account of the interests of users, the Commission has taken note of the complaints made by bodies representing the interests of the users of the inland transport services supplied by the members of the FEFC: the German Shipper's Council; supported by the British Shippers' Council, the French Shippers' Council (CNUT) and by the main representative body for shippers in Europe, the European Shippers' Councils. Freight forwarders have through their representative organization CLECAT (Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport) as well as the UIRR (Union Internationale des Sociétés de Transport Combiné Rail-Route) have expressed concern about distortions of competition in inland transport which are brought about by the practices to which this Decision is addressed.

(118) In the present case, the reservation of a fair share of the benefit to consumers implies the maintenance of a high level of competition in the supply of inland transport services to shippers: the Commission should seek to ensure that shippers have the widest choice of quality and price when buying inland transport services. In practice, the reservation to consumers of a fair share of the benefits of door-to-door transport would be more easily achieved in the absence of any price-fixing agreement such as the FEFC.

(f) *Indispensability of the restrictions*

(119) As explained at paragraph 94, it is necessary to consider whether the restrictions of competition resulting from the price-fixing activities of the FEFC with regard to carrier haulage are indispensable:

— for the provision of multimodal transport services, or

— for the preservation of the liner conference system of rate fixing for maritime transport.

(120) In respect of the first of these objectives, it must be stressed that the members of the FEFC do not, for the most part, provide inland transport services themselves. Nor does the FEFC undertake any inland transport activities other than providing the forum for fixing the prices of carrier haulage services provided in combination with other services as part of a multimodal transport service by members of the FEFC.

(121) Collective price fixing for carrier haulage is not essential for the provision of these services, as is demonstrated by the fact that many independent carriers and freight forwarders offer equivalent or similar services outside the framework of the FEFC, or any other conference, and without fixing prices in common with any other line for the provision of carrier haulage services.

(122) Freight forwarders are in direct competition with shipping lines for the provision of transport services and both of them act as intermediaries between actual providers and buyers of inland transport services. Moreover, freight forwarders have provided door-to-door services to shippers for as long as liner shipping companies, if not longer. Neither freight forwarders nor railway companies enjoy any exemption for price fixing in relation to their activities.

(123) So far as the second objective is concerned, the FEFC has argued that the stabilizing role of liner conferences [1] would be endangered in the absence of collective inland rate-fixing by liner conferences. The FEFC has contended that if their members set inland rates on an individual basis rather than collectively, they would be tempted to undermine the conference-set maritime rates by competing on price with regard to inland rates. This argument has been supported by the Gilman and Graham Report which states, *inter alia*, that:

> 'in an integrated intermodal environment, conferences can not perform their functions of stabilizing rates or promoting efficiency and rationalization unless their rate making authority extends to the inland sector.' [2]

[1] '. . .whereas liner conferences have a stabilizing effect, assuring shippers of reliable services;. . .' 8th recital of Regulation (EEC) No 4056/86.

[2] Gilman and Graham Report, paragraph 4.30.

(124) Gilman and Graham argue that the primary cause for loss of maritime freight rate stability lies in the relationship between sea freight and inland transport revenues.

> 'By competing for and securing the inland move a carrier also secures the sea freight. It is clear that, (so long as they had any spare slots on their vessels) it would pay conference carriers to absorb a considerable amount of the inland transport cost in order to obtain cargo.' [1]

(125) Gilman and Graham argue that the perishable nature of transport capacity contributes to this tendency towards price instability. Pointing to the fact that under the auspices of the conference system there has been considerable network rationalization [2], they also argue that competition might be extended 'across broad hinterlands using the inland modes' (paragraph 4.19).

(126) For the following reasons, the Commission does not accept that these arguments demonstrate the indispensability of price fixing for carrier haulage services for the preservation of the maritime rate stability achieved by conferences such as the FEFC. It must be noted that to satisfy the test of 'indispensability', it is incumbent on the parties to demonstrate that it would not be possible to achieve their objectives in a manner which was less restrictive of competition.

(127) A conference brings stability to the trades it affects by fixing a uniform tariff which serves as a reference point for the market. Prices set in this way are likely to remain unchanged for a longer period of time than if they are set by individual lines. This reduction in the price fluctuations which would be expected in a normally competitive market may benefit shippers by reducing uncertainty as to future trading conditions.

(128) The stability envisaged by Regulation (EEC) No 4056/86 has the consequent effect of assuring shippers of reliable services. Liner services are by their nature regular in the sense of following an evenly spread timetable. Reliable services are those which are of a reasonable quality, such that the shippers' goods come to no harm, and at the same price irrespective of which day and which line is chosen to carry the cargo. Reliability in the supply of transport services is the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs.

