COMMISSION

COMMISSION DECISION

of 14 November 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case COMP/37.396/D2 — Revised TACA)

(notified under document number C(2002) 4349)

(Only the English text is authentic)

(Text with EEA relevance)

(2003/68/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 4(1) thereof,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [3], as amended by the Act of Accession of Austria, Finland and Sweden, and in particular the second subparagraph of Article 12(4) thereof,

Having regard to the summary of the application [4] published pursuant to Article 12(2) of Regulation (EEC) No 4056/86 and Article 12(2) of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [5], as amended by the Act of Accession of Austria, Finland and Sweden,

Having regard to the Commission's letter of 4 August 1999 notifying the parties in accordance with Article 12(3) of Regulation (EEC) No 4056/86 that there were serious doubts as to the applicability of Article 81(3) to the notified agreement,

Having regard to the summary of the notified agreement [6] published pursuant to Article 23(3) of Regulation (EEC) No 4056/86 and Article 19(3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport,

Whereas:

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 378, 31.12.1986, p. 4.
[4] OJ C 125, 6.5.1999, p. 6.
[5] OJ L 175, 23.7.1968, p. 1.
[6] OJ C 335, 29.11.2001, p. 12.

1. INTRODUCTION

1.1. Background

(1) On 16 September 1998 the Commission adopted Decision 1999/243/EC ([7]) (the TACA Decision), holding that a number of arrangements entered into within the framework of the Trans-Atlantic Conference Agreement (TACA) were contrary to Article 85(1) of the Treaty and did not fall within the scope of the block exemption contained in Article 3 of Regulation (EEC) No 4056/86. Nor did the arrangements in question qualify for individual exemption under Article 85(3). The arrangements to which the Decision related included inland price-fixing within the territory of the Community, the collective fixing of brokerage and freight-forwarder remuneration and the fixing of the terms and conditions on which conference members might enter into service contracts with shippers.

(2) The Commission also found that the members of the TACA had abused their collective dominant position, contrary to Article 86 of the Treaty, by altering the competitive structure of the market and placing restrictions on the availability and contents of service contracts. Fines in an aggregate amount of ECU 273 million were imposed for these abuses.

(3) The TACA parties' application for the annulment of that decision is now before the Court of First Instance of the European Communities ([8]).

1.2. Chronology

(4) On 29 January 1999, the members of TACA (the Parties) notified the agreement which is the subject-matter of this decision (hereinafter referred to as the Revised TACA or the Agreement).

(5) On 6 May 1999, pursuant to Article 12(2) of Regulation (EEC) No 4056/86 and to Article 12(2) of Regulation (EEC) No 1017/68, the Commission published a summary of the application in the *Official Journal of the European Communities* (the Article 12(2) Notice) inviting interested parties to comment within 30 days from the date of publication of the Notice.

(6) On 4 June 1999, in response to the publication, the European Shippers' Council (ESC) submitted comments in the form of what it claimed to be a formal complaint pursuant to Article 10 of Regulation (EEC) No 4056/86 ([9]). Comments were also received from the European Liaison Committee of Freight Forwarders (Clecat), from Fédération des Entreprises de Transport et Logistique France (TLF) ([10]), (which represents transport and logistics companies), and from the Federation of Swedish Industries/Swedish Shippers' Council. On 15 July 1999, the Swedish Competition Authority sent a letter supporting some of the views expressed by the Swedish Shippers' Council, in particular in relation to the confidentiality of individual service contracts. No other Member State commented.

(7) On 7 July 1999, the Director-General of the Directorate-General for Competition sent the Parties a letter inviting them to amend the provisions of their agreement concerning the exchange of statistical information. The letter further informed the Parties that certain types of agreements and conduct in relation to the negotiation of service contracts which might restrict competition to a material degree could not be considered to be covered by the notification ([11]).

([7]) Case No IV/35.134 — Trans-Atlantic Conference Agreement (OJ L 95, 9.4.1999, p. 1).
([8]) Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98 *Atlantic Container Line and Others* v *Commission*.
([9]) Case COMP/37.527/D2 — ESC v Revised TACA.
([10]) The TLF's comments were also re-submitted by Clecat under Clecat's name by letter of 5 June.
([11]) This concerned any agreement, understanding or concerted practice between the parties that they would when agreeing individual service contracts follow the standard form, content or price of agreement service contracts or use voluntarily service contracts guidelines in such a way that competition could be restricted to a material degree.

