II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 May 2000

relating to a proceeding pursuant to Article 81 of the EC Treaty

(IV/34.018 — Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA))

(notified under document number C(2000) 1170)

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

(2000/627/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Article 3(1) and Article 15(2) thereof,

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 [3], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 11(1) and Article 22(2) 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 [4], as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 11(1) and Article 19(2) thereof,

Having regard to the Commission's decision of 19 April 1994 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 19 of Regulation No 17, Article 26 of Regulation (EEC) No 1017/68, Article 23 of Regulation (EEC) No 4056/86 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [5],

Having consulted the Advisory Committee on Restrictive Practices and Monopolies, the Advisory Committee on Restrictive Practices and Monopolies in the Transport Industry and the Advisory Committee on Agreements and Dominant Positions in Maritime Transport,

Whereas:

SUMMARY

(1) In this Decision, the Commission finds that the parties to the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) infringed Article 81(1) of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 by agreeing not to discount from published tariffs for

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 175, 23.7.1968, p. 1.
[4] OJ L 378, 31.12.1986, p. 4.
[5] OJ L 354, 30.12.1998, p. 18. Before the entry into force of Regulation (EC) No 2842/98, the Commission followed the procedure provided for in Commission Regulations No 99/63/EEC, (EEC) No 1630/69 and (EEC) No 4260/88.

charges and surcharges. The agreement not to discount is not capable of exemption under Article 81(3) and Article 5 of Regulation (EEC) No 1017/68. The Commission imposes fines for the infringement.

(2) The minutes of the meetings quoted in recitals 40 to 54 show that the parties discussed possible ways of aligning the practices of the members of the Far East Freight Conference with those of their principal non-conference competitors concerning charges and surcharges. Such discussions within the framework of the FETTCSA went beyond activities consistent with a 'technical agreement' within the meaning of Article 2(1) of Regulation (EEC) No 4056/86 and Article 3(1) of Regulation (EEC) No 1017/68. Any agreement resulting from such discussions would constitute an infringement of Article 81 of the EC Treaty. The minutes do not show that a specific agreement was recorded other than the agreement not to discount, and the present Decision makes no finding of an infringement in relation to the parties' discussions about the tariff currency, and about charges and surcharges.

THE FACTS

1. INTRODUCTION

(3) The Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) was an agreement dated 5 March 1991 between shipping lines operating on the north Europe/Far East trade. The FETTCSA came into force on 4 June 1991.

(4) The FETTCSA parties claimed that the 'object of the Agreement is to improve the operational functioning of the maritime transport industry by introducing greater transparency and functional clarity in charges and surcharges and by achieving the standardisation of methodology and in their calculation'.

(5) On 15 July 1991 the European Shippers' Councils lodged a formal complaint with the Commission against the FETTCSA.

(6) On 28 September 1992 the Commission's Directorate-General for Competition informed the FETTCSA parties of its view that the FETTCSA fell within Article 85(1) (now Article 81(1)), that it was not a 'technical agreement' within the meaning of Article 2(1) of Regulation (EEC) No 4056/86 and that it should be notified in order to allow the Commission to decide whether an individual exemption might be granted.

(7) On 19 April 1994 the Commission adopted a Statement of Objections.

(8) On 26 May 1994 the Commission was informed that the FETTCSA parties had terminated the agreement on 10 May 1994. The Commission has been told that the last meeting of the FETTCSA parties was held on 8 September 1992.

(9) The FETTCSA has not been notified to the Commission for an individual exemption, the parties considering that it is a technical agreement falling within Article 2 of Regulation (EEC) No 4056/86.

(10) The Commission considers that the FETTCSA falls within the scope of application of Regulation No 17 and Regulation (EEC) No 1017/68 as well as Regulation (EEC) No 4056/86.

2. THE PARTIES

2.1. **Parties to the FETTSCA**

(11) The parties to the FETTCSA were all shipping lines. There were initially 20 members: 14 were members of the Far Eastern Freight Conference (FEFC) whilst six were independent shipping lines operating in the same trades (see below).

FEFC members:	Ben Line Container Holdings Ltd (Ben Line)
	Compagnie Générale Maritime (CGM)
	East Asiatic Company (EAC)
	Hapag-Lloyd AG (Hapag-Lloyd)
	Kawasaki Kisen Kaisha Ltd (K Line)
	A.P. Møller — Maersk Line (Maersk)
	Malaysia International Shipping Corporation Bhd (MISC)
	Mitsui OSK Lines Ltd (MOL)
	Nedlloyd Lijnen BV (Nedlloyd)
	Neptune Orient Lines Ltd (NOL)
	Nippon Yusen Kaisha (NYK)
	Orient Overseas Container Line (OOCL)
	P & O Containers Ltd (P & O)
	Polish Ocean Line (POL)
Independent lines:	Cho Yang Shipping Co. Ltd (Cho Yang)
	Deutsche Seereederei Rostock GmbH (DSR)
	Evergreen Marine Corp. (Taiwan) Ltd (Evergreen)
	Hanjin Shipping Co. Ltd (Hanjin)
	Senator Linie GmbH & Co. KG (Senator)
	Yangming Marine Transport Corp. (Yangming)

(12) The Statement of Objections was addressed to 18 members of the FETTCSA: those listed above except Ben Line and EAC. The Commission was informed on 14

July 1992 that Ben Line ceased shipping activities on 2 July 1992. The Commission was (in the East Asia Trades Agreement proceedings, see recitals 19, 20 and 21) informed on 23 July 1993 that the East Asiatic Company and EACBen Container Line Ltd no longer operate vessels on the trades in question, although for a while the vessels they had operated were maintained in use on the same trades by Maersk.

(13) Since January 1991, DSR and Senator operated a joint service in the north Europe/Far East trades and, in 1994, they merged. In 1994, CGM left the north Europe/Far East trade and, in 1996, it was purchased by Compagnie Maritime d'Affrètement. In 1997, Nedlloyd Lijnen BV and P & O Containers Limited merged to form P & O Nedlloyd Container Line Ltd, Hapag-Lloyd AG transferred its containerised liner shipping activities to Hapag Lloyd Container Linie GmbH, and Hanjin acquired control of DSR Senator Lines GmbH.

(14) In considering the FETTCSA, it is relevant to consider not only the parties to the agreement at the relevant time but also the structure of the market. In particular it is significant that many of the FETTCSA parties were members of the FEFC and that all the parties to the FETTCSA were parties to the EATA. Membership of the FETTCSA parties to these other agreements is set out in Table 1 below.

Table 1: Market structure in 1993

	EATA	FETTCSA	FEFC
CGM	yes	yes	yes
Cho Yang	yes	yes	no
DSR/Senator	yes	yes	no
Evergreen	yes	yes	no
Hanjin	yes	yes	no
Hapag-Lloyd	yes	yes	yes
Hyundai	yes	no	no
K Line	yes	yes	yes
Maersk	yes	yes	yes
MISC	yes	yes	yes
MOL	yes	yes	yes
Nedlloyd	yes	yes	yes
NOL	yes	yes	yes
NYK	yes	yes	yes
OOCL	yes	yes	yes
P & OCL	yes	yes	yes
Yangming	yes	yes	no

2.2. **The Far Eastern Freight Conference** ([6])

(15) The FEFC is an association of shipping lines which operate liner shipping services on routes between Europe and the Far East. The FEFC does not itself offer any shipping service or enter into contracts with shippers or other customers. It regulates a number of conditions, including tariffs, on the basis of which its member lines offer their services. The FEFC is used by its member lines as a central body for publishing their decisions and communicating with other relevant organisations, including shippers' councils.

(16) Under Article 3 of Regulation (EEC) No 4056/86 (the block exemption for liner conferences), the members of the FEFC are permitted to operate under uniform or common rates for the provision of liner maritime transport services.

(17) The members of the FEFC also agree on the levels of charges and surcharges that were the subject of the FETTCSA. This Decision deals only with the extension to the independent lines of the FEFC lines' decision, in relation to charges and surcharges, not to grant discounts. To the extent that the FEFC's charges and surcharges relate to maritime transport services, they fall within the block exemption for liner conferences. This Decision does not address the question whether agreements fixing the amount of charges and surcharges relating to port handling services fall within the scope of the block exemption. As regards inlands transport services, the Commission has previously decided that price-fixing agreements relating to such services fall outside the scope of the block exemption ([7]).

(18) In 1991 the members of the FEFC had a 58 % market share for traffic between northern Europe and the Far East.

2.3. **East Asia Trades Agreement** ([8])

(19) The EATA was an agreement dated 27 August 1992 between all the major shipping lines on the Europe/Far

([6]) The Far Eastern Freight Conference includes the Europe/Japan and Japan/Europe Freight Conferences, Hong Kong/Europe Freight Conference, Philippines/Europe Conference and Sabah, Brunei and Sarawak Freight Conference. Its activities are further described in Commission Decision 94/985/EC (Far Eastern Freight Conference), (OJ L 378, 31.12.1994, p. 17).

([7]) Decision 94/985/EC (Far Eastern Freight Conference); Commission Decision 94/980/EC (Transatlantic Agreement) (OJ L 376, 31.12.1994, p. 1); Commission Decision 1999/243/EC (Transatlantic Conference Agreement) (OJ L 95, 9.4.1999, p. 1).

([8]) Commission Decision 1999/485/EC (Europe Asia Trades Agreement) (OJ L 193, 26.7.1999, p. 23).

East trade, including 12 members of the FEFC and seven non-conference lines operating in the trades ([9]). According to the EATA Secretary ([10]), the FETTCSA emerged in March 1991 as a result of discussions by various shipping lines concerning the forerunner to the EATA, the European Stabilisation Agreement (ESA).

(20) The EATA provided for the exchange of information relating to capacity and the setting-up of a capacity management programme under which the parties agreed not to use part of their capacity. The express purpose of the EATA was to reduce price competition between the parties to the EATA by artificially limiting the liner shipping capacity made available to shippers wishing to have goods transported from north Europe to the Far East.

(21) The parties to the EATA terminated their agreement with effect from 16 September 1997.

3. THE FETTCSA

3.1. **The terms of the FETTCSA**

(22) According to section 2 of the Agreement, the FETTCSA aimed:

(i) to create industrial standards for the calculation and setting of charges and surcharges by means of common procedural mechanisms; and

(ii) to use a common mechanism for the calculation and setting of charges and surcharges other than sea freight and inland haulage.

(23) Specifically section 5 of the Agreement provided:

'For the purposes of the calculating and the setting of charges and surcharges other than sea freight and inland freight, the Parties may consult each other for the following purposes:

(a) The establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.

(b) The establishment or application of inclusive rates and conditions for the organisation and execution of successive or supplementary maritime transport operations.'

([9]) Hyundai Merchant Marine Co. Ltd was a party to the EATA but not to the FETTCSA.

([10]) Letter from the EATA Secretary to the Commission dated 19 October 1993.

(24) The wording of the objectives set out in section 5(a) and (b) of the Agreement reflect respectively the language used in Article 2(1)(f) and (c) of the Regulation (EEC) No 4056/86.

(25) Section 6 of the Agreement provided:

'The Parties shall apply the same methodology for calculating and setting charges and surcharges […] according to the common mechanisms and procedures envisaged by section 2 and created by section 5 of this Agreement.'

(26) Sections 7 and 11 of the Agreement provided for the parties to exchange views and information regarding any matter within the scope of the Agreement as well as for the administration of the Agreement. Section 3 of the Agreement provided that the parties are not required to agree upon or to adhere to any common course of action (except to the extent that the parties may agree to incur a common expense or contractual obligation to third parties) and that adherence to the Agreement by the parties is voluntary.

(27) Section 11 of the Agreement provided that the Director-General and staff of the FEFC were to serve as a secretariat of the FETTCSA for the duration of the Agreement.

3.2. **The scope of the FETTCSA**

(28) The principal charges and surcharges applied in the Europe/Far East trades are the following:

1. Bunker adjustment factor (BAF);

2. Currency adjustment factor (CAF);

3. Terminal handling charges (THC);

4. Less-than-container-load service charges (LCLSC);

5. Detention charges;

6. Demurrage charges;

7. Special equipment premium;

8. War surcharges.

(29) A brief description of each of these charges and surcharges is contained in Annex II. Other charges and surcharges include transport additionals, non-standard lift charges, hazardous cargo surcharges and congestion surcharges.

(30) A schedule showing how these charges and surcharges are incorporated into the price paid by the shipper is attached as Annex III. this schedule is taken from NT90, the tariff schedule published by the FEFC ([11]).

3.3. **The geographical scope of the FETTCSA**

(31) According to section 4 of the FETTCSA, the geographical scope of the Agreement is transport from ports and points in the Far East to ports and points in north Europe and vice versa. North Europe is defined as Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Poland, Sweden, Switzerland and the United Kingdom. The Far East is defined as Japan, the Republic of Korea, People's Republic of China, Republic of China/Taiwan, Hong Kong, Macao, Thailand, Cambodia, Vietnam, Singapore, Malaysia, Laos, Burma, Brunei, the Philippines and Indonesia.

3.4. **Significance of charges and surcharges**

(32) According to the European Shippers' Councils and the Conseil national des usagers des transports (CNUT) ([12]) charges additional to ocean freight such as surcharges could amount to some 35 % of the total transport cost to shippers or as much as 60 % of the actual freight rate. The FETTCSA secretariat has accepted that charges and surcharges could amount (in the eastbound trade) to up to 60 % of the total tariff ([13]).