(129) The fact that the cartelization of one part of the activities of shipping lines is judged to be compatible with the competition rules is not in itself a justification for the exemption of all the activities of those companies. Such an argument would be tantamount to arguing that members of a liner conference should be permitted to fix prices in respect of any service which they chose to provide in combination with maritime transport services, lest price competition for such further services undermined the conference tariff for maritime transport.

(130) It would not be compatible with the Community's objective of achieving a system ensuring that competition in the internal market is not distorted if it were accepted that stability in respect of one revenue-producing activity could, under the Community's competition rules, justify an exemption in respect of price fixing for all other revenue-producing activities provided in combination with the exempted activity.

(131) Furthermore, it has not been shown that price fixing for carrier haulage is indispensable for the preservation of the 'stabilizing role' of conferences. Although the parties have argued at length that all activities undertaken by conference members must be subject to price fixing, they have failed to show that this is essential in order to preserve the rate discipline on the maritime leg from which the stability in question arises and that there is no less restrictive way of doing so.

(132) The FEFC is no exception to the general rule that all cartels are susceptible to 'cheating' or secret discounting at times when members of the cartel have spare capacity [3]. This was conceded by Counsel for the FEFC at the oral hearing, who acknowledged [4] the existence of both authorized rebating such as service contracts [5] and loyalty arrangements [6] as well as unauthorized rebating.

[1] Gilman and Graham Report, paragraph 4.16.

[2] That is to say, conference members have agreed between themselves to serve a limited number of ports in the interests of rationalization.

[3] 'Detecting and deterring cheating has been termed the central cartel problem, and, because solving it is often difficult, many economists argue that price-fixing cartels are inherently unstable.' F. M. Scherer and David Ross, Industrial Market Structure and Economic Performance (Houghton Mifflin, 1990, p. 245).

[4] See page 131 of the transcript of the oral hearing in this case.

[5] Service contracts are agreements between individual shippers and individual shipping lines, or groups of shipping lines, for the carriage of a minimum number of containers and provision of special services at an individually negotiated price.

[6] Such as those provided for in Article 5 (2) of Regulation (EEC) No 4056/86.

(133) This is a perfectly normal consequence of cartel behaviour. The members of the cartel seek not only to maximize profits by agreeing prices between themselves but also to maximize revenues by gainig market share from one another. Such behaviour normally results in a degree of instability even in the most disciplined cartel. Cartels also suffer the inevitable instability due to the fact that it always pays to be the one company operating outside the cartel.

(134) The FEFC therefore already faces a degree of instability in respect of both its maritime and inland tariffs, brought about by competitive discounting on the part of its members. It is not necessary to have absolute discipline in order to maintain the stability which the conference system brings about, that is to say, reliable services at prices which do not fluctuate greatly in the short-term. In particular, competitive discounting does not upset the stability envisaged by Regulation (EEC) No 4056/86, since it has not been shown that it leads to the absence of reliable services or of stable prices over a period of time.

(135) In this context, it is important to note that certain activities are undertaken not on the basis of an agreed conference price but on the much less restrictive basis of an agreement not to charge below cost (see paragraph 40). No evidence has been supplied by the parties that this system undermines stability to an excessive degree, or indeed at all.

(136) The Commission recognizes that, in the absence of collective price fixing for carrier haulage services, the members of the FEFC might charge shippers rates which are below their costs of buying in such services, the effect of which would be similar to offering a discount off the conference tariff for the maritime transport. There is a risk that this would undermine the stability brought about by the FEFC to a greater extent than it is already undermined by other means of discounting from the FEFC maritime transport tariff and by competition from shipping lines which are not members of the FEFC.

(137) However, even if it is accepted that permitting the FEFC to fix prices in respect of carrier haulage services offered by its members does contribute to the creation of stability, it has not been established that measures less restrictive of competition would not have sufficient impact to attain that objective. Measures which might be taken to ensure the stability of the conference maritime tariff are listed in Article 3 of Regulation (EEC) No 4056/86 and include the allocation of cargo or revenue amongst the members of a conference.

(138) In conclusion, price fixing for carrier haulage by the members of the FEFC does not appear indispensable to the attainment of the objectives claimed.

(139) This conclusion applies only to the existing practices of the FEFC in relation to price fixing for inland transport. In particular, this Decision does not consider whether and to what extent other kinds of agreement relating to multimodal transport might fulfill the conditions of Article 85 (3) [1].

(g) *Elimination of competition for a substantial part of the market*

(140) Since it has been established that the first three conditions of Article 85 (3) of the Treaty and of Article 5 of Regulation (EEC) No 1017/68 are not satisfied in the present case, it is not necessary to consider whether the parties are afforded the possibility of eliminating compoetition in respect of a substantial part of the services in question.