(8) On the same date, the Director-General informed the ESC that, apart from the provisions of the agreement concerning the exchange of statistical information, there were insufficient grounds to raise serious doubts as to the applicability of Article 81(3). That letter also informed the ESC that there was no scope for a complaint pursuant to Article 10 of Regulation (EEC) No 4056/86 in the context of an objections procedure opened by a Commission notice published pursuant to Article 12(2) of that Regulation.

(9) On 14 July 1999, the ESC replied to the Commission's letter of 7 July 1999, stating, *inter alia*, that its comments against the 'not-below-cost' rule (see recital 27) should also be considered a formal complaint under Article 10 of Regulation (EEC) No 1017/68.

(10) On 13 and 23 July 1999, the Parties informed the Commission that they were willing to amend the provisions referred to in the Commission's letter of 7 July and would each provide the Commission, every six months, with information relating to their service contract activity. The letter did not however contain any specific information on how or when the agreements would be amended in order to remove the identified competition concerns.

(11) On 4 August 1999, within the period of 90 days provided for by Article 12(3) of Regulation (EEC) No 4056/86 ([12]) the Commission sent a letter to the Parties stating that there were serious doubts as to the applicability of Article 85(3) of the Treaty. In accordance with Article 12(3) of Regulation 4056/86 the Commission was then entitled to continue its investigations into the maritime aspects of the Revised TACA. The fact that no serious doubts were raised with regard to the inland transport aspect of the Revised TACA meant that — on the assumption that it was severable from the aspects in respect of which the Commission did raise serious doubts — this aspect was deemed to be exempted for a period of three years from 6 May 1999.

(12) By letter dated 6 August 1999, the ESC was informed that the Commission had not raised serious doubts with respect to the inland transport aspects of the Revised TACA. By letter of 27 September 1999, the ESC asked to be apprised of the reasons for that decision.

(13) On 12 October 1999, the Director-General of the Directorate General for Competition replied to the ESC, summarising the reasons for not raising serious doubts as regards the inland transport aspects of the Revised TACA. He also reiterated the Commission's view on the procedural status of comments made under the objections procedure (see recital 8).

(14) Subsequently, the European Council of Transport Users (ECTU), which incorporates the ESC and certain other associations, submitted an application to the Court of First Instance seeking annulment of an act described as the Commission's decision communicated in the form of the letter to the ESC of 6 August 1999 ([13]).

(15) On 1 December 2000, the Parties submitted a supplementary notification, informing the Commission that they had amended the Revised TACA to include a specific authority to make a coordinated temporary capacity withdrawal limited to the Christmas and New Year period 2000/2001 ([14]).

([12]) Under Regulation (EEC) No 4056/86 (the main maritime transport regulation), the Commission has 90 days from the date of publication of the summary of the application to raise serious doubts and so continue its investigation into the case. The inland transport regulation, Regulation (EEC) No 1017/68, contains a nearly identical provision. If the Commission takes no action within the 90-day period, an agreement is automatically exempted for six years in relation to maritime transport and three years in relation to inland transport.

([13]) Case T-224/99, *ECTU and Others* v *Commission*.

([14]) The original version of the notified agreement contained a general authority according to which the parties could 'regulate the carrying capacity offered by each of them' — see the Article 12(2) Notice. Although the Parties considered that the 2000/2001 capacity regulation programme fell within the scope of the liner conference block exemption contained in Article 3 of Regulation (EEC) No 4056/86, they nevertheless thought prudent to notify that programme to the Commission. The general capacity regulation authority contained in the Agreement was subsequently modified at the Commission's request (see recital 81 et seq.).

(16) On 29 November 2001, following further correspondence with the Parties, the Commission published a notice in the Official Journal indicating its intention to grant exemption to the remaining aspects of the Revised TACA pursuant to Article 23(3) of Regulation (EEC) No 4056/86 and to Article 19(3) of Regulation No 17 (the Article 23(3) Notice). It invited interested parties to comment within 30 days from the date of publication of the Notice.

(17) On 12 December 2001, the ESC asked the Commission to provide further information about certain provisions of the Revised TACA and about the Commission's reasons for proposing to grant exemption. Following a further exchange of correspondence and several meetings, the ESC submitted comments on 8 March 2002. Further comments were submitted on 24 April 2002.