4. ACTIVITIES OF THE PARTIES PURSUANT TO THE FETTCSA

(33) The parties held the following meetings within the framework of the FETTCSA:

1. 30 September 1991 — Technical Committee;

2. 9 June 1992 — Principals;

3. 8 September 1992 — Principals.

(34) The minutes of those meetings show that representatives of all the lines (with the exceptions of Ben Line and POL and, at the first meeting, MISC) attended those meetings along with a number of representatives of the FEFC. In this Decision, the Commission relies on those minutes together with the FETTCSA Agreement itself as supplemented by various explanations given by the FEFC and FETTCSA secretariats in correspondence with the Commission, and the parties' reply to the Commission's Statement of Objections.

4.1. **Agreement not to discount**

(35) The following agreement is recorded in the notes of the meeting held on 9 June 1992:

'Under the provisions of the FETTCSA the timing of the imposition of charges and surcharges should be agreed. The Chairman stated that he had to report under the terms of the FETTCSA that the *prinicipals of FEFC lines had decided that all additionals including CAF/BAF, etc., would be charged in full as per the FEFC tariff* with effect from 1 July 1992. It was appreciated that some deals had been arranged on a net all-in basis which unfortunately took time to change but any new deals would include all additionals. *It was proposed that all Parties to the FETTCSA charged additionals in full as per their own individual tariffs for the eastbound and westbound trades.*

This was agreed by the FETTCSA lines present without dissent.' (emphasis added).

(36) The Commission concludes that those FETTCSA lines present at the meeting (i.e. all those who were party to the FETTCSA other than Ben Line and POL) agreed that with effect from 1 July 1992 they would no longer grant discounts off the rates for 'additionals' as quoted in their tariffs. In their reply to the Statement of Objections the FETTCSA parties admit that 'the wording of the note of the meeting of the FETTCSA principals of 9 June 1992 is unfortunately open to such an interpretation'. The parties claim that their Agreement was not an agreement not to discount, but an agreement to stop charging 'net all-in' rates, i.e. an agreement to quote and invoice rates broken down into their different elements 'by referring to all additionals appearing in an individual line's tariff for the purpose of providing clarity to shippers' ([14]). In view of the wording of the minutes, the Commission ins unconvinced by the parties' interpretation of the Agreement.

(37) The Commission further concludes that 'additionals' refers to the charges and surcharges listed at recitals 28,

([11]) NT90 was the tariff schedule introduced with effect from 1 January 1990.
([12]) Letter from CNUT to the Commission dated 27 September 1991.
([13]) Letter from FETTCSA to the Commission dated 19 October 1992.
([14]) Reply to Statement of Objections point 2.11.

29 and 30, as well as to the following charges:

1. Non-standard lift charges (NSLs);

2. Optional destinations;

3. Change of destination (COD);

4. Change of delivery status;

5. Packages of value exceeding the carrier's normal bill of lading liability.

(38) Descriptions of these charges are given in Annex II. In the FEFC's tariff schedule, NT90, these additionals are given as flat rates in US dollars based on weight or numbers of optional destinations or per TEU (20 foot equivalent unit), as a percentage of *ad valorem* value, or by reference to other rates quoted in the tariff schedule ([15]).

(39) It is clear from the minutes of the meeting of 9 June 1992 quoted in recital 35 that lines could and did offer 'net all-in' rates which did not identify the parts of the rate which represented the price for haulage or ocean freight and those which represent charges and surcharges.

4.2. **Discussion about tariff currency**

(40) The notes of the meeting held on 8 September 1992 read as follows:

'The Chairman reported that he had to advise under the terms of the FETTCSA that the principals of FEFC lines were considering *a change in the tariff currency* and if this were to happen then it would fundamentally affect the basis of FAC calculations. The present currency, US dollars was subject to considerable fluctuation and was presently very weak which meant that *lines suffered considerable exchange losses*. A switch to the ecu or possibly the German mark or yen was being considered by FEFC lines and it might therefore be appropriate for FETTCSA lines to meet in due course to consider the issues involved.

All FETTCSA lines present expressed an interest in participating in such a meeting and it was left that this issue would be developed in due course.' (empahsis added).

([15]) See NT90, section 3.6.

(41) The Commission has been told that no date was fixed for such a meeting (indeed, the meeting of 8 September 1992 was the last meeting held under the FETTCSA) and the question of a change in the tariff currency was not developed further. Nevertheless these minutes demonstrate that the parties to the FETTCSA discussed acting in concert in relation to a measure which, in the words of the FETTCSA's own document, would fundamentally affect the basis of calculations for CAF surcharges imposed by the parties to the FETTCSA. The purpose of such concerted action would have been to reduce the parties' 'considerable exchange losses'.

4.3. **Discussions on charges and surcharges**

BAF and CAF

(42) The notes of the meeting of 30 September 1991 contain the following extract concerning the BAF:

'… it should be pointed out that the north Atlantic is a much simpler trade to monitor having shorter sea distances compared to the Far East trade so that it can presumably be assumed that bunkers are only stemmed on New York and Rotterdam prices. On the other hand on the Far East trade, bunkers can be stemmed at many interim ports between Europe and Japan with a resulting wider variation in prices as up to 20 ports are covered'.

(43) The notes contain the following extract concerning the CAF:

'Conference lines' input on their pattern of costs and the Conference cargo flows are given to an independent firm of accountants who then regularly recalculate Line 1 of the CAF. Line 1 is used to weight the currencies in the Conference "basket" and their re/devaluation against the base rates of exchange, currently October 1989, (Line 2) is then calculated to result in Line 3, the underlying CAF. This is compared against the operative CAF and if the difference passes one of the "triggers" a CAF change occurs'.

(44) The notes also contain the following extract concerning both the BAF and the CAF:

'In considering BAF and CAF from a FETTCSA point of view, it was suggested that broadly speaking, and especially now that the number of CAF's had been

reduced from 10 to three, the independents and Conference lines would have fairly similar bunker offtake and cost/currency structures since they traded the same routes. However lines' domestic cost structures which could affect base data used, for example in the bunker weighting, may be marginally different depending on where the line is based. This may therefore indicate the necessity to use more publicly available indices.

Although it was fully appreciated that at this early stage of FETTCSA, the Committee's function is to study and search for a common methodology for calculating accessorial charges, there is the chance that simply adopting a similar methodology to the FEFC could lead to each independent calculating its own quite separate levels of BAF and CAF. At a time when shipper bodies constantly criticise differences in charges as between Conferences in quite separate trades, whether the application of a whole range of e.g. CAF and BAF levels in the same trade would be in shippers' interests, could be questioned. In this respect and as even the secretariat do not see the detailed input from the lines, only the averaged results, the thought was expressed that the independents might eventually consider putting in their own figures to the independent accountants at least in an exploratory way in order to arrive at overall Far Eastern bunker offtakes and CAF Line 1.'

(45) From these extracts and from the descriptions of BAF and CAF given in Annex II, it can be seen that there are a number of cost elements taken into account in calculating BAF and CAF which are not uniform between the lines but which vary depending on the ability of each line to maximise their revenues and to keep their costs to a minimum.

(46) So far as BAF is concerned, the following three factors would appear to have a bearing on the level at which the BAF for any particular line is set:

1. where it lifts its bunkers;

2. its proportion of bunker costs to net sea freight revenue;

3. the base level for bunker costs incorporated in its freight rates.

(47) So far as CAF is concerned, FEFC practice at the material time was to base the CAF on a basket of currencies weighted to reflect where the members of the FEFC earn their revenues and where they incur their expenses (see Annex II).

(48) The extract from the notes of the meeting of 30 September 1991 quoted in recitals 42, 43 and 44 show that the FETTCSA parties discussed calculating a single level of BAF and CAF to be applied both by the Conference members and by the independents who were members of the FETTCSA.

THC

(49) The notes of the meeting of 30 September 1991 contain the following extract concerning THCs:

'It was stressed that there is no profit element in the Conference THC and the effect of the 80/20 cost split in further reducing the THC levels was explained. On the basis of this information, some independents advised they now realised why the FEFC THC levels had often seemed too low.'

(50) In order to arrive at the FEFC THC for each port within the FEFC range, the FEFC Secretariat consolidates and averages out the costs incurred by its members. According to the FEFC '(t)hese costs can vary according to the individual line/consortium's throughput at a port and their agreeement with a terminal operator' ([16]).

LCL service charges

(51) The notes of the meeting of 30 September 1991 contain the following extract concerning LCL service charges:

'Members were advised that in obtaining the "THC element"(suitably weighted according to the 80/20 split) for calculating LCL SC, the Conference has to use "arbitrary" factors, currently 9TW in Europe for both eastbound and westbound cargo and 21,5 M/25M for eastbound and westbound cargo in the Far East.'

(52) The use of 'arbitrary factors' to calculate the THC element of LCL service charges suggests that this element is not based on individual lines' actual costs.

([16]) FETTCSA circular to members, FT/3, supplied to the Commission pursuant to a request for information dated October 1993.

Dentention and demurrage charges

(53) The notes of the meeting of 30 September 1991 contain the following extract concerning detention charges and demurrage charges:

'Before concluding the discussion on the detention and demurrage charges mention was made of the current situation in Korea where all lines are experiencing severe delay in the movement of their equipment due to internal congestion in Korea. In the hope of taking some action to remedy the situation, moves are under way through the KSAA to ensure that whatever detention and demurrage charges the various carriers show in their tariffs are actually implemented. One of the independents advised that they are not releasing cargo until all such costs/charges have been paid.'

(54) This extract shows the importance of terms of payment (i.e. terms regulating how and within what period payment is to be made) in relation to detention and demurrage charges. These charges are calculated on the basis of 'an estimate of the long-term leasing costs of equipment which lines would have to hire to cover that detained by the client' ([17]). As with terminal costs, leasing costs vary depending on the negotiating power of any particular line.

5. THE RELEVANT PRODUCT MARKET

(55) The relevant product market for the purpose of considering the agreement not to discount entered into by the FETTCSA parties is that of scheduled maritime transport services for the transport of containerised cargo between northern Europe and the Far East. This includes on the one hand ports in the United Kingdom, Ireland, Belgium, the Netherlands, Germany, northern France, Norway, Finland, Denmark, Sweden and Iceland and on the other hand ports in Japan, North and South Korea, Taiwan, Hong Kong, Singapore, Malaysia and the Philippines.

(56) In these proceedings the parties have adopted the same arguments as to market definition as they put forward in the EATA proceedings ([18]). The parties consider that there are a number of substitutable ways of transporting goods from northern Europe to the Far East.

(i) The first is that provided by specialised vessels which can carry some of the large volume homogenous products moving within the general cargo sector;

(ii) The second is provided by ships in the bulk or specialised sectors which can also carry a number of containers;

(iii) The third is said to be air and air-sea combinations for goods requiring faster shipment;

(iv) The fourth substitute is the possibility of transporting goods by the Trans-Siberian Railway;

(v) The fifth possibility is offered by carriers operating westbound out of north Europe which can also serve the Far East either by using rail land bridges across the United States of America, or by trans-shipping at US west coast ports onto Pacific services (i.e. Europe/US east coast/US west coast/Far East);

(vi) Finally, the parties consider that services from the Mediterranean and Black Sea represent a significant source of competition to the operators on the north Europe to Far East trades.

(57) The Commission's findings in respect of possible substitution coming from any of those ways are explained below.

5.1. **Maritime services**

(58) For the following reasons, none of the alternative maritime services mentioned by the parties (except for services via the Pacific, which are separately considered in recitals 85 to 88) is considered to form part of the same market as the market for scheduled maritime transport services for the transport of containerised cargo between north Europe and the Far East.

(59) In the Tetra Pak case ([19]), the Court of Justice of the European Communities stated that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that the fact that different products are, to a marginal extent, interchangeable does not preclude the conclusion that these products belong to separate product markets.

(60) The Commission takes the view that, for the vast majority of categories of goods and users of containerised liner shipping, the other forms of maritime transport, including conventional (break-bulk liner transport, do not offer a reasonable alternative to

([17]) See footnote 16.

([18]) Reply to the Statement of Objections, paragraph 2.41. The EATA only directly covered the eastbound trade whilst the FETTCSA covered both eastbound and westbound trade.

([19]) Case C-333/94 P *Tetra Pak International SA* v *Commission* [1996] ECR I-5951, points 13,14 and 15.

containerised transport services on the routes falling within the relevant geographic market in this case and that these services constitute one or more markets in their own right.

(61) The effect of marginal competition from other means of transport for certain categories of goods can be limited. This situation arises because liner shipping companies are able to identify shippers of such goods and, because of the differentiated price structure in liner shipping, offer lower prices to such shippers without necessarily affecting prices generally.

5.1.1. *Non-scheduled services*

(62) Firstly, scheduled maritime transport, or liner services constitute a separate market from that of tramp services ([20]). On the whole the nature of the relationship between shippers on the one hand and shipping lines is quite different depending on whether the latter is providing liner services or tramp services. Liner services are provided on the basis of the operator being a 'common carrier': that is to say, the transport service provider offers to carry all the goods brought to it for carriage. On the other hand tramp services are usually supplied on the basis of ad hoc individually negotiated contracts.

(63) Charters are only viable for containerisable goods ([21]) provided the shipper has a sufficiently large cargo, or is able to combine with other shippers for each trip. Furthermore, chartering and bulk or specialised services will not as a rule give the frequency, regularity or dependability of service required by many shippers, nor can they provide the door-to-door service often required.