(h) *Conclusions*

(141) The above considerations lead to the conclusion that while the development of multimodal transport may constitute a means of improving transport services, collective price fixing for carrier haulage services does not. Furthermore, transport users do not obtain a fair share of the benefits of price fixing for carrier haulage services and the restrictions of competition are not indispensable. Accordingly, the conditions of Article 85 (3) and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

(142) Moreover, at a time when efforts are being made to liberalize and deregulate the provision of

[1] Note should be made of the Commission's statement in its Report to the Council concerning maritime transport: it considered:
'that, in certain circumstances, specific cooperation agreements between groups of shipowners or between shipowners and individual carriers could promote sufficient technical or economic progress to be allowed, by individual exemption, to set uniform inland rates.'
The Commission also stated in that Report that, if appropriate, it would be prepared to consider granting individual exemptions which also allowed:
'a provision to be included in the agreement of the conference of which the group lines (benefiting from the individual exemption) are members stipulating that the inland rates of the tariffs. . .may be not less than cost, thus largely avoiding any risk of destabilizing the conferences through cross subsidization between the inland and maritime segments.'

European inland transport services, it would be incoherent and would give rise to inconsistencies if conferences were granted an exemption to fix prices for some inland transport services but their competitors providing equivalent services were not so permitted [1].

VI. Article 22 (2) of Regulation (EEC) No 1017/68

(143) According to Article 22 (2) of Regulation (EEC) No 1017/68, the Commission may impose on undertakings fines from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they commit an infringement of Article 2 or Article 8 of Regulation (EEC) No 1017/68. In fixing the amount of the fine the Commission will have regard both to the gravity and to the duration of the infringement.

(i) *Assessment as to gravity and duration*

(144) In considering the gravity and duration of the infringement in this case, the Commission has taken into account the following criteria:

(a) the nature of the infringement;

(b) the intentions of the parties;

(c) the failure of the parties to terminate the infringement;

(d) the nature and value of the services in question;

(e) the degree of each party's involvement in the infringement; and

(f) the duration of the infringement.

(a) The nature of the infringement

(145) The Commission considers that, in general, practices aimed at restricting price competition are a matter of indisputable gravity [2]. This follows both from the fact that price fixing is specifically referred to in Article 85 (1) and from the established case-law of the Court of Justice [3]. The infringement in question eliminates price competition between the members of the FEFC with respect to the inland transport services they provide.

(b) Intentions of the parties

(146) The Court of Justice has ruled that:

> 'it is not necessary for an undertaking to have been aware that it was infringing the competition rules in the Treaty for an infringement to be regarded as having been commited intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition' [4].

(147) The Commission considers that the purpose of the members of the FEFC was to eliminate price competition between themselves with respect to the inland transport services they provide. Accordingly, they could not have been unaware that their price-fixing activities in relation to inland transport services had as their object the restriction of competition.

(c) The failure of the parties to terminate the infringement

(148) The members of the FEFC have been aware at least since the complaint submitted by the BDI/DSVK to the Commission was sent to them on 23 June 1989 that there was a possibility that the practices dealt with in this Decision constituted infringements of Article 85 (1) of the Treaty and Article 2 of Regulation (EEC) No 1017/68 and that they did not fall within the scope of the group exemption for liner conferences contained in Article 3 of Regulation (EEC) No 4056/86.

(149) Despite this complaint and in spite of repeated preliminary advice from the Commission (including a letter from the Member of the Commission then responsible for competition policy to the Chairman of the FEFC in June 1990) that the practices in question fell within the scope of Article 85 (1) and did not benefit from any exemption pursuant to Article 85 (3), the parties have maintained them in full force and effect. At no stage, even subsequent to the notification of the statement of objections in December 1992, have the parties formally notified their practices to the Commission for individual exemption.

(d) The nature and value of the services in question

(150) As indicated at paragraphs 34 to 37, in 1992 the cost of supplying inland transport services for 10 of the largest members of the FEFC was some ECU

[1] See also the Report of the Commission to the Council concerning the application of the Community's competition rules to maritime transport.

[2] HOV SVZ/MCN, cited above, paragraph 259.

[3] See, for example, Case 26/76, Metro v. Commission II [1977] ECR, p. 1875: 'price competition is so important that it can never be eliminated'.

[4] Case C-279/87, Tippex v. Commission [1990] ECR I, p. 261.

477 million. This amount is probably representative, in real terms, of the cost of supplying inland transport services by those 10 lines for years both before and since 1992. The annual value of the services in question is therefore considerable and represents a significant cost for the Community's industry.