(18) By letter dated 3 May 2002, the Parties requested a renewal of the exemption for all aspects of the Revised TACA falling within the scope of Regulation (EEC) No 1017/68. As that request will be the subject of a separate procedure, the inland transport aspects of the Revised TACA are described below only insofar as may be necessary for a full understanding of the Agreement.

2. **THE PARTIES**

(19) Since the adoption of the TACA decision, six shipping lines have left the TACA, originally leaving eight parties to the Revised TACA. Since the date of notification, A.P. Møller Maersk has merged with Sea-Land Service, reducing the number of parties to seven:

1. Atlantic Container Line AB, established in Gothenburg, Sweden;
2. Hapag-Lloyd Container Line GmbH, established in Hamburg, Germany;
3. Mediterranean Shipping Company SA, established in Geneva, Switzerland;
4. A.P. Møller-Maersk Sealand, established in Copenhagen, Denmark;
5. Nippon Yusen Kaisha, established in Tokyo, Japan;
6. Orient Overseas Container Line Ltd, established in Wanchai, Hong Kong;
7. P&O Nedlloyd Limited, established in London, United Kingdom.

3. **THE AGREEMENT**

3.1. **Purpose and scope**

(20) The purpose of the Revised TACA is stated to be to afford the Parties the opportunity to cooperate, as authorised by the Agreement, with respect to the provision of efficient and stable international liner shipping services for the carriage of cargo on routes within the geographic scope of the trade as defined below.

(21) The Agreement covers eastbound and westbound shipping routes between (i) ports in the 48 contiguous States of the United States of America, and interior and coastal points in the United States of America via said ports and (ii) ports in Europe situated in latitudes from Bayonne, France, to the North Cape, Norway (excluding non-Baltic ports in Russia, Mediterranean ports and ports in Spain and Portugal) and, except for inland transport services within the EEA as summarised in recital 26, points in Europe via said non-excluded European ports, other than points in Spain or Portugal. Those routes are referred to as 'the trade'.

3.2. **Tariff rates**

(22) The Revised TACA authorises the Parties to engage in the establishment, revision, maintenance and cancellation of (except for inland transport services within the EEA) rates (including charges and surcharges) and conditions, except for inland transport services with the EEA. Those rates and conditions agreed within the framework of the Revised TACA are referred to as 'the Tariff'.

3.3. **Service contracts**

(23) The TACA decision concluded that the members of the TACA at that time infringed Article 85 of the Treaty 'by agreeing the terms and conditions on and under which they may enter into service contracts with shippers'. This concerned two main types of restriction: (i) where the agreement prevented the TACA members from entering into individual service contracts (ISCs) with shippers or restricted their freedom to do so, and (ii) where the agreement restricted the terms which could be included in ISCs.

(24) The Revised TACA does not contain such restrictions; no restrictions are placed on the availability of ISCs. The provisions of the Revised TACA relating to service contracts may be summarised as follows:

1. The Parties are authorised to negotiate and enter into service contracts ([15]) with any one or more shippers (conference service contracts, or 'agreement service contracts' (ASCs)) relating to services provided between ports within the EEA and ports and inland points outside the EEA. Such contracts may include a price for all services closely related to the activity of maritime transport, provided between the vessel and the port gate ([16]). Such contracts are to include certain essential terms including, amongst others, the minimum volume or portion, the line-haul rate, the duration, service commitments and the liquidated damages in respect of non-performance, if any.

2. There are no restrictions on the Parties as regards their freedom to negotiate and enter into ISCs with any shipper on such terms as the parties to the contract may freely agree.

3. Two or more Parties (but not all of the Parties) are free to negotiate and enter into multi-carrier service contracts (MSCs) with any shipper relating to services provided between ports within the EEA and ports and inland points outside the EEA ([17]), and to engage in related activities including, amongst others, discussions and communications concerning MSCs.

4. When a shipper makes a request to one or more of the carrier parties to an MSC to provide services relating to inland transport within the EEA, the terms of the contract must be bilaterally negotiated between the shipper and each involved MSC carrier party individually. The terms must be recorded in a confidential annex to the MSC and must not be disclosed to any other carrier party to the MSC. Similar provisions apply in relation to shipper requests for inland transport within the EEA under ASCs.

5. ASCs and MSCs must not include carriers other than the Parties to the Agreement, and must not contain rate structures differentiated on the basis of which carrier party transports the cargo.

([15]) As defined under Article 3(21) of the US Shipping Act of 1984 and, as from 1 May 1999, Article 3(19) of US Ocean Shipping Reform Act of 1998.