5.1.2. *Bulk services*

(64) It is clear that many bulk commodities can be containerised and that before the advent of containerisation (in the late 1950s) all goods travelled bulk of some description or another. In the present case, in order to determine the competitive conditions in the relevant market, it is only necessary to consider the effect of substitutability from carriage in container to carriage in bulk: there is no lasting substitution from container to bulk in the vast majority of cases.

(65) Almost all cargo can be containerised and, over time, it is likely that the degree of containerisation in most maritime markets involving Member States will be very high. In mature markets, such as the northern Europe/United States of America or the northern Europe/Far East markets, the process of change towards containerisation is more or less complete, and few, if any, non-containerised cargoes are left which are capable of being containerised.

(66) Furthermore, once a type of cargo regularly becomes containerised it is unlikely ever to be transported again as non-containerised cargo. The reasons for this are that shippers become accustomed to shipping in smaller but more frequent quantities and become accustomed to the fact that once cargo has been loaded into a container, it is easier to ship onwards from the port of delivery to the ultimate consignee using multimodal transport.

(67) Thus, as the degree of containerisation increases, shippers of non-containerised cargoes turn towards containerised services but once those shippers have become accustomed to shipping in containers they do not revert to non-containerised shipping. Such examples of one-way substitutability are not uncommon ([22]).

(68) Drewry ([23]) makes a cautious estimate that the containerised share of world general cargo trade has risen from 20,7 % in 1980, to 35,1 % in 1990, to 41,6 % in 1994. Drewry forecasts that by the year 2000, this percentage will rise to 53,8 %. The transformation from bulk shipping to containerisation reflects not only a change in the nature of the goods being shipped (essentially from raw materials to manufactured commodities), but also the inherent characteristics of containerised liner shipping.

(69) These characteristics include the following. Smaller more frequent shipments, as is typically the case with

([20]) See the definition of 'tramp vessel services' in Article 1(3)(a) of Regulation (EEC) No 4056/86, which emphasises the freely negotiated nature of tramp service freight rates.

([21]) It should be noted that containers generally measure 20 feet or 40 feet by eight feet on the outside and that vessel slots are sized to match. Accordingly cargoes which are larger in width or length than these dimensions use up slots in an inefficient manner.

([22]) Such one-way substitutability is not restricted to shipping: for example, although soft drinks are not a substitute for bottled waters, it is not necessarily the case that bottled waters are not a substitute for soft drinks. See Commission Decision 92/553/EEC (Nestlé/Perrier) (OJ L 356, 5.12.1991, p.1).

([23]) Drewry, Global Container Markets, pages 38 to 48.

container shipping, lead to reduced inventory costs. Containerised goods are less likely to suffer from damage and pilferage. Containerised goods are easier to ship multimodally. For these reasons, once a commodity has made the transformation from bulk to container, possibly on a route-by-route basis, the differences in the nature of the service being provided mean that once that transformation period is over, a shipper is highly unlikely to revert to bulk shipping.

(70) In this context, it is not important that certain commodities may still travel by both means: the essential question for determining demand substitutability is whether the choice of mode is made on the basis of the characteristics of the mode. Thus, the fact that some steel products may travel by bulk and others by container does not show that the two modes are substitutable since it does not take into account the diverse nature (and value) of steel products nor the delivery requirements of customers. The same is true for the other products for which the parties claim substitutability between bulk and containers.

(71) Even to the extent that reefer containers may be substitutable for bulk reefer services ([24]), for the reasons given above this does not mean that bulk reefer services are substitutable for reefer container services. Apart from the advantages offered by liner container services, such as smaller volumes and speed of transfer to other modes of transport, a wider variety of products can travel in reefer containers than can travel as bulk reefer cargoes. Such products include furs and leathers, pharmaceuticals, electronic goods and, because of the steady temperatures and the ability to control ripening, soft fruits.

(72) On this basis, while it is possible that in exceptional circumstances some substitution may occur between break-bulk and container transport, it has not been demonstrated that there is any lasting substitution from container towards bulk for the vast majority of cases.

([24]) According to Mats Jansson, President of Unicool and Cool Carriers, 'The reefer container capacity deployed is still limited and the negative impact so far on the demand for specialised reefers is small.' (Fairplay, 3 July 1997).

(73) On the supply side, the parties have argued that break and neo-break carriers could readily convert their vessels so as to enter into the relevant market and for this reason should be regarded as potential competitors.

(74) In principle, any vessel can carry containers. The effect of potential competition from operators of non-fully containerised vessels could only be material if both of the following two conditions were fulfilled. First, it would have to be shown that suppliers of such services could economically compete with the parties on even terms and second that customers regarded carriage on a non-fully containerised vessel as being functionally interchangeable with carriage on a fully containerised vessel.

(75) In considering whether the first of these cumulative tests is fulfilled, it is essential to note that the characteristics and performance of non-fully containerised vessels are significantly different to those of fully containerised vessels:

'It is crystal clear, and almost implicit in the terminology, that cellular containership capacity is more efficient and more productive than non-cellular space when it comes to carrying unitised (i.e. containerised) cargo, and hence of greater significance as far as the supply/demand balance is concerned. Each slot on a cellular vessel will provide more container carrying capacity in any given year than a slot on a non-cellular vessel, since the cellular ship:

— spends less time in port,

— usually possesses a much higher sea-speed,

— operates on regular liner schedules ([25]).

While ro-ros may achieve 80 % or more of the productivity of a cellular vessel, a semi-containership or a con-bulker will be considerably less efficient on the grounds of both speed and cargo-handling time in port. An overall estimate of the relative productivity ratios for cellular and non-cellular capacity might reasonably be 2:1' ([26]).

(76) Apart from the performance characteristics which militate against supply side conversion, there are a number of technical characteristics. The first of these is the additional expenditure required to carry containers

([25]) Drewry, Global Container Markets, page 69.
([26]) Drewry, Global Container Markets, page 71.

on vessels which were not specifically built as container vessels. Such costs are both one-off in the sense that chains and fittings have to be purchased (according to Dynamar at a cost of some ECU 150 per slot) and variable in the sense that the cost of labour is higher for stowing containers on non-container vessels than on container vessels. Account needs also to be taken of the additional port costs involved in carrying containers on such vessels due to slower stowing times and consequentially longer periods spent in port.

(77) The second reason for which the potential capacity of non-fully containerised vessels is less than the parties assert is the fact that the operators of such vessels do not possess the same fleets of containers as do operators of fully containerised vessels. Typically each of the parties has three containers for every vessel slot it operates. Many operators of break-bulk services will own no containers at all. The significance of this is especially important given that 'the global box inventory has seldom, and certainly not for the last 10 years or more been sufficient to permit all the nominal containership capacity of the non-cellular fleet to be used' ([27]). This situation is compounded by the fact that the operators of non-fully containerised vessels do not generally possess the same land-side facilities as do operators of fully-containerised vessels.

(78) So far as the customers are concerned, the Commission does not accept that the vast majority of customers of the parties would regard carriage on a bulk or neo-bulk vessel as being substitutable for carriage on a fully-containerised vessel. Differences so far as customers are concerned are the absence of scheduled weekly sailings and the fact that in many cases non-fully containerised vessels use different port terminals or berths to the ones used by fully containerised vessels with consequential inefficiencies for multimodal transport operations.

(79) Thus, the Commission does not agree that break and neo-break carriers should be considered a source of either actual or potential competition to containerised liner services. Operators of non-containerised vessels would have to make significant investments in containers, stowing equipment and land-side facilities, as well as incurring higher operating costs, in order to offer services that would be less attractive to customers.

([27]) Drewry, Global Container Markets, page 70.

5.1.3. *Mediterranean/Black Sea services*

(80) The parties have also argued that services from the Mediterranean and Black Sea represent a significant source of competition to the operators on the north Europe to Far East trades. The parties have failed to give a single example of cargo actually switching from one to the other in the Reply to the Statement of Objections in the EATA proceedings. Furthermore, Drewry considers that:

'By turning in the Mediterranean, Europe-Far East ships could save at least two weeks on their average nine-week round voyage time (a 22 % increase in vessel productivity), but this seems unlikely in anything like the foreseeable future, given the infrastructural limitations of the southern ports and the European rail system' ([28]).

(81) In 1991, port productivity in the Mediterranean ports generally continued to be lower than in northern Europe and direct handling costs were generally higher ([29]). A shipper based in northern Europe faced with increased prices on northern Europe/Far East services would not shift to Mediterranean/Far East services unless the prices increased so significantly as to make it cheaper to pay the extra costs of inland transport to a Mediterranean port and the extra costs at such a port ([30]).

(82) In addition to their argument that Mediterranean/Far East services are substitutes for northern Europe/Far East services, the parties argue that operators which incorporate wayport calls in the Mediterranean en route to/from northern Europe could increase capacity on their northern Europe/Far East services by using the capacity they set aside for Mediterranean/Far East cargo. The Commission does not consider that an operator, having taken a decision to operate a northern Europe/Far East service which incorporates Mediterranean wayport call, would have been likely to make a decision at short notice to switch an appreciable part of the capacity set aside for Mediterranean cargo to

([28]) Drewry, Global Container Markets, page 76.

([29]) Drewry, Global Container Markets, page 128 and Table 7.9.

([30]) See Commission Decision of 19 December 1996, recital 36; Decision pursuant to Article 6(1)(b) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, (OJ L 395, 30.12.1989, p. 1).

northern European cargo. If it would have done so, it would have lost the service advantage of being able to offer a Mediterranean service whilst still incurring the costs of making calls at one or more Mediterranean ports.

5.2. **Air transport services**

(83) Air transport services (or combined sea-air transport services) are only appropriate for goods which require faster transport times, the high value of which permits higher transport costs to be incurred.

(84) Giving that any shipper is concerned to reduce its transport costs to the necessary minimum, it will only incur the additional expense of air transport services if it is necessary for its goods to be delivered faster than would be possible if they were carried by sea and if the value of the goods is sufficiently high to bear the higher transport costs. In such a case it would not be correct to say that sea transport services were substitutable for air transport services. It should be noted that the vast majority of goods carried eastbound from northern Europe to the Far East are considered by the parties to be of low value.

5.3. **Land transport services and transpacific services**

(85) The Trans-Siberian Railway and services via the Pacific were available to shippers during the time when the FETTCSA was in force. However, neither of them can be considered to have been a suitable substitute for scheduled maritime transport of containers on the northern Europe/Far East trade.

(86) The Trans-Siberian Railway was not an efficient substitute form of transport in the 1990s, a period of economic and political instability in the countries of the former Soviet Union. It is understood that volumes carried on the Trans-Siberian Railway have decreased considerably since the collapse of the Soviet Union. In any event, it is understood that a single 4 000 TEU vessel carries the equivalent to some 50 train loads of 1,5 miles (approximately 2,4 kilometres) in length. Moreover, its longer transit times and insufficient reliability means that it was at best an inefficient competitor: 'The [Trans-Siberian Railway] advertises a 35 to 45-day transit between Rotterdam and Japan but this is subject to weather conditions in the USSR and the timing of connections at either end …. The [Trans-Siberian Railway] route is usually sold at rates below all-water (non-Conference) levels, in view of the supposedly longer transit times. However when, as now, all-water rates are themselves depressed, the [Trans-Siberian Railway's] ability to discount fades into near-insignificance' ([31]). The information available to the Commission indicates that if included in the relevant market it accounted for a mere 2 % of traffic.

(87) The parties have furnished no evidence that trans-shipments at US ports or rail land bridges account for material quantities of goods carried between North Europe and the Far East. Moreover, a US landbridge service was actually offered by APL in 1991 but was an ineffective competitor: 'While the transit time is good (28 days), it is a costly way to do things when the all-water route can do the same using just one ship and two lifts. In view of the prevailing eastbound all-water rates, APL does not currently offer a Europe/Far East service and while the other direction is limited to Japan/Europe one gathers that little is actually moving that way' ([32]).

(88) On the basis of the foregoing, the Commission concludes that even if land transport services and services via the Pacific were included in the relevant market, they would not change the market position of the FETTCSA to any material extent.

6. COMBINED EFFECT OF THE FEFC, FETTCSA AND EATA

(89) The Commission considers a purpose of the FETTCSA to have been to extend the practice whereby members of the FEFC agree common commercial policies on charges and surcharges to the principal non-Conference lines operating between northern Europe and the Far East.

(90) Although some members of the FEFC were not party to the FETTCSA, the system of price-fixing practised by the FEFC and the fact that the most important members of the FEFC were parties to the FETTCSA would have ensured that all members of the FEFC, whether or not party to the FETTCSA, operating within the geographical scope of the Agreement would have benefited from any restrictive effects of the FETTCSA.

(91) The EATA and FETTCSA contained provisions appointing the Director-General and staff of the FEFC as secretary and secretariat of the respective Agreements which are identical in all material respects. Their role of administering the three Agreements was likely to reinforce the strong links and increase the exchange of information between the Conference members and non-Conference members.

([31]) Containerisation International, May 1991, p. 39.
([32]) Containerisation International, May 1991, p. 39.

7. MARKET SHARES

(92) According to EATA estimates, the EATA parties had a market share of some 86 % of all eastbound liner traffic from north Europe to the Far East in 1991 ([33]). This would also have been the market share of the FETTCSA parties at that time, given that the only EATA member who was not a member of the FETTCSA was Hyundai who did not enter the Europe/Far East trade until August 1992 ([34]). This would have left 14 % of the market nominally unaffected by the Agreement. That figure includes an allowance for the relatively unimportant quantities of traffic (approximately 2 %) carried on the Trans-Siberian Railway.