(e) The degree of each party's involvement in the infringement

(151) With the exception of Wilh. Wilhelmsen, there is no indication that any individual line had a greater or lesser involvement in the collective decision to fix prices for the services with which this Decision is concerned. Wilh. Wilhelmsen is not an active member of the FEFC and does not operate vessels on the routes in question.

(f) The duration of the infringement

(152) As indicated at paragraphs 39, 40 and 41, price fixing for inland transport services by the FEFC commenced in a general manner around 1971 and has been in continuous effect since them. The current FEFC tariff for carrier haulage which is contained in NT90 was introduced with effect from 1 January 1990. Regulation (EEC) No 1017/68, the regulation applicable to the infringement in question, came into force on 1 July 1968.

(ii) *Conclusions as to the gravity and duration of the infringements*

(153) The Commission considers that the infringement in question is a very serious infringement of Community competition law and that it is likely to have had a significant economic impact. Furthermore, the infringement has been taking place in a general manner since 1971 and certainly since the submission of the DSVK's complaint to the Commission in April 1989.

(154) Although the parties have argued that the practices in question fall within the scope of the group exemption for liner conference price-fixing agreements laid down in Regulation (EEC) No 4056/86, the scope of that exemption could not possibly be wider than the scope of the Regulation itself. Article 1 (2) of the Regulation provides that:

> 'It shall apply only to international maritime transport services from or to one or more Community ports'.

(155) In construing the provisions of Regulation (EEC) No 4056/86, it is necessary to bear in mind the general principle of Community law that derogations, such as group exemptions, are not to be construed broadly (see footnote 20).

(156) Furthermore, the Commission's Report to the Council concerning the application of the Community's competition rules to liner shipping in June 1994 contained very clear indications of the Commission's conclusions concerning multimodal rate fixing in general. Representatives of the FEFC wrote to the Commission with its preliminary views on the Report on 12 August 1994.

(157) The Commission considers that the members of the FEFC could not have been unaware that the agreement fell within the scope of Article 85 (1) of the Treaty and that they should have been aware that it did not fall within the scope of the group exemption for liner conferences or any other exemption. The Commission considers that fines are appropriate in this case.

(158) Notwithstanding these conclusions as to the gravity and duration of the infringement, the Commission has taken into account the facts that the existence of the practices in question was widely known and that, for a variety of reasons, this Decision on those practices has taken longer to adopt than might otherwise have been the case. The Commission has also considered the following circumstances:

(i) the Commission's orientations with respect to multimodal price fixing by liner shipping conferences were not widely known until the submission of its Report to the Council referred to above;

(ii) the development of the Commission's orientations in this regard has taken some time to achieve, with the result that the prosecution of this case has taken longer than would normally have been the case and the members of the FEFC should not be penalized in respect of this additional period; and

(iii) the fact that the present Decision is the first decision applying the provisions of Regulation (EEC) No 1017/68 to the members of a liner shipping conference.

(159) In view of the above, the Commission considers that the level of fines in this case should be set at a symbolic level to make clear the existence of the infringement and the need for future compliance with the Community's competition rules by the undertakings in question and by other undertakings which may be engaged in equivalent practices. No fine should be imposed on Wilh. Wlhelmsen having regard to its non-involvement in the offence (see paragraph 151).

HAS ADOPTED THIS DECISION:

Article 1

The members of the Far Eastern Freight Conference listed in the Annex have infringed the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East.

Article 2

The conditions of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 3

The members of the Far Eastern Freight Conference listed in the Annex are hereby required to put an end to the infringement referred to in Article 1.

Article 4

The undertakings to whom this Decision is addressed are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreement referred to in Article 1.

Article 5

Fines as set out below are hereby imposed on the undertakings to whom this Decision is addressed in respect of the infringement of the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 referred to in Article 1.

Compagnie Générale Maritime	ECU 10 000
Hapag-Lloyd Aktiengesellschaft	ECU 10 000
Croatia Line	ECU 10 000
Kawasaki Kisen Kaisha Limited	ECU 10 000
Lloyd Triestino di Navigazione SpA	ECU 10 000
AP Møller-Maersk Line	ECU 10 000
Malaysian International Shipping Corporation Berhad	ECU 10 000
Mitsui OSK Lines Ltd	ECU 10 000
Nedlloyd Lijnen BV	ECU 10 000
Neptune Orient Lines Ltd	ECU 10 000
Nippon Yusen Kabushiki Kaisha	ECU 10 000
Orient Overseas Container Line	ECU 10 000
P & O Containers Ltd	ECU 10 000

Article 6

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

After expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Monetary Institute for transactions in ecus on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 9,25 %.

Article 7

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

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

Done at Brussels, 21 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

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