([16]) The Revised TACA thus provides that an ASC may include a price for services covered by the following: maritime freight rate; terminal handling charge (THC), container service charge (CSC) and less than container load service charge (LCLSC) at origin/destination; demurrage; multiple bill of lading charges; outport additionals or arbitraries; currency adjustment factor (CAF) and bunker adjustment factor (BAF); emergency surcharges; International Maritime Organisation (IMO) additionals; special equipment surcharges; oversize additionals; fitting additionals; change of destination fee; optimal stowage fee; heating fee; and port additionals such as customs inspection on terminal in Canada. An ASC may not include a price for any other services provided within the EEA, nor give any indication as to any terms for inland haulage or other inland services agreed between the shipper and individual carrier parties.

([17]) The principles set out above with respect to ASCs apply also to MSCs.

6. Under ASCs and MSCs, the shipper must have the right to choose which participating carrier parties transport shipments of cargo and in what proportions, unless otherwise agreed by the shipper.

7. The Parties may adopt a standard ASC form from which the parties to any service contract may agree to deviate. Those engaged in ISC and MSC activities may refer to and adopt the standard ASC form, and refer to and adopt published ASC rates and/or Tariff terms.

8. Except in relation to those parties participating in an MSC or where the shipper party so consents, the parties are not entitled to disclose information regarding which ASC form, rates and/or Tariff terms have or have not been included in any ISC or MSC.

9. The Parties are authorised to agree to voluntary service contract guidelines which relate solely to technical, non-commercial matters or to the disclosure of the existence, but not the terms, of an ISC with a shipper when that shipper subsequently requests an ASC or MSC.

10. ISCs and MSCs must expressly state that, subject to United States law, the terms are to remain confidential except (a) where the shipper has consented to the disclosure, or (b) where a shipper requests an ASC, in which case any member of the Revised TACA which is a party to an ISC and/or MSC with that shipper may disclose the existence, but not the terms, of such contract.

3.4. **Through intermodal freight rates — 'not below cost' rule**

(25) The TACA decision found that the members of the TACA had infringed Article 85 of the Treaty by agreeing the price of inland transport provided within the Community as part of a multimodal transport operation.

(26) In the Revised TACA, the Parties have abandoned inland price fixing, subject to the 'not below cost' rule described in recital 27. Under the Agreement, the Parties are not authorised to discuss or agree prices with each other for inland transport services supplied wholly or partly within the EEA to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo in the trade or any tariff or other matter pertaining to inland transport within the EEA.

(27) The Parties are authorised to agree that, where they provide maritime transport services pursuant to the Tariff, no member of the Revised TACA may charge a price less than the direct out-of-pocket cost incurred by it for inland transport services supplied within the EEA in combination with those maritime transport services (not-below-cost rule). For the purposes of this rule, 'cost' does not include empty equipment positioning or repositioning costs in Europe or overhead and/or administration costs. An independent, neutral body may be appointed to monitor compliance with such a rule.

(28) The Parties have not actually introduced such a rule.

3.5. **Technical Agreements**

(29) The Revised TACA provides that the Parties may voluntarily endeavour to achieve technical improvements through cooperation by means of ([18]):

(i) the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations;

([18]) The wording of (i) to (vi) follows the wording of Article 2(1)(a) to (f) of Regulation (EEC) No 4056/86.

(ii) the exchange or pooling, for the purpose of operating transport services, of vessels, space in vessels or slots and other means of transport, staff, equipment or fixed installations;

(iii) the organisation and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

(iv) the coordination of transport timetables for connecting routes;

(v) the consolidation of individual consignments; and

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

(30) The Parties have agreed to cooperate only with respect to heading (ii) above. The Revised TACA stipulates that should the Parties agree to cooperate with respect to any other matter described in that recital, the agreement must not be implemented (to the extent that any such cooperation falls within the prohibition of Article 81(1) of the Treaty) until such cooperation is notified under Regulation (EC) No 4056/86 or other applicable Community legislation.

3.6. **Operation of scheduled maritime transport services**

(31) The Parties may ([19]):

(i) coordinate their shipping timetables, sailing dates or dates of call;

(ii) determinate the frequency of their respective sailings or calls;

(iii) coordinate or allocate their respective sailings or calls;

(iv) regulate the carrying capacity offered by each of them ([20]); and

(v) allocate cargo or revenue among them.