Table 2: Volumes and market shares in 1991

Containerised cargo on liner vesels eastbound, northern Europe to Far East

	TEUs	%
EATA	1 447 000	86
Others	235 000	14
Total	1 682 000	100

Source: EATA.
Note: figure for 'others' includes Trans-Siberian Railway.

(93) The EATA parties have estimated that the comparable figures to those given for the EATA parties' market share in Table 2 were 83,5 % in 1993, 80 % in 1994. Those figures include the market share of Hyundai, and the market share of the FETTCSA parties (which included all EATA members except Hyundai) would have been correspondingly lower.

8. COMPETITION IN THE MARKET

(94) The parties consider that there was significant actual competition from non-EATA members, and significant competitive pressure from potential competition ([35]). Recitals 95 to 122 assess those claims.

([33]) Decision 1999/485/EC (Europe Asia Trades Agreement), at recital 80.

([34]) Hyundai entered the trade by way of a vessel sharing agreement with SeaLand.

([35]) In these proceedings the parties have adopted the same arguments as to market definition and competitive pressures as they put forward in the EATA proceedings, even though the EATA only directly covered the eastbound trade whilst the FETTCSA covered both eastbound and westbound trade. In this section, references to the parties' arguments are, unless otherwise indicated, references to arguments put forward in their reply to the Statement of Objections in the EATA proceedings.

(95) First, however, it is necessary to consider the parties' argument that the Commission, by discussing each element of potential and actual competition in turn, separately and one by one, gives the appearance of having given balanced consideration to each element, but that the Commission fails to give weight to the totality of competition presented by the competitive alternatives. In making this argument the parties are referring to the alleged competitive constraints imposed by 1. potentially substitutable services, and 2. the actual and potential competition.

(96) Potentially substitutable services are considered in recitals 5 to 88 in relation to the definition of the market. As stated in recital 59, the fact that different products are, to a marginal extent, interchangeable does not preclude the conclusion that these products belong to separate product markets. As regards actual and potential competition, for the reasons stated below the Commission concludes that the FETTCSA parties were not subject to effective competition from actual or potential competitors whether those competitors are considered individually or in aggregate.

8.1. **Actual competition**

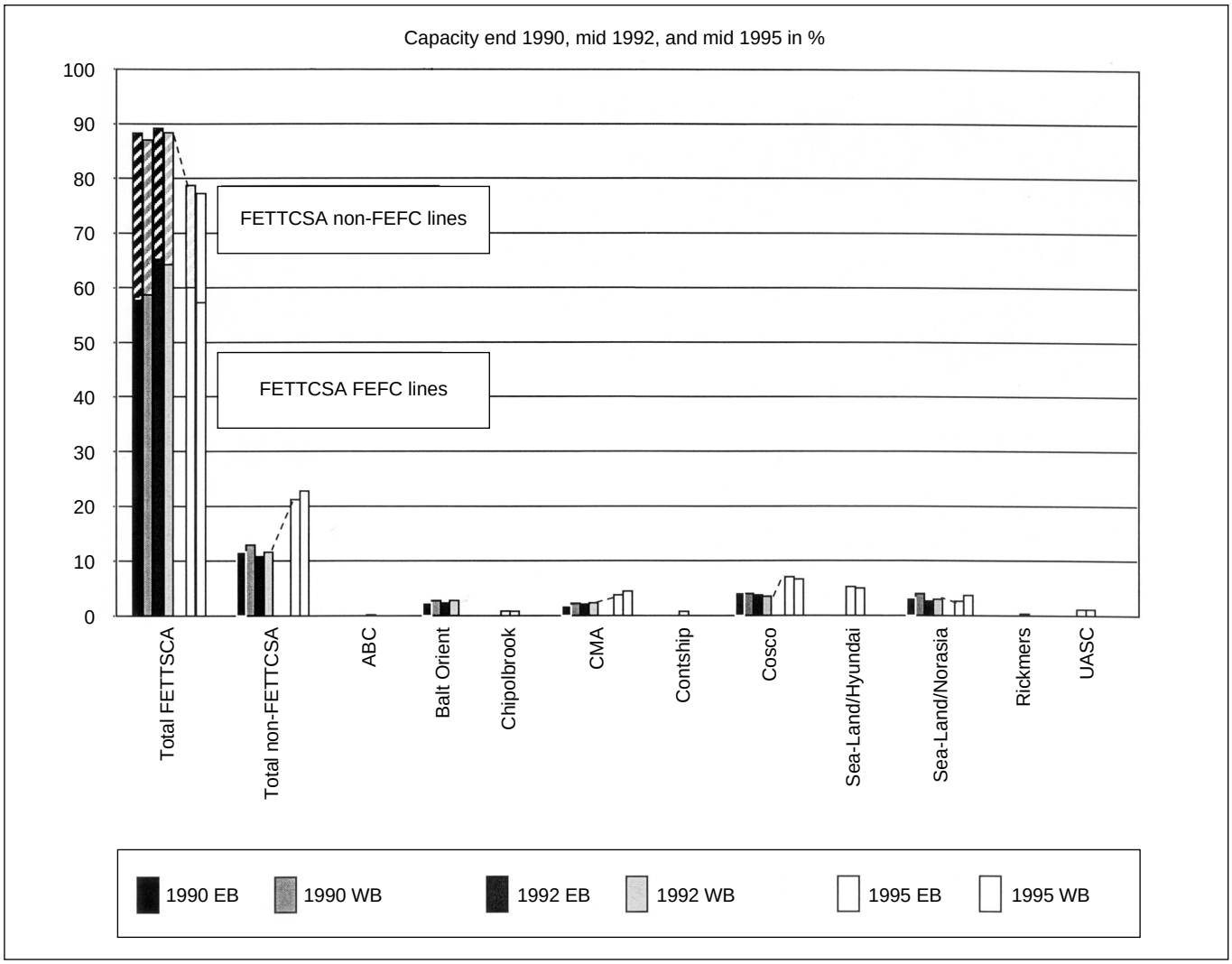
(97) The parties argue that they faced competition in the direct northern European to Far East eastbound trade from a number of operators including COSCO/Broad Remix, CMA, Norasia, Sinopol, Sinotrans and USAC.

8.1.1. *Capacity and utilisation*

(98) In their reply to the Statement of Objections in the EATA case, the EATA parties provided a list of containerised operators, not members of the EATA, showing their eastbound capacity in 1993. In order, however, to get a full picture of the competitive pressure exerted by actual competitors to the FETTCSA parties, it is necessary to examine whether the operators that were not members of FETTCSA had sufficient capacity to win significant market share from the FETTCSA parties.

(99) The following chart shows the eastbound (EB) and westbound (WB) capacity operated by the FETTCSA lines and by the non-FETTCSA lines. The chart shows the capacity at the end of 1990 (i.e., shortly before the FETTSCA dated 5 March 1991), at mid-1992 (i.e., a year after the entry into the force of the Agreement on 4 June 1991) and at mid-1995 (i.e., a year after the Agreement was terminated on 10 May 1994).

Figure 1: Northern Europe/Far East capacity



Source: Drewry, Strategy and Profitability in Global Container Shipping 1991, Table, 6.18; Drewry, Container Market Profitability to 1997, 1992, Table 5.12; Drewry, Global Container Markets, Table 5.16.

(100) The capacity figures in the chart exclude capacity set aside for Mediterranean/Far East cargo.

(101) As shown in figure 1, the FETTCSA lines' share of capacity on the trade was in the 85 to 90 % range in 1991 and 1992. Even if that share subsequently fell, the FETTCSA lines still had a significant 79 % eastbound and 77 % westbound share of capacity in mid-1995, a year after the FETTCSA had been terminated. The significance of these figures is that in order to attract significant volumes from the FETTCSA lines, direct competitors would have had to have introduced significant new capacity. Certain non-FETTCSA lines did introduce new capacity in the 1991 to 1994 period, and these are considered in recitals 106 to 111.

(102) An alternative way of assessing the significance of the FETTCSA lines is to consider the number of services operating a weekly frequency. It is generally accepted that on a major trade lane it is a tremendous competitive disadvantage for a carrier not to offer a weekly, preferably fixed-day weekly, service ([36]). As shown in Table 3, it was the FETTCSA lines which offered by far the largest proportion of such services in the 1991/1992 period.

([36]) See Decision 1999/243/EC (Transatlantic Conference Agreement), recitals 284 to 286 and 365.

Table 3: Number of weekly services on northern Europe/Far East, end 1990 and mid 1992

Year	FETTCSA		non-FETTCSA	Total
	FEFC	non-FEFC		
End 1990	6	4	2	12
Mid-1992	9	4	3 (*)	16

(*) Includes the POL/CMA joint service; POL was an FEFC and FETTCSA member, CMA not.

Source: Drewry, Strategy and Profitability in Global Container Shipping, 1991, Table 6.18; Drewry, Container Market Profitability to 1997, 1992, Table 5.12; Lloyd's Shipping Economist, October 1992, p. 9; Drewry, Global Container Markets, p. 160.

(103) Over the 1991 to 1994 period in which the FETTCSA was in force, the supply/demand balance on the northern Europe/Far East trade was as follows.

Table 4: Northern Europe/Far East supply/demand balance, 1991 to 1994

Year	Eastbound			Westbound		
	Net capacity	Demand	Utilisation	Net capacity	Demand	Utilisation
	(million TEU)		(%)	(million TEU)		(%)
1991	1,26	1,03	81,7	1,68	1,60	95,2
1992	1,52	1,10	72,4	2,02	1,65	81,7
1993	1,53	1,30	85,0	2,36	1,73	73,3
1994	1,92	1,46	76,0	2,57	1,87	72,8

Source: Drewry, Global Container Markets, Table 5.19.

(104) Table 4 shows the continuous eastbound and westbound growth that took place in demand. It also shows the imbalance between the eastbound and westbound demand that is a feature of the northern Europe/Far East trade. In 1991, the year in which the FETTCSA Agreement was entered into, westbound capacity was almost fully utilised. The 1991 Drewry report infers that 'much of the additional westbound trade this year (1991) will have moved on Conference vessels due to the limited space with the non-Conference carriers. This, in fact, accords with the recent FEFC pricing strategy to press for rate increases due to the fact that the non-Conference vessels can only be filled once, and that the residual cargo (which now almost equates to the total FEFC capacity) would have no choice but to pay the higher rates. The obvious success of this strategy can be judged from the September 1991 announcement that the FEFC intended to impose a second westbound GRI (General Rate Increase) (amounting to USD 400 per TEU) within 12 months of the last such rise' ([37]).

(105) The figures given for demand in Table 4 exclude military traffic and relay/trans-shipment cargo moved via main trade ports as well as empty containers. They therefore underestimate actual vessel utilisation. The figures given for capacity are calculated after deduction of EATA cap in 1993 and 20 % slot reduction due to deadweight limitations.

8.1.2. *Cosco/Broad Remix*

(106) In 1991, the largest non-FETTCSA line on the trade was the Chinese State carrier China Ocean Shipping Company (Cosco). In 1990/1991, Cosco had a single string of relatively small (less than 1 500 TEU vessels) calling at Chinese ports as well as Hong Kong and Singapore. By 1992, working with a Hong Kong company BR Line, Cosco offered six sailings a month still on relatively small vessels ([38]). In 1993/1994, Cosco made a great leap forward by introducing new 3 800 TEU vessels and thereby increasing its capacity by 80 %. This enabled it to offer two strings with six sailings per month overall, still calling at Chinese ports as well as Hong Kong and Singapore ([39]).

(107) Although Cosco was well placed to meet the growing trade between northern Europe and China and Hong Kong, it was likely to have provided only limited competition to the FETTCSA lines. First, at least until its new 3 800 TEU vessels were introduced in 1993/1994, its service was based on vessels with low speeds and low TEU capacity. In 1991, the transit time for Cosco's Rotterdam/Hong Kong service was 36 days eastbound and 30 days westbound, as compared to, for example Hanjin's 21 days eastbound and westbound or Maersk's 24 days eastbound and 21 days westbound ([40]). Secondly, Cosco is unlikely in any event to have been an effective competitor for cargo other than that carried to and from China, Hong Kong and Singapore. In 1992

([37]) Drewry 1991, p. 141.
([38]) Lloyd's Shipping Economist, October 1992, p. 9.
([39]) Lloyd's Shipping Economist, October 1994, pp. 6 to 10.
([40]) Containerisation International, May 1991, p. 37; April 1991, p. 31.

it lacked space on the westbound leg of its service ([41]). It also lacked direct calls at ports in Korea, Japan and Taiwan, which made it less likely to have been able to compete with those FETTCSA lines which had such direct calls. In 1990, those three countries are estimated collectively to have generated 56 % eastbound and 57 % westbound of Europe/Far East cargo ([42])

8.1.3. *Hyundai*

(108) The Korean carrier Hyundai Merchant Marine entered the trade in September 1992 by introducing the 'AEX' service in conjunction with Sea-Land and Norasia. Hyundai contributed six 2 640 TEU vessels that it switched from the transpacific trade, Sea-Land contributed three 2 600 TEU vessels and Norasia slot-chartered the equivalent of 50 % of the space provided by Sea-Land.

(109) Hyundai's ambitions to be a major player in the east-west trades were known, and its entry was not surprising. Drewry states:

'Hyundai was already a major force on the transpacific, and doubtless found that many of the shippers and importers in Asia were common to both trades — indeed this would have been a major factor in its decision to enter the new market — while the size and type of tonnage required, the level of infrastructural sophistication provided, and the scope of inland services and information systems demanded were all closely aligned to its existing transpacific operations' ([43]).

(110) Hyundai joined the EATA and thus the parties do not mention Hyundai as an actual competitor in their reply to the Statement of Objections in the EATA proceedings. By joining the EATA, Hyundai agreed to limit its competition with the FETTCSA lines by participating in the capacity management programme set up under the EATA.

(111) The capacity introduced by the AEX service was significant; Drewry estimates it to have been equivalent to 6,9 % of then eastbound space and 6,5 % westbound ([44]). However, this must be seen in the context of the strong growth in volumes that were taking place in the trade. Annual growth in demand in 1993 was 18 % eastbound and 5 % westbound. In a survey of the Europe/Far East trade in October 1992, Lloyd's Shipping Economist reviewed likely new capacity on the trade and concluded:

'However, the general view is that the market will be much stronger by the mid 1990s, and the extra capacity might do little more than balance the actual demand.

One additional point to note is that with the arrival of Hyundai and APL (whose entry was then thought to be imminent, but whose entry in fact did not occur until 1995), all the major east-west liner operators will be active in this trade — unlike the north Atlantic, where lines live in constant fear of new entrants from the pool of highly-qualified global carriers, there is now little reason to fret on that score' ([45]).

8.1.4. *Other operators*

(112) CMA: The competition offered by the Compagnie maritime d'affretement (CMA) is likely to have been limited by the nature of its service. In the 1991/1994 period, CMA operated a joint service with POL, a Conference member and member of the FETTCSA. CMA is unlikely to have followed a policy of aggresive pricing against the Conference orientation of its joint service partner POL. In May 1991, Containerisation International reported that 'Seeing that its consortium partner POL is already a member, CMA has now applied to join the (FEFC) too' ([46]). Furthermore, in early 1991 when the FETTCSA was entered into, the CMA/POL service offered a only nine-day frequency. Although this was later increased to a fixed-day weekly service, the service stopped at a large number of ports and 'only a minority of boxes are actually carried right through from one end to the other' ([47]). By 1994, CMA had introduced larger capacity vessels on its service and chartered slots to the Tonnage-Sharing Agreement of the Conference lines Nedlloyd/CGM/MISC. Moreover, CMA is reported to have made a renewed application to join the Conference ([48]).

(113) Norasia: The competition offered by the joint Norasia/Sea-Land 'AME' service is likely to have been limited because of the nature of the service:

'Take the Sea-Land Service and Norasia Line combination, whose weekly sailings from Europe call at four ports before arriving in the Far East. Its primary market is actually north Europe to the mid-east and Indian subcontinent, augmented by cargo from the

([41]) Lloyd's Shipping Economist, March 1992, p. 29.
([42]) Drewry 1991, Table 6.20, p. 141.
([43]) Drewry, North-South Trades, September 1995.
([44]) Drewry 1992, p. 83.
([45]) Lloyd's Shipping Economist, October 1992, p. 10.
([46]) Containerisation International, May 1991, p. 35.
([47]) Lloyd's Shipping Economist, October 1992, p. 8.
([48]) Lloyd's Shipping Economist, October 1994, p. 8.

United States of America and the Mediterranean (trans-shipped at Algeciras and Malta respectively). Indeed, each intermediate call forms a sub-market within the overall Europe/Far East intinerary (allowing multiple use of slots) and a valuable repositioning opportunity. But while such a compound service achieves much, its performance in the straight Europe/Far East stakes is necessarily compromised. Also, with so many ports en route, and a relatively slow (17 knot) speed, it is no wonder that Sea-Land/Norasia employs 13 ships (of which 10 happen to be furnished by Norasia); by contrast the Conference consortia use only eight or nine per end-end string' ([49]).

(114) Moreover, although Norasia is not a Conference member its attitude towards strong competition on price has been reported as follows:

'Norasia has … avoided too much involvement in liner bodies, with membership of just two open-structured Conferences covering northern Europe and the Mediterranean to the Middle East. Nevertheless, where rates are concerned, it is very much a supporter of bodies formed to achieve sensible rate levels' ([50]).

(115) As noted in recital 108, Sea-Land and Norasia also participated with Hyundai in the 'AEX' service introduced in September 1992.

(116) Sinotrans: Sinotrans will have offered only very limited competition because of the low capacity of, and limited destinations served by, its northern Europe/Far East service. In the relevant period it was offering a monthly service between northern Europe and Hong Kong and ports in China, using three vessels of between 1 000 and 1 300 TEU ([51]).

(117) USAC: USAC will also have offered only very limited competition because although it offered a weekly service, its 'figure-of-eight operation has been sewn together from separate services from Europe and the Far East into the Gulf, and cargo to/from south Asia and the Mediterranean is also being carried on the ships' ([52]). Only a small number of its slots are estimated to have been used for northern Europe/Far East cargoes ([53]).

8.2. **Potential competition**

(118) The parties argue that liner shipping is highly contestable, and that there was potential for entry and cross-entry by container operators that were not present on the northern Europe/Far East trade.

8.2.1. *Contestability*

(119) The parties argue that liner shipping is an example of a market that is highly contestable. Their argument is thus that the existence of potential competition guaranteed efficient services at competitive prices. In the TACA and EATA Decisions, the Commission has found that the applicability of the theory of contestable markets to liner shipping is disputed by many economists, and that the contestability of markets must be distinguished from flexibility in the redeployment of vessels ([54]). The Commission has concluded in those Decisions that arrangements between shipping lines on rates (Conferences) or capacity (consortia), or in cartels which are even more restrictive of competition, including price agreements between Conference members and outsiders, cannot be analysed solely and simplistically on the basis of the contestable market theory. That conclusion also holds good in this case.

8.2.2. *Container ship cross-entry*

(120) The parties argue that the Commission has not taken into account the possibility that lines active on other trades might enter the northern Europe/Far East trade (i.e., 'cross-entry' from other trades).

(121) Cross-entry onto the northern Europe/Far East trade, a major east-west trade, is most likely to have come from the major global carriers not yet present on the trade. In 1991 Drewry identified 18 'global carriers' by reference to factors such as their size, presence on east-west trade, commercial orientation and assets ([55]). A further three carriers were identified as candidates for global carrier status ([56]). Of those 21 actual and almost global carriers,

([49]) Containerisation International, May 1991, p. 35.
([50]) Lloyd's Shipping Economist, May 1994, p. 17.
([51]) Lloyd's Shipping Economist, October 1992, pp. 7 and 9; October 1994, pp. 8 and 10.
([52]) Lloyd's Shipping Economist, October 1992, p. 8.
([53]) Lloyd's Shipping Economist, October 1992, pp. 7 and 8; Lloyd's Shipping Economist, October 1994, p. 8.
([54]) Decision 1999/243/EC (Transatlantic Conference Agreement), recitals 350 to 357; Decision 1999/485/EC (East Asia Trades Agreement), recitals 125 to 132.
([55]) Drewry 1991, Table 2.7, p. 31.
([56]) Drewry, 1991, p. 30. Lloyd's Shipping Economist, November 1992, pp. 18 and 19, identified 19 'leading global carriers' which did not include ACL and MISC from Drewry's list.

15 were FETTCSA members and only three have not already been discussed above as actual competitors: Atlantic Container Line (ACL), American President Line (APL) and Zim.

(122) ACL is and was a line only active on the north Atlantic. Zim did operate a southern Europe Far East service at the relevant time, but the focus of its service in Europe was in southern rather than northern Europe. APL was thus the only global carrier not present on the trade but which was considered likely to enter. Lloyd's Shipping Economist was thus able to reach its conclusion in October 1992 (quoted in recital 111)) that operators on the Europe/Far East trade had little reason to fear new entrants from the pool of highly-qualified global carriers.

LEGAL ASSESSMENT

9. THE APPROPRIATE REGULATIONS

(123) The charges and surcharges which are covered by the FETTCSA concern maritime transport services which fall within the scope of Regulation (EEC) No 4056/86, rail, road and inland waterway transport services (or services ancillary thereto) fall within the scope of Regulation (EEC) No 1017/68 and services which fall within the scope of neither of those two Regulations therefore fall within the scope of Regulation No 17.

(124) The Commission has in this case applied the procedures applicable under Regulations (EEC) No 1017/68 and (EEC) No 4056/86, as well as those of Regulation No 17. Thus, even if the Commission were wrong in its identification of the Regulation(s) applicable to each of the charges and surcharges, the parties have had the benefit of the procedural safeguards provided for by all possibly applicable Regulations.

(125) The Commission considers that the main charges and surcharges fall within the scope of the different Regulations as follows.

9.1. **Bunker adjustment factor (BAF)**

(126) A BAF is a price adjustment made by a carrier to reflect the current cost of bunkers (i.e. ship's fuel) against a base level incorporated in the freight rate. The BAF relates to maritime transport, and therefore a restrictive agreement as to BAFs falls within the scope of application of Regulation (EEC) No 4056/86.

9.2. **Currency adjustment factor (CAF)**

(127) A CAF is a price adjustment made by a carrier in order to compensate for fluctuations in the exchange rates between the currency in which the carrier charges shippers and the currencies in which the carrier incurs its costs. A Conference's CAF is based on the weighted effect of the movements of the currencies in which each line earns its revenues and/or incurs its expenses against the tariff currency. To the extent that a CAF is applied to the price of each of maritime transport, port services, and inland transport, a restrictive agreement as to a CAF falls within the scope of application of respectively Regulation (EEC) No 4056/86, Regulation No 17 and Regulation (EEC) No 1017/68.

9.3. **Terminal handling charges (THC)**

(128) A THC is a charge made by a carrier in order to cover certain costs incurred by the carrier at a port, including receiving/delivering a container, inspecting a container, handling a container within the port area and moving a container to or from the ship. The handling of containers at a port (possibly in combination with other services such as inspection and storage) at least in part contitutes stevedoring and other cargo-handling services within the port which are not maritime transport services as such ([57]). Therefore a restrictive agreement as to THCs falls at least partly within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to a THC has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable ([58]).

9.4. **Less-than-container-load (LCL) service charges**

(129) An LCL service charge is a charge made by a carrier in order to cover certain costs incurred by the carrier where the goods to be shipped are less than a full container load. The additional costs associated with less-than-container-load goods include those of receiving/delivering loose goods, packing/unpacking the goods into/from a container, and administration. These operations are cargo-handling services within the port or terminal area; they are not maritime transport

([57]) See, in relation to cargo-handling at airports, Commission Decision 98/190/EC of 14 January 1998 (Flughafen Frankfurt/Main AG), (OJ L 72, 11.3.1998, p. 30.).

([58]) See Case C-246/95 P *Commission* v *UIC* [1997] ECR I-1287, point 42.

services as such. Therefore, a restrictive agreement as to LCL service charges falls within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to an LCL service charge has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable ([59]).

9.5. **Detention and demurrrage charges**

(130) These are charges paid by shippers for respectively cargo and/or equipment kept beyond the freetime allowed for taking receipt of cargo in the port/terminal/container yard, and for detaining carriers' containers/chassis beyond the prescribed freetime period. These operations can be considered equivalent to respectively cargo-storage and equipment hire services; they are not maritime transport services as such. Therefore, a restrictive agreement as to such charges falls within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to detention or demurrage charges has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable ([60]).

10. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 2 OF REGULATION (EEC) No 1017/68

(131) For the reasons set out in recitals 132 to 144, the Commission considers that the parties infringed Article 81(1)(a) of the Treaty and Article 2(a) of Regulation (EEC) No 1017/68 by agreeing, within the framework of the FETTCSA, not to discount from published tariffs for charges and surcharges.

10.1. **Article 81(1): restriction of competition**

(132) The stated purpose of the FETTCSA (see recitals 22 to 27) was to create standards for the calculation of charges and surcharges, and to use a common mechanism for the calculation of charges and surcharges. Provisions in the Agreement mirrored the wording of Article 2(1)(f) and (c) of Regulation (EEC) No 4056/86 relating to 'technical agreements'.

(133) As described in recitals 35 to 39, the parties agreed not to discount off published rates for charges and surcharges, whether those rates were published as part of an FEFC tariff or were published by an individual carrier. Charges and surcharges are a potentially significant part of the overall price paid by shippers. An agreement not to discount off published prices restricts price competition contrary to Article 81(1)(a), even if the parties to such an agreement do not expressly agree on the level of their published prices ([61]).

(134) An agreement between the parties not to grant discounts from published levels significantly reduces the ability of lines to compete with regard to the final price charged to shippers. The ocean freight and inland haulage may be less than half of the price paid by the shipper in question, in which case the scope for discounting in relation to the overall price is reduced. This amounts to a significant restriction of price competition.

(135) The parties have pointed out, correctly, that the Commission is not putting forward evidence relating to actual price levels. It is however sufficient for the application of Article 81(1) that an agreement has the object of restricting competition ([62]). It is not necessary to show that such an agreement was put into effect, although the actual effects of the agreement, where these can be demonstrated, may be relevant to the amount of any fine.

(136) As stated in recital 36, the Commission is unconvinced by the parties' contention that there was no more than an agreement to stop charging 'net-all-in' rates 'for the purpose of providing clarity to shippers' ([63]). However, the fact that there were such 'net all-in' rates, which the parties admit to agreeing that they would avoid offering in the future, is itself evidence that competition over the level of charges and surcharges existed and that the intention of the FETTCSA parties was to eliminate or at least reduce such competition.