3.7. **Consultation with shippers**

(32) The Parties may enter into and implement consultation agreements with transport users concerning the rates, charges, conditions and quality of scheduled maritime transport services and negotiate with shippers and groups of shippers with regard to rates, charges, classifications, rules and regulations.

3.8. **Administration**

(33) The Parties may meet or otherwise communicate, discuss and act on any matter falling within the scope of Article 2 (technical agreements) and Article 3 (liner conference block exemption) of Regulation 4056/86. They are further authorised to negotiate and enter into agreement service contracts. Two or more Parties (but not all of the Parties) are free to negotiate and enter into multi-carrier service contracts. The Parties may not discuss or exchange any confidential information relating to individual service contracts. Nor may they adopt any form of guidelines for individual service contracts, save purely technical, non-commercial, guidelines. The Parties are further precluded from any form of collective price-fixing for inland transport within the European Economic Area.

(34) A secretariat is established to administer the Agreement.

([19]) The wording of (i) to (v) follows the wording of Article 3(a) to (e) of Regulation (EEC) No 4056/86.
([20]) See further recital 81.

(35) The Parties may appoint an independent neutral body to monitor their compliance with their obligations under the Agreement, including the obligations arising under any 'not-below-cost' rule. According to the Parties, no such body has yet been appointed.

4. **THE MARKET**

(36) The Revised TACA covers, *inter alia*, the following relevant service markets ([21]):

(a) in relation to maritime transport services, the market for containerised liner shipping between Northern Europe and the United States using the sea routes between ports in Northern Europe and the ports in the United States and Canada ([22]). The geographic market for these services is the area in which the services are marketed. As the Commission found in the TAA Decision ([23]) and subsequently confirmed in the TACA Decision ([24]), this area consists, as far as the European geographic market is concerned, of the catchment areas of the Northern European ports;

(b) in relation to land transport services, the market for inland transport services undertaken within the territory of the Community which shippers acquire together with other services as part of a multimodal transport operation for the carriage of containerised cargo between Northern Europe and the United States ([25]).

(37) Of the above markets, only that relating to maritime transport needs to be considered in this decision, as the inland transport aspects of the Revised TACA will be dealt with under a separate procedure.

(38) The above (see recital 36(a)) maritime transport market definition has been endorsed by the Court of First Instance in its recent TAA judgment ([26]). The Court agreed in particular that air transport was not substitutable for sea transport as the evidence clearly showed that the demand for air transport, unlike that for sea transport, involved limited quantities of high value-added goods. The Court also confirmed that the Commission was correct to consider that containerised liner shipping services formed a separate market distinct from that or those for other maritime transport services.

(39) With regard to the geographic dimension of the relevant maritime transport market, the Court held that the available evidence showed that liner shipping services from Mediterranean ports were only marginally substitutable for those from Northern European ports. In this context, it should be noted that in its recent decision in Hutchison/RCPM/ECT ([27]), the Commission found that the available evidence showed that there was still only marginal competition between Northern European and Mediterranean ports ([28]). Nothing has emerged in this case that might call into question the continuing validity of this conclusion.

(40) The Revised TACA also authorises its members to agree on rates and charges for the services provided between the vessel and the port gate (see recital 24(1)). In this regard, a distinction must be made between those Revised TACA services for which there is specific supply and demand distinct from that for either sea or inland transport and those services for which no such specific supply and demand exists. The former constitute a separate market or markets while the latter do not ([29]).

([21]) Revised TACA Articles 2 (Purpose of agreement), 4 (Geographic scope of agreement) and 5 (Overview of Agreement authority).
([22]) See TACA Decision, recital 84.
([23]) Commission Decision 94/980/EC in Case No IV/34.446 — *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994, p.1), recitals 67 and 68.
([24]) Paragraphs 76-83.
([25]) TACA Decision, recital 91.
([26]) Judgment of the Court of First Instance of 28 February 2002 in Case T-395/94 *Atlantic Container Line and others* v *Commission* [2002] ECR II-875, paragraphs 269 to 298.
([27]) Commission Decision of 3 July 2001 in Case COMP/JV.55 — Hutchison/RCPM/ECT, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/jv55_en.pdf. See recital 37 et seq.
([28]) Paragraphs 41 and 46.
([29]) See in this respect the judgment in Case T-86/95 *Compagnie Générale Maritime and others* v *Commission* (FEFC) ([2002] ECR II-1011, paragraphs 128 and 129.