(137) Furthermore, an agreement not to charge 'net all-in' rates has the effect of increasing price transparency to the detriment of competition. It is less easy effectively to

([59]) *Commission* v *UIC*, point 42.
([60]) *Commission* v *UIC*, point 42.
([61]) Commission Decision 74/292/EEC (Agreements between manufacturers of glass containers) (OJ L 160, 17.6.1974, p. 1), (recitals 35 and 36; Commission Decision 75/497/EEC (IFTRA rules for producers of virgin aluminium)(OJ L 228, 29.8.1975, p. 10).
([62]) Joined Cases 56 and 58/64 *Grundig and Consten* v *Commission* [1966} ECR 299, p. 342; Case T-35/92 *John Deere Ltd* v *Commission* [1994] FCR II-0957, point 61, Joined Cases T-305/94 etc. *LVM and others* v *Commission* [1999] not yet published in the ECR, point 741; Commission Decision 84/405/EEC (Zinc Producer Group) (OJ L 220, 17.8.1984, p. 27), point 71; Commission Decision 1999/210/EC (British Sugar) (OJ L 76, 22.3.1999, p. 1), point 75.
([63]) Reply to Statement of Objections, point 2.11.

monitor a competitors' pricing when it offers 'all-in' rates than when it offers rates broken down into their component parts.

(138) It is clear from the eighth recital in the preamble to Regulation (EEC) No 4056/86 that external competition to Conferences is an essential factor so far as the granting of the group exemption is concerned. As described in recitals 15 and 18, the FEFC lines had in 1991 a combined market share of 58 % and they agree common rates for their services. In the face of such a large part of the supply being offered at agreed prices, it is especially important that there remains effective competition from non-Conference lines. Agreements such as the parties' agreement not to discount enable the members of a Conference to extend their market power by engaging in anticompetitive behaviour in common with shipping lines which are not members of the Conference. Such agreements are, in general, intended to eliminate competition for a substantial part of the services provided in the market in question.

(139) The potential effect of the parties' agreement not to discount is likely to have been appreciable in view of the high market share of the parties on the relevant market.

10.2. **Article 81(1): effect on inter-State trade**

(140) The agreement not to discount involved Conference and non-Conference lines operating in several Member States and aimed to restrict competition between such lines in respect of the prices they charged for the services they offer. The diminution of price competition between these companies was likely to reduce the advantages which would otherwise accrue to the more efficient of them. This was likely to affect in turn the normal pattern of losses and gains of market share which would have been expected in the absence of the Agreement. This restriction of competition between shipowners operating in many Member States was consequently likely to influence and alter trade flows in transport services within the common market, which would have been different in the absence of the Agreement.

(141) In addition, restrictive practices concerning international maritime transport from or to Community ports may affect trade between Member States because they are capable of affecting competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas [64]. The changes brought about by the Agreement in the normal pattern of competitive behaviour by which more efficient companies are likely to enjoy increases in market share may also have influenced competition between ports in different Member States, by artificially extending or diminishing their catchment areas and the market shares of shipping lines operating out of those ports. In particular, shipping lines operating out of more efficient ports would not have passed on to their customers cost savings resulting from improvements made in port efficiency [65]. The effect that the Agreement had on the normal play of competitive forces may also have changed the capacity available at each port and caused deflections of trade between points in Europe and ports in northern Europe from some ports to other ports and in so doing be capable of affecting trade between Member States.

(142) The effect on the supply of maritime transport services described in recitals 140 and 141 is likely to have had a consequential effect on the supply of services ancillary to the supply of maritime transport services. Such services include the services of freight forwarders, port services, land transport services, and stevedoring services. The effect on these services would principally have been brought about by the alteration in the flow of transport services between Member States.

(143) The Commission therefore considers that the parties' agreement not to discount was such that it could have an appreciable effect on trade between Member States.

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

(144) Article 2 of Regulation (EEC) No 1017/68 is based on and reflects the provisions of Article 81(1) of the Treaty [66]. It does not depart from the substantive content of Article 81(1) and the reasons given in recitals 132 to 143 as to the applicability of Article 81(1) accordingly apply equally to the applicability of Article 2 of Regulation (EEC) No 1017/68.

[64] See the sixth recital to Regulation (EEC) No 4056/86.

[65] Drewry has described the mid-1992 use of ports on the north Europe/Far East trade as follows: 'The port rotation in northern Europe does show considerable rotation between competing carriers, not just in the selection of ports (e.g. Southampton or Felixstowe in the United Kingdom, and Hamburg or Bremerhaven in Germany) but also in the sequence in which they are called. Furthermore the perennially thorny question of whether to make single or double calls is answered differently by different carriers …'. Drewry, Container Market Profitability to 1997, December 1992, p. 135.

[66] Commission Decision 93/174/EEC (Tariff structures in the combined transport of goods) (OJ L 73, 26.3.1993, p. 38) as amended by Decision 93/354/EEC, (OJ L 145, 17.6.1993, p. 31), recital 15.

11. ARTICLE 2(1) OF REGULATION (EEC) No 4056/86 (TECHNICAL AGREEMENTS)

(145) The parties consider their activities within the framework of the FETTCSA to have been exempt from Article 81(1) pursuant to Article 2(1)(f) of Regulation (EEC) No 4056/86 which provides, *inter alia*, that the 'prohibition laid down in (Article 81(1) … shall not apply to agreements … whose sole object and effect is to achieve technical improvements or cooperation by means of … (f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs'. The Commission disagrees. The parties' activities within the framework of the FETTCSA went beyond activities consistent with a technical agreement within the meaning of Article 2(1). Nor was the parties' agreement not to discount such a technical agreement.

11.1. **Declaratory nature of Article 2(1)**

(146) The only way that Article 81(1) can be declared inapplicable to an agreement falling within its scope is by way of exemption under Article 81(3). Article 2(1) of Regulation (EEC) No 4056/86 cannot be considered a block exemption: it is neither stated to be an exemption nor does the Regulation contain any reasoning as to the four conditions of Article 81(3) ([67]). Article 2(1) must therefore be considered merely declaratory: it lists a number of different kinds of agreement which do not fall within the scope of Article 81(1) of the Treaty when their sole object and effect is to achieve technical improvements or technical cooperation.

(147) Moreover, the meaning of the words 'as a general rule' in the seventh recital should be noted. These words cannot be construed as referring to individual agreements which have some effects which are restrictive of competition but which do not restrict competition very much or very often. They can only be construed as referring to types of agreement which are considered to be usually wholly neutral with regard to competition: in the event that a particular example of one of these types of agreement was restrictive of competition it would not fall within the scope of Article 2(1) since its sole object and effect would not be the achievement of technical improvements or technical cooperation.

(148) The parties have stated that they agree that any agreement which is restrictive of competition within the meaning of Article 81(1) is not a technical agreement for the purposes of Article 2(1) of Regulation (EEC) No 4056/86 and is not to be regarded as being excluded from the application of Article 81(1) by virture of Article 2(1) of that Regulation.

11.2. **'Sole object and effect'**

(149) The parties have stated that they agree that the use of the adjective 'sole' in Article 2(1) limits its scope to agreements, decisions and concerted practices whose only object and effect is to achieve 'technical improvements or cooperation' by the means identified in the subsequent paragraphs of that Article.

(150) The Court of First Instance has held that the introduction of a legal exception for agreements of a purely technical nature cannot amount to an authorisation, on the part of the Community legislature, allowing agreements to be concluded whose purpose is the joint fixing of prices ([68]). The same principle applies where an agreement constitutes some other restriction of competition, such as a restriction on the freedom of manufacturers to differentiate their products ([69]).

(151) An agreement not to offer discounts from a substantial portion of prices charged in a particular trade cannot be said to be an agreement the sole object and effect of which is to achieve technical improvements or technical cooperation. This is consistent with the seventh recital of Regulation (EEC) No 4056/86 since agreements between competitors restricting their freedom to set prices do as a general rule have a restrictive effect on competition.

11.3. **Article 2(1)(f): the structure and conditions of transport tariffs**

(152) Article 2(1)(f) of Regulation (EEC) No 4056/86 refers to 'the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs'. The parties have stated that they agree that Article 2(1)(f) would only apply to the extent that there was no influence on price or other contractual conditions in relation to which

([67]) Contrast the seventh recital of Regulation (EEC) No 4056/86, which relates to Article 2(1), ('Whereas certain types of technical agreements, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition;') with the eighth recital, which relates to the block exemption provided for by Article 3, ('Whereas provision should be made for a block exemption of liner conferences; …'): The eighth recital contains reasons as to why the four conditions of Article 85(3) are considered to be fulfilled.

([68]) See Case T-229/94 *Deutsche Bahn AG* v *Commission* [1997] ECR II-1689, at paragraph 37, in relation to the similar exception for technical agreements provided for in Article 3 of Regulation (EEC) No 1017/68.

([69]) Commission Decision 86/399/EEC (Roofing Felt), (OJ L 232, 19.8.1986, p. 15). Commission Decision upheld in Case 246/86 *Belasco* v *Commission* [1989] ECR 2117.

competition can exist, and that the types of conditions referred to in Article 2(1)(f) do not include conditions as to the level of prices, the timing of the implementation of price changes, or an agreement not to grant discounts in respect of part of the price for a given service.

(153) The examples given in Article 2 concern types of agreement which, if their sole object and effect is to achieve technical improvements or technical cooperation, do not generally fall within the ambit of Article 81(1). Since an agreement between competitors as to prices will almost invariably fall within Article 81(1) where there is an effect on inter-State trade, the type of conditions referred to in Article 2(1)(f) cannot include conditions as to the level of prices ([70]) or the timing of the implementation of price changes. Furthermore, the language of Article 2(1)(f), which refers to 'the conditions governing the application of transport tariffs', makes it plain that a transport tariff cannot also be a condition governing its own application.

(154) Charges and surcharges are an integral part of the final cost presented to a shipper ([71]). An obligation not to grant discounts in respect of part of the price for a given service is not an agreement as to conditions governing the application of transport tariffs within the meaning of Article 2(1)(f), but is an agreement on the level of prices to be charged.

(155) As described in recitals 42 to 48, the parties discussed calculating a single level of BAF and CAF to be applied both by the Conference members and by the independents who were members of the FETTCSA. The parties' argument that they merely discussed methodology, and not a suggested common level of BAF and CAF, is inconsistent with the notes of the meeting of 30 September 1991. The notes state 'that simply adopting a similar methodology to the FEFC could lead to each independent calculating its own quite separate levels of BAF and CAF'. The notes then consider that prospect as likely to lead to criticism from shippers. The notes then conclude by stating 'In this respect and as even the Secretariat do not see the detailed input from the lines, only the averaged results, the thought was expressed that the independents might eventually consider putting in their own figures to the independent accountants at least in an exploratory way in order to arrive at overall Far Eastern bunker offtakes and CAF Line 1.' The Commission concludes that the parties discussed a proposal that the independents who were members of the FETTCSA should include their own costs to the calculation of a single level of BAF and CAF to be applied both by the Conference members and by the independents.

(156) The introduction to the relevant paragraph of the notes ('Although it was fully appreciated that at this early stage of FETTCSA, the Committee's function is to study and search for a common methodology for calculating accessorial charges,') is drafted in such a way as to imply that the author was aware that the conclusions that were in fact reached went further than seeking a common methodology. The concluding statement is expressed as a solution to criticism that could be expected from shippers if a single methodology led to different levels of charges. Moreover, the concluding statement refers to the independents providing their figures to 'the independent accountants'. This can only be a reference to the independent firm of accountants referred to earlier in the notes to whom the Conference lines provide their individual costs data for the purpose of calculating Line 1 of the Conference CAF. If the discussion within FETTCSA really was merely about methodology, the independents would merely apply an agreed mathematical formula to their own costs and there should be no question of supplying those costs to independent accountants for the purposes of arriving at 'overall Far Eastern bunker offtakes and CAF Line 1' (emphasis added).

11.4. **Article 2(1)(c): the establishment or application of inclusive rates and conditions**

(157) The parties also initially considered that the FETTCSA was covered by Article 2(1)(c) of Regulation (EEC) No 4056/86 which provides, *inter alia*, that the 'prohibition laid down in (Article 81(1)) … shall not apply to agreements … whose sole object and effect is to achieve technical improvements or cooperation by means of … (c) the organisation and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations'. The parties abandoned that argument and have stated that they consider that the standardisation objective envisaged by FETTCSA does not fall within Article 2(1)(c).

(158) Although the parties no longer rely on the argument, it is useful for the Commission to state its view that the activities and objectives odf the FETTCSA do not fall within Article 2(1)(c) of Regulation (EEC) No 4056/86.

(159) First, Article 2(1)(c) refers to 'successive or supplementary maritime transport operations'. It does not refer to and cannot be construed as referring to successive or supplementary transport operations, i.e.

([70]) See Decision 93/174/EEC (Tariff structures in the combined transport of goods), recital 47.

([71]) Letter from FETTCSA to the Commission dated 19 October 1992, point 10.

transport operations which are not exclusively maritime in nature. It is therefore clear that the provision concerns trans-shipment and services ancillary to trans-shipment. The providers of successive services would not as a general rule be competitors of the providers of the initial or principal maritime transport operation and for that reason agreements relating to such services would not generally fall within the scope of Article 81(1).

(160) Secondly, the joint calculation of a charge or surcharge which is intended to reflect additional expenditure incurred by individual shipping lines cannot be said to be the establishment or application of inclusive rates and conditions for a through maritime transport operation. Moreover, the expression 'the establishment or application of inclusive rates' does not mean the same as and does not cover the joint setting of certain specific elements contained in such rates.

11.5. **Article 3 of Regulation (EEC) No 1017/68 (technical agreements)**

(161) Article 3(1)(c) and 3(1)(g) of Regulation (EEC) No 1017/68 is similarly worded to respectively Article 2(1)(c) and 2(1)(f) of Regulation (EEC) No 4056/86. The views of the Commission set out above in relation to the applicability of Article 2 of Regulation (EEC) No 4056/86 to the parties' activities within the framework of the FETTCSA apply, *mutatis mutandis* to the applicability of Article 3 of Regulation (EEC) No 1017/68. The inapplicability to the parties' activities within the framework of the FETTCSA of Article 3(1)(g) of Regulation (EEC) No 1017/68 is especially clear since the latter expressly states that it is only applicable 'provided such rules do not lay down transport rates and conditions'.

12. ARTICLE 81(3) EC AND ARTICLE 5 OF REGULATION (EEC) No 1017/68

12.1. **Applicability of Article 3 of Regulation (EEC) No 4056/86**

(162) Neither the FETTCSA itself nor the agreement not to discount constituted an agreement or arrangement within the framework of which the parties to the FETTCSA operate under uniform or common rates. The parties were therefore not a liner conference within the meaning of Article 1(3)(b) of Regulation (EEC) No 4056/86. The block exemption contained in Article 3 of Regulation (EEC) No 4056/86 is not applicable since it only applies to liner conferences as defined in Article 1(3)(b).

12.2. **Article 81(3): individual exemption**

(163) No application for individual exemption has been made in respect of any agreement made within the framework of the FETTCSA. However, in view of the Commission's obligation pursuant to Article 11(4) of Regulation (EEC) No 4056/86 to issue a decision applying Article 81(3) 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 81(1) and of Article 81(3) ([72]), it is necessary to consider whether the agreement not to discount meets the conditions for an individual exemption.

(164) In their reply to the Commission's Statement of Objections, the parties put forward no arguments as to whether the conditions for an individual exemption are met in this case. The parties merely argued that there is no evidence to support any finding that Article 81(1) was infringed and that accordingly the Commission was not required to consider whether an individual exemption could be granted. On the basis of the material in the Commission's file including the lengthy and detailed explanations supplied by the FETTCSA and FEFC secretariats in correspondence with the Commission ([73]), the Commission considers that the conditions of Article 81(3) are not satisfied.

12.2.1. *Improving production or distribution or promoting technical or economic progress*

(165) The FEFC has argued:

'We are only trying to create an industry standard, in a way similar to recording equipment manufacturers who came to a common agreement as to the size and design of music cassettes: their agreement has not resulted in similar prices being set by all cassette manufacturers, but all manufacturers produce cassettes which correspond to an industry-wide standard size and design' ([74]).

(166) The parties' agreement not to discount cannot be considered beneficial. It certainly cannot be compared to the establishment of uniform sizes for such products as cassette tapes. Furthermore, far from promoting economic progress, even the parties' admitted agreement not to offer net all-in contracts was intended to restrict such progress by preventing lines from entering into diverse forms of contracts with their customers.

([72]) Article 11(4) of Regulation (EEC) No 1017/68 makes the same provision in respect of Article 2 and Article 5 of Regulation (EEC) No 1017/68.

([73]) See in particular letters to the Commission dated 30 July 1991 (FEFC/FETTCSA), 7 October 1991 (FEFC/FETTCSA), 21 October 1991 (FEFC), 23 December 1991 (FEFC/FETTCSA), 14 July 1992 (FETTCSA), 19 October 1992 (FETTCSA), 4 May 1993 (FETTCSA).

([74]) Letter from FEFC to the Commission dated 21 October 1991, point 7.

12.2.2. *Whether consumers receive a fair share of the resulting benefits*

(167) The FEFC has made the following claims in respect of the FETTCSA:

'[It] would result in greater transparency in the presentation of tariffs and will enable a transport user to identify these elements of the tariff which are dependent on common external factors over which carriers have little or no control (e.g. currency movements) while clearly identifying the tariff elements, which reflect the relative efficiency and competitivity of carriers (i.e. sea freight)' ([75]).

'The advantages to transport users of identifying the common and "central" elements in a tariff so that the relative efficiency and competitivity of carriers is highlighted are obvious: these are transparency between costs incurred and price offered to the consumer and clarity of tariff for ease of use' ([76]).

(168) The parties make other claims that their behaviour was for the benefit off shippers: that the admitted agreement not to offer net all-in contracts was made 'for the purpose of providing clarity to shippers' (see recital 36).

(169) The parties' agreement not to discount did not bring any benefits to consumers. The Commission does not agree that price transparency necessarily benefits consumers. It is necessary to consider the structure of the market in question, and to distinguish between transparency between competitors (which can result in an alignment of prices at levels higher than they would otherwise have been) and transparency between suppliers and consumers. Increased price transparency between suppliers and consumers is not of benefit to consumers when it is accompanied by a lessening of price competition.

12.2.3. *Whether restrictions of competition are indispensable*

(170) The FETTCSA parties have claimed that:

'There are a number of different ways of calculating (and then setting) the charges and surcharges used by different carriers. In order to increase the transparency of tariffs, it was thought useful by the liner operators to identify clearly and separately the various component elements of a freight tariff, such as inland freight, THCs and sea freight so as to differentiate from those elements of tariffs which the liner operator controlled and those which he did not' ([77]).

(171) What is thought useful is not necessarily indispensable. Even if the price transparency was considered beneficial, it was not indispensable for the FETTCSA parties to enter into an agreement not to discount from published tariffs.

12.2.4. *Whether there is an elimination of competition for a substantial part of the services in question*

(172) According to the FEFC:

'Far from eliminating or reducing competition, any agreement resulting from the FETTCSA will actually increase competitivity between carriers since the transport user will be able to identify more easily the relative freight prices quoted by carriers and thus compare tariffs to negotiate the best possible price' ([78]).

(173) The assertions of the FEFC and FETTCSA must be viewed in the light of the price restrictions arising under the FEFC, the fact that the parties to the FETTCSA are also party to the EATA (recitals 11 to 14), and the very high market shares of the parties to the FETTCSA.

(174) In the present case, however, the fact that the Commission is not putting forward evidence as to actual price levels and the fact that the first three conditions of Article 81(3) of the Treaty are not, in any event, fulfilled, leads to the conclusion that it is not necessary for the Commission to adopt a formal position as to the fourth condition of Article 81(3).

12.3. **Article 5 of Regulation (EEC) No 1017/68**

(175) Article 5 of Regulation (EEC) No 1017/68 is based on and reflects the provisions of Article 81(3) of the Treaty. The reasons given in recitals 163 to 174 as to why the FETTCSA does not qualify for exemption under Article

([75]) Letter from FEFC and FETTCSA to the Commission dated 30 July 1991, point 15.

([76]) Letter from FEFC and FETTCSA to the Commission dated 30 July 1991, point 26.

([77]) Letter from FETTCSA to the Commission dated 19 October 1992, point 2.

([78]) Letter from FEFC and FETTCSA to the Commission dated 30 July 1991, point 20.

81(3) apply equally to the question of individual exemption pursuant to Article 5 of Regulation (EEC) No 1017/68.

13. FINES

(176) The parties argue that any infringement that might arise out of the parties entering into the FETTCSA itself was unintentional because the parties had reasonable grounds to believe that the FETTCSA was a technical agreement falling within Article 2(1)(f) of Regulation (EEC) No 4056/86, including legal advice to that effect. They therefore consider that there was no intentional or negligent infringement as is required, under Regulations (EEC) No 4056/86, (EEC) No 1017/68 and No 17, for the imposition of fines. The parties argue that the Commission has not in any event demonstrated that there were any effects on competition between the FEFC members and independent lines.

(177) The Commission considers that the parties' agreement not to discount should be considered intentional because the parties cannot have been unaware that an agreement not to grant discounts was intended to restrict competition in particular as between the FEFC and the non-Conference lines.

(178) It is appropriate to impose a fine in order to ensure that this Decision has the necessary deterrent effect. Only a fine is both punitive and preventive in character ([79]).

13.1. **Basic amount of fine**

(179) Article 15(2) of Regulation No 17 and Article 19(2) of Regulation (EEC) No 4056/86 empower the Commission to impose fines, within stated limits, on undertakings which have infringed Article 81(1) either intentionally or negligently. Article 22(2) of Regulation (EEC) No 1017/68 makes equivalent provision for infringements of Article 2 of Regulation (EEC) No 1017/68. In fixing the amount of the fine, regard shall be had to both the gravity and duration of the infringement.

(180) The FETTCSA entered into force on 4 June 1991. The agreement not to discount was entered into on 9 June 1992 to take effect on 1 July 1992. Although the FETTCSA was terminated only on 26 May 1994 (after the Commission adopted a Statement of Objections), the last meeting of the FETTCSA parties was held on 8 September 1992 shortly before the letter dated 28 September 1992 sent by the Commission's Directorate-General for Competition. For the purposes of fixing the amount of the fine, the Commission considers it appropriate to consider the duration of the infringement as having ended on 28 September 1992. The duration of the infringement should therefore be considered to be three months.

(181) The agreement not to discount was a horizontal agreement aiming to restrict price competition between undertakings with a high market share. A restrictive agreement between Conference members and independent lines is particularly serious in the liner shipping sector where the existence of actual and potential competition from non-Conference lines is one of the principal justifications for the group exemption. An agreement not to discount from published prices is, however, a less serious form of horizontal price agreement than an agreement fixing the level of prices. Horizontal price agreements will normally be considered very serious infringements. In this case, however, the Commission has not obtained any evidence as to the effects of the infringement on price levels. Any harmful effects are in any event likely to have been short-lived. It is therefore appropriate that the infringement should be considered serious and that the basic level of fine be set at the very lowest end of the scale of fines appropriate for a serious infringement. In the circumstances of this case it is appropriate to set a basic level of fine, for the largest of the FETTCSA parties, at EUR 1 300 000.

(182) In order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect the Commission considers it appropriate that larger fines be imposed on the larger FETTCSA parties than on the smaller ones because of the considerable disparity between their sizes. It has therefore divided the parties into four groups according to size.

(183) Table 5 indicates these four groups and relative size of each of the FETTCSA parties in 1994 (the year in which the FETTCSA was abandoned) as compared with Maersk, the largest of the FETTCSA parties. The comparison is made on the basis of turnover in respect of transport services relating to the carriage of containerised cargo where the services supplied included a maritime element. It is appropriate to take worldwide liner shipping turnover as the basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the real resources and importance of the undertakings concerned.

([79]) Joined Cases T-305/94 etc. *LVM and others* v *Commission*, point 1166.

Table 5: Relative size of undertakings in 1994

		Size
Large carrier	Maersk	100
Medium to large carriers	NYK	58
	MOL	55
	P & O	52
	K Line	49
	Nedlloyd	46
	Hanjin	41
Small to medium carriers	Hapag-Lloyd	34
	Evergreen	30
	NOL	28
	DSR-Senator	23
	Yangming	23
Small carriers	Cho Yang	17
	MISC	14
	OOCL	11
	CGM	6

(184) The facts that in 1997 P & O merged with Nedlloyd and Hanjin bought DSR-Senator are not relevant as the infringements occurred before the dates of those events.

(185) The Commission has considered whether the 12 FEFC lines should be treated differently from the six non-Conference lines, on the grounds that the Commission is not contesting the FEFC lines' agreement amongst themselves not to discount from published tariffs for charges and surcharges. The Commission considers that such a distinction should not be made because it is the extension to the non-Conference lines of the FEFC lines' agreement that is at issue in this case, and in respect of that extension there is no basis to distinguish between the gravity of the behaviour of the FEFC lines on the one hand and the non-Conference lines on the other.

(186) Table 6 sets out the basic amount of fines for the carriers falling into each of the four groups, taking into account the factors mentioned in recitals 179 to 185.

Table 6: Basic amount of fines (in EUR)

Category of carrier	
Large carrier	1 300 000
Medium to large carriers	1 000 000
Small to medium carriers	650 000
Small carriers	325 000

13.2. **Aggravating and mitigating factors**

(187) None of the FETTCSA parties has put forward any reason for which it should be considered to have acted as a follower as opposed to a ringleader. Nor have any of the FETTCSA parties given any evidence that any of the other FETTCSA parties acted as a ringleader. Accordingly, there is no reason which would justify distinguishing between the individual FETTCSA parties as regards their participation in the infringement, except in the manner described in recital 186.

(188) As indicated in recital 180, the Commission presumes that the infringement ended upon the parties' receipt of the letter dated 28 September 1992 sent by the Commission's Directorate-General for Competition. The harm to consumers brought about by restrictive agreements is mitigated when parties to such an agreement terminate their agreement upon receipt of a warning letter from the Commission. The Commission considers that the presumed termination of the agreement in this case justifies a reduction of the basic amount of the fine on each of the parties by 20 %.

13.3. **Commission Notice on the non-imposition or reduction of fines in cartel cases**

(189) The Commission Notice on the non-imposition or reduction of fines in cartel cases ('the Notice') ([80]) is only directly applicable in respect of cooperation taking place after its publication on 18 July 1996. However, in respect of cooperation that took place before that date the Commission applies the Notice by analogy ([81]).

(190) In this case the parties cooperated with the Commission to the extent that they took the initiative in informing the Commission of the conclusion of the Agreement, and, in their reply to the Statement of Objections, have undertaken not to enter into and implement any agreement having the same stated objectives as the FETTCSA without first formally notifying such an agreement to the Commission, and that they voluntarily

([80]) OJ C 207, 18.7.1996, p. 4.
([81]) Decision 1999/210/EC (British Sugar), at recital 212.

abandoned the FETTCSA after receiving the Statement of Objections. It should, however, also be noted that the Commission only became aware of the agreement not to discount as a result of the parties' replies to formal requests for information about their activities under the FETTCSA.