(41) The services covered by the Revised TACA for which there is typically no specific supply and demand are those services that are indivisible from the sea transport or inland transport service in the sense that it would be physically or economically impossible for a third-party service provider (for example a container terminal operator) independent of the sea or inland transport operator to provide these services separately and directly to the transport user.

(42) The other Revised TACA services, the services for which there is specific supply and demand, consist of those cargo-handling services within the port in respect of the provision of which to transport users the members of the Revised TACA are in actual or potential competition not only with each other and with other non-TACA lines but also with third-party service providers.

(43) The relevant market for cargo-handling services in the instant case is accordingly that for the provision of these services in Northern European ports serving the sea routes covered by the Revised TACA.

5. THE STRUCTURE OF THE MARKETS

(44) As compared with the period covered by the finding of Article 86 infringements in the TACA decision (part of 1994, 1995 and 1996), the competitive conditions on the transatlantic routes have changed materially. Table 1 shows the development of market shares over the period 1994-2001:

Table 1

Market shares of container shipping lines on the direct north transatlantic trade and via the Canadian gateway, 1994 to 2001 (first quarter) ([30])

(%)

Carrier	1994	1995	1996	1997	1998	1999	2000	2001 (First quarter)
TACA parties/Revised TACA parties (from 1999 onwards)	60,65	61,55	59,83	58,3	59,5	49	48,5	47,7
Others	39,35	38,45	40,17	41,7	40,5	51	51,5	52,3
Total	100	100	100	100	100	100	100	100

(45) The above picture of a steady decline in the market share of the TACA conference is confirmed by the findings of the United States Federal Maritime Commission (FMC) in the final report on the impact of the 1998 Ocean Shipping Reform Act (OSRA) ([31]). The FMC estimates that the market share of the TACA conference has declined from a high of some 80 % in 1992 (when the TACA was first formed) to approximately 50 % in 2001. The members of the Revised TACA are therefore now faced with significantly more external competition than was the case during the period covered by the TACA decision.

(46) The advent of confidential individual service contracts also means that there is significantly more internal competition than was the case at the time of the TACA decision. The TACA parties have thus reported to the FMC that only about 10 % of the cargo carried by the conference members is moved under the conference tariff. Further, by the end of 1999, 80 % of the cargo carried by the TACA parties was carried under non-conference service contracts. Finally, the number of conference service contracts (also referred to as ASCs) declined from thirty in 1999 to only three in the year 2000 ([32]).

([30]) *Sources:* TACA Decision; Revised TACA parties (based on PIERS Global Container Reports).
([31]) *The Impact of the Ocean Shipping Reform Act of 1998*, Federal Maritime Commission, September 2001.
([32]) *The Impact of the Ocean Shipping Reform Act of 1998*, page 12.

(47) The FMC findings are consistent with the information contained in the six-monthly reports provided to the Commission by the individual Parties ([33]). The reports provided by the Parties also confirm that an overwhelming proportion of the cargo carried by the Parties is moved under individual service contracts. It is clear from this information that the individual service contract has become the norm on the trade covered by the Revised TACA and that each member of the conference is therefore now faced with substantial competition from other TACA members.

(48) The above conclusions concerning the sea transport market are equally valid for the market for cargo-handling services. Here too, the members of the Revised TACA face external competition from independent carriers operating on the transatlantic trade. They also face potential competition from independent cargo-handling operators. Internally, the Parties are faced with strong competition from each other on the terms (including price) and conditions of port-to-port and door-to-door ISCs and MSCs.

(49) In conclusion, the available evidence suggests that the members of the TACA are now subject to an unprecedented degree of both external and internal competition.

6. THIRD-PARTY OBSERVATIONS

6.1. Comments in response to the Article 12(2) Notice

(50) Comments were received from the third parties mentioned in recital 6. A number of these comments concerned the inland transport aspects of the Revised TACA and need not be described further here. Other comments — mainly hostile to exemption — appear no longer to reflect the views of the third party in question ([34]). A number of the comments submitted in response to the Article 12(2) Notice are however still relevant for an assessment of whether the provisions of the Agreement qualify for block or individual exemption and will therefore be dealt with in sections 9 and 10.

6.2. Comments in response to the Article 23(3) Notice

(51) Comments have been received from CLECAT and the ESC. CLECAT now raises no fundamental objection to the exemption of the Revised TACA. It does however urge the Commission to set up 'an appropriate and stringent control mechanism' to ensure compliance with the Parties' undertaking not to increase any tariff rate in conjunction with any capacity regulation programme or create an artificial peak season.

(52) The Commission is confident that the arrangements put in place are sufficient to ensure compliance with the Parties' undertakings on capacity regulation. Those arrangements are described further in recital 81.

(53) The ESC's comments on the Article 23(3) Notice can be summarised as follows:

1. the Commission needs to assess the Revised TACA in a legal and economic context consisting of, in particular, the OECD final report on liner shipping competition policy ([35]), the judgments of the Court of First Instance in the TAA and FEFC cases, and the Commission's intention to examine the liner conference block exemption in the light of the OECD report and other developments;

([33]) The individual six-monthly report contains information on the number of contracts to which the line is a party, broken down between ISC, MSC, ASC and tariff, as well as information concerning the number of TEUs (the industry standard abbreviation for '20-foot equivalent unit' — it refers to the size of the containers) and the percentage of total TEU carried by the line under each of these contracts.

([34]) Clecat thus no longer opposes exemption, while neither TLF nor the Federation of Swedish Industries have commented on the Notice of 29 November 2001.

([35]) Available on the OECD website at: http://www.oecd.org/EN/home/0,,EN-home-25-nodirectorate-no-no–25,00.html.

2. there is no need for the Commission to take a decision on individual exemption, as the notification has been submitted on a precautionary basis only, the Parties taking the view that all of the provisions of the Revised TACA fall within the scope of the liner conference block exemption. The Commission should therefore not waste its scarce resources on dealing with the Parties' application;

3. the Commission should give further consideration to the relevance of the TAA judgment for an assessment of the capacity regulation provisions of the Agreement;

4. the provisions of the Revised TACA on information exchange are such as to give the conference as a whole insight into the terms of confidential service contracts entered into between individual conference members and individual shippers.

(54) Neither the OECD report nor the fact that the Commission has begun a review of Regulation (EEC) No 4056/86 has any direct relevance to the matter at hand. Both concern a possible reform of existing competition legislation, while what is in issue in this decision is the application of that legislation to a specific case. Nor is it necessary to make express provision in this decision for the possibility that the applicable legislation may be substantially amended before the expiry of an individual Revised TACA exemption, as any such amendment would be accompanied by appropriate transitional arrangements.

(55) Regarding the contention that there is no need for the Commission to take a decision on individual exemption, it is sufficient to note that the Parties have expressly requested the Commission to take a decision ([36]) and that the Commission must therefore adopt a formal decision ([37]).

(56) The possible relevance of the TAA judgment for an assessment of the capacity regulation provisions of the Agreement is dealt with in recitals 85 and 86. The ESC's remarks on information exchange are addressed in recitals 70 and 71.

7. **APPLICABLE REGULATIONS**

(57) As a result of there being specific sectorial Council Regulations applying Articles 81 and 82 of the Treaty to transport services, the activities of the Revised TACA parties may fall under three different Regulations: Regulation (EEC) No 4056/86, Regulation (EEC) No 1017/68 and Regulation No 17.

(58) Regulation (EEC) No 4056/86 applies to international maritime transport services ([38]). In its FEFC judgment, the Court of First Instance concluded that the scope of the Regulation was limited to:

> 'maritime transport services properly so called, that is, to transport by sea from port to port, and does not cover the inland on- or off-carriage of cargo supplied in combination with other services as part of an intermodal transport operation' (paragraph 241).

(59) The following provisions of the Agreement therefore clearly fall within the scope of Regulation (EEC) No 4056/86:

1. the provisions relating to the operation of scheduled maritime transport services; and

2. the relevant parts of the provisions relating to the Tariff and service contracts, that is to say, those parts that concern maritime transport.

(60) Equally clearly, the inland transport aspects of the Agreement fall outside the scope of Regulation (EEC) No 4056/86 ([39]). In particular, the provisions of the Agreement relating to the 'not-below-cost' rule fall under Regulation (EEC) No 1017/68.

([36]) Confirmed by letter of 20 March 2002.
([37]) Article 12(4) of Regulation (EEC) No 4056/86.
([38]) Article 1.
([39]) See, for example, paragraph 261 of the FEFC judgment.

(61) The provisions of the notified agreement that fall neither under Regulation (EEC) No 4056/86 nor under Regulation (EEC) No 1017/68 fall under Regulation No 17. The provisions relating to cargo handling within a port under the Tariff or service contracts fall at least in part within Regulation No 17 ([40]). This is in particular the case for those cargo-handling services for which there is specific supply and demand distinct from that for maritime or inland transport (see recital 42).

8. **ARTICLE 81(1) OF THE TREATY (AND ARTICLE 53(1) OF THE EEA AGREEMENT)**

8.1. **Agreement between undertakings**

(62) The Parties are engaged in the commercial activity of providing maritime transport and related services. They are therefore undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The Revised TACA is a formal agreement between these undertakings.

8.2. **Restriction of competition**

(63) The following provisions of the agreement restrict or may restrict competition appreciably within the meaning of Article 81(1) of the Treaty:

1. the agreement between the parties by which they agree the prices and conditions that constitute the Tariff;

2. the operation of scheduled maritime transport services;

3. provisions relating to agreement service contracts (ASCs) and to multicarrier service contracts (MSCs) ([41]).

8.2.1. *Individual service contracts (ISCs)*

(64) The Revised TACA contains no restriction on the terms and conditions under which the parties might enter into ISCs with shippers. The ESC and the Federation of Swedish Industry have previously argued that three aspects in particular of the Revised TACA would in practice restrict the free availability of ISCs.

8.2.1.1. Effect of agreement service contracts

(65) The two shipper groups were concerned that allowing the lines to enter into ASCs and MSCs would result in restrictions as regards the lines' freedom to negotiate and enter into ISCs.

(66) Individual TACA lines are entering into ISCs, and there is no evidence that allowing ASCs and MSCs is restricting the availability of ISCs. On the contrary, the most recent reports submitted to the Commission by the Parties (individually) indicate that the overwhelming majority of cargoes continue to be carried under ISCs, with a very modest proportion being accounted for by MSCs and ASCs. The position of the individual service contract as the preferred form of agreement between carrier and shipper is therefore unchallenged.

(67) The provision that lines offering ISCs and MSCs can refer to the standard form of ASC is no more than a statement of what in practice is likely to be an obvious starting point for many such negotiations. However, any agreement, understanding or concerted practice between the parties that they will, when agreeing ISCs, follow in whole or in part the standard form, content or price of ASCs could not be considered to be covered by any exemption. Any such agreement could furthermore be a reason for the Commission to revoke the exemption, in accordance with Article 13(3) of Regulation (EEC) No 4056/86.

([40]) Commission Decision 2000/627/EC in Case IV/34.018 — *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)* (OJ L 268, 20.10.2000, p. 1), recital 128.
([41]) See TACA Decision, recitals 454 to 462.

8.2.1.2. Voluntary service contract guidelines

(68) The ESC claimed that the voluntary guidelines published by the Transpacific Stabilisation Agreement (TSA) and arguments made by the Parties in the United States of America were evidence that any voluntary guidelines would be likely to relate to commercial matters, including the prices of individual confidential contracts, in breach of Article 81(1) of the Treaty.

(69) The nature of guidelines and discussion agreements permitted (but not required) under the United States regulatory regime is not directly relevant to the application for exemption under the Community competition rules. The Parties have notified an agreement under which they may agree voluntary guidelines (although they have not in fact done so) which relate solely to 'technical, non-commercial matters'. Guidelines on such matters can be considered not to raise competition concerns. The type of detailed price recommendations contained in the TSA guidelines cannot legitimately be described as either 'technical' or 'non-commercial'. If the Parties were to agree 'voluntary service contract guidelines' that might restrict competition to a material degree (for example replicating those adopted by the TSA) such an agreement would not fall within the limits of the activity described in the notification. Any such agreement could furthermore be a reason for the Commission to revoke the exemption.

8.2.1.3. Exchange of information

(70) The ESC contended that the parties would exchange information to the maximum extent permitted under United States law, and that this would include discussing the terms and conditions of individual service contracts including, as lines operating on transpacific trades have done within the TSA, jointly agreeing recommended general rate increases applicable to ISCs. This is, however, a scenario based on what lines may do under United States law, and have done on the transpacific; the scenario is inconsistent with what the Parties have notified. Jointly agreed recommended rate increases would not be covered by an exemption.

(71) Contrary to what has been argued by the ESC, it is appropriate that the tariff is set by reference to the prevailing prices on the market, including service contract prices. The concern is to ensure in such circumstances that there is a sufficient degree of aggregation to protect the confidentiality of information relating to individual and multicarrier service contracts. Following amendments made