(191) The parties' cooperation falls within Section D of the Notice. The Commission considers that the parties' cooperation in this case justifies a reduction of the basic amount of the fine on each of the parties by 10 %.

13.4. **Lapse of time**

(192) In view of the lapse of time since the Statement of Objections was sent and the agreement was terminated, the Commission has considered what effect if any this should have on the amount of any fine.

(193) The Commission does not consider that lapse of time is a reason not to impose a fine, provided that the lapse of time does not exceed the limitation period for competition proceedings laid down by Council Regulation (EEC) No 2988/74 ([82]). Article 1 of the Regulation provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of Article 81(1) of the Treaty. The period begins to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which it ends. It may, however, be interrupted or suspended, pursuant to Article 2 or 3 respectively of the Regulation. Under Article 2(3) of the Regulation the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed.

(194) In this case, the imposition of a fine is not time-barred. The limitation period has been interrupted in April 1994 by the Statement of Objections, and in March 1995, June 1998 and October 1999 by written requests for information. The period elapsed does not exceed twice the limitation period.

(195) The Commission is also bound by the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time ([83]). The Commission does not believe that the lapse of time has in this case affected its outcome, nor that the rights of the defence of the parties have been infringed in any way. The Commission acknowledges, however, that the duration of the proceedings in the present case has been considerable, and justifies a reduction of the basic amount of the fine on each of the parties by EUR 100 000.

13.5. **Specific arguments of DSR-Senator**

(196) DSR-Senator has argued that there are several specific circumstances that the Commission should take into account when considering the imposition of any fine in relation to its participation on the FETTCSA.

(197) First, DSR-Senator argues that account should be taken of the fact that during the period 1991 to 1994 it did not make any profits but suffered from substantial losses.

(198) The Court of Justice has stated that to take into account the adverse financial position of an individual participant to an infringement would be to bestow 'an unjustified competitive advantage on undertakings least well adapted to the conditions of the market' ([84]). The profits accruing from an infringement are relevant: the basic amount determined on the basis of the gravity of the infringement may need to be increased in order to increase the penalty so it exceeds the amount of gains improperly made as a result of the infringement. The fact that a company is loss-making does not mean that it cannot benefit from an infringement of the competition rules. Such a company can benefit from a reduction of its losses. The fact that DSR-Senator made no profits in the period in question is therefore not a reason to reduce the amount of its fine.

(199) Secondly, DSR-Senator argues that the Commission should take into account its specific characteristic that it no longer owns any vessels. It considers that the Commission has recognised that the question whether a company has had to sell its vessels is an important criterion to evaluate the effective economic capacity of a liner shipping company and should therefore be taken into account when considering whether to impose a fine. It considers itself to be in a similar position to the Compagnie maritime Zaïroise (CMZ) on which the Commission did not impose a fine in the CEWAL Decision ([85]).

(200) The Commission does not consider that the position of DSR-Senator is comparable to that of CMZ in the CEWAL case. Unlike DSR-Senator, CMZ was effectively moribund, its sole real activity being the sale of its

([82]) OJ L 319, 29.11.1974, p. 1.

([83]) Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, point 56; Joined Cases T-305/94 etc. *LVM and others* v *Commission*, point 121. Concerning the duration of proceedings before the Court of First Instance, see *Baustahlgewebe* in which the Court of Justice reduced by ECU 50 000 the applicant's fine of ECU 3 million as satisfaction for the excessive duration of proceedings before the Court of First Instance: Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, points 47 and 141.

([84]) Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, points 54 and 55.

([85]) Commission Decision 93/82/EC (CEWAL) (OJ L 34, 10.2.1993, p. 20), recitals 111 and 112.

rights to carry goods to and from Zaiire. In contrast, DSR-Senator operates 31 vessels in 14 liner services ([86]).

(201) Thirdly, DSR-Senator argues that its actual financial situation limits its ability to pay. In particular DSR-Senator argues that the imposition of a fine on it of EUR 13,75 million in the TACA Decision has caused serious damage to an already precarious financial position. The imposition of a further fine would increase the risk of bankruptcy with all the attendant negative consequences.

(202) The level of fine imposed by this Decision on DSR-Senator is not such as on its own can be considered to threaten the financial viability of DSR-Senator. Moreover, information provided by DSR-Senator shows that its financial situation improved in the course of 1999.

(203) Fourthly, DSR-Senator considers the Commission should in this case take into account the fines imposed on DSR-Senator Lines in the TACA Decision. The Commission does not consider it appropriate so to do. The FETTCSA and TACA cases concern different infringements on different markets.

13.6. **Specific arguments of Cho Yang**

(204) Cho Yang has argued that the Commission should take into account its financial difficulties when considering the imposition of any fine in relation to its participation on the FETTCSA. Cho Yang refers to its financial difficulties since 1997 when Korea fell into economic crisis and the won collapsed. It refers to the arguments it made in its application to the Court of First Instance for the suspension of the fine imposed on it in the TACA Decision ([87]).

(205) The individual financial situation of a participant in an infringement cannot entail a diminution in the amount of its fine. In any event, Cho Yang is a significant liner shipping company. It owns six container ships and charters 17 container ships. It operates on all three major east-west trades, as well as on routes within Asia. Within the framework of the reform of financial institutions and corporate restructuring in Korea, as agreed between the Korean Government and the International Monetary Fund, Cho Yang and its main lender entered into an agreement involving a five-year plan for restructuring Cho Yang and various companies connected to it by common ownership links. Cho Yang's situation is now improving. The level of fine imposed by this Decision on Cho Yang is not such as to threaten the restructuring plan.

13.7. **Level of fines**

(206) Table 7 below sets out the calculation of the level of fines taking into account the relative size of each of the FETTCSA parties.

Table 7: Fines (in EUR)

	Relative size	Basic amount	After deduction for mitigation	After deduction for cooperation	After further deduction for lapse of time
Mærsk	100	1 300 000	1 040 000	936 000	836 000
NYK	58	1 000 000	800 000	720 000	620 000
MOL	55	1 000 000	800 000	720 000	620 000
P & O	52	1 000 000	800 000	720 000	620 000
K Line	49	1 000 000	800 000	720 000	620 000
Nedlloyd	46	1 000 000	800 000	720 000	620 000
Hanjin	41	1 000 000	800 000	720 000	620 000
Hapag-Lloyd	34	650 000	520 000	468 000	368 000
Evergreen	30	650 000	520 000	468 000	368 000
NOL	28	650 000	520 000	468 000	368 000
DSR-Senator	23	650 000	520 000	468 000	368 000
Yangming	23	650 000	520 000	468 000	368 000
Cho Yang	17	325 000	260 000	234 000	134 000
MISC	14	325 000	260 000	234 000	134 000
OOCL	11	325 000	260 000	234 000	134 000
CGM	6	325 000	260 000	234 000	134 000

([86]) http://www.dsr-senator.com/cooperat.htm, updated 23.11.1999.

([87]) Case T-191/98 R II *Cho Yang Shipping Co. Ltd* v *Commission* — case pending.

(207) In no case do the fines set out in Table 7 exceed 10 % of the worldwide turnover in 1993 or 1998 of the group of companies of which each undertaking forms part.

14. CONCLUSIONS

(208) The parties to the FETTCSA infringed Article 81(1) of the Treaty and Article 2 of Regulation (EEC) No 1017/68. The conditions of Article 81(3) and of Article 5 of Regulation (EEC) No 1017/68 are not satisfied. The duration of the infringement was from 1 July 1992 to 28 September 1992,

HAS ADOPTED THIS DECISION:

Article 1

The agreement not to discount from published tariffs for charges and surcharges entered into between the undertakings which were the former members of the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) and to which this Decision is addressed constituted an infringement of the provisions of Article 81(1) of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68.

Article 2

The conditions of Article 81(3) of the EC Treaty and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 3

The undertakings to which 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 infringement referred to in Article 1.

Article 4

Fines as set out below are hereby imposed on the undertakings to whom this Decision is addressed.

CMA CGM SA	EUR	134 000
Hapag-Lloyd Container Linie GmbH	EUR	368 000
Kawasaki Kisen Kaisha Limited	EUR	620 000
A.P. Møller — Maersk Sealand	EUR	836 000
Malaysia International Shipping Corporation Berhad	EUR	134 000
Mitsui OSK Lines Ltd	EUR	620 000
Neptune Orient Lines Ltd	EUR	368 000
Nippon Yusen Kaisha	EUR	620 000
Orient Overseas Container Line Ltd	EUR	134 000
P & O Nedlloyd Container Line Ltd	EUR	1 240 000
Cho Yang Shipping Co. Ltd	EUR	134 000
DSR-Senator Lines GmbH	EUR	368 000
Evergreen Marine Corp. (Taiwan) Ltd	EUR	368 000
Hanjin Shipping Co. Ltd	EUR	620 000
Yangming Marine Transport Corp.	EUR	368 000

Article 5

The fines imposed in Article 4 shall be paid, in euro, within three months of the date of notification of this Decision, into bank account No 642-0029000-95 of the European Commission, Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Art/Kunstlaan 43, B-1040 Brussels.

After expiry of that period, interest shall automatically be payable on the fine at the rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 7,25 %.

Article 6

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

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 16 May 2000.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

CMA CGM SA
22 Quai Galliéni
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DK-1098 Copenhagen K

Malaysia International Shipping Corporation Berhad
Menara Dayabumi
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PO Box 10371
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Malaysia

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Japan

Neptune Orient Lines Ltd
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Singapore 119962

Nippon Yusen Kaisha
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Chiyoda-Ku
Tokyo
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Orient Overseas Container Line Ltd
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Wanchai
Hong Kong

P & O Nedlloyd Container Line Ltd
Beagle House
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Cho Yang Shipping Co. Ltd
51-1 Namchang-Dong, Chung-Ku
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Korea

DSR-Senator Lines GmbH
Martinistraße 62-66
D-28195 Bremen

Evergreen Marine Corp. (Taiwan) Ltd
Evergreen Building
166, Section 2, Minsheng East Road
10444 Taipei
Taiwan

Hanjin Shipping Co. Ltd
25-11 Yoido-Dong, Youngdeungpo-Ku
Seoul 150–010
Korea

Yangming Marine Transport Corp.
271 Ming De 1st Road
Chidu
Keelung
Taiwan 206

ANNEX II

Descriptions of the charges and surcharges

1. Bunker adjustment factor (BAF)

   The BAF comprises adjustment to reflect the current cost of bunkers (i.e. ship's fuel) against the base level incorporated in the freight rate. The methodology is based on voyage returns submitted by the FEFC member lines which include taking total net sea freight revenue of each line and calculating what proportion the total bunker costs bear to that sea freight. It also includes a weighting depending on what proportion of bunkers was lifted where.

2. Currency adjustment factor (CAF)

   The CAF is based on a weighting for each currency in the CAF basket based on the currencies in which each line earns its revenues and incurs its expenses. This involves each FEFC member providing a breakdown of cargo flows on a country-by-country basis as well details of cost breakdowns (crew, repairs, canal dues, etc.).

3. Terminal handling charges (THC)

   Charges paid by shippers for:

   (a) the carrier receiving and storing export containerised cargo or cargo for containerisation at the terminal and presenting it to the vessel for loading;

   (b) the carrier receiving from the vessel import containerised cargo and arranging its storage at the terminal and movement from the terminal; and

   (c) associated documentation arising from (a) and (b) above.

4. Less-than-container-load-sevice-charges (LCLSC)

   Charges paid by shippers for:

   (a) receipt of export LCL (less-than-container-load) goods at the container freight station (i.e. where they are consolidated into container loads) by the carrier and for their subsequent storage and handling in accordance with the carrier's instructions,

   (b) receipt of import LCL goods from the carrier and for their storage and handling before release to the haulier, and

   (c) associated documentation arising from (a) and (b).

5. Detention charges

   Charges imposed for cargo and/or equipment kept beyond the freetime allowed for taking receipt of cargo in the port/terminal/container yard.

6. Demurrage charges

   Charges paid by shippers for detaining carriers' containers/chassis beyond the prescribed freetime period.

7. Special equipment premium

   Charges paid in respect of specialised equipment.

8. War surcharges

   Charges imposed to reflect additional costs resulting from war situations.

Descriptions of additional charges

1. Optional destinations

   Charges paid by shippers where the bill of lading gives the option of delivery at two or more ports or container terminals, declaration of the required port or terminal having to be made a specified period before the vessel's due date of arrival at the first port or terminal in the list.

2. Change of destination (COD)

   Charges paid by shippers following a change in the discharge port.

3. Change of delivery status

   Change of delivery status from FCL (full-container-load where the haulier is responsible for packing and unpacking the container) to LCL (less-than-container-load where the carrier is responsible for packing and unpacking the container) and vice versa.

4. Packages of value exceeding the carrier's normal bill of lading liability

   Charges paid by shippers where they wish the carrier to be responsible for a cargo value in excess of limitation prescribed in the carriers's bill of lading.

ANNEX III

Indicative calculation — ocean freight

1	Basisc freight	a	
2	Tariff contract discounts/rebates where applicable	b	
3	Subtotal	c	c
4	CAF on 3	d	
	BAF on 3	e	
5	Subtotal	f	f
6	FCL/Pallet allowance		g
7	NSLC		h
8	Transport additionals		i
9	Other ocean freight charges		j
10	Total ocean freight and charges		k

Source: NT90 3.1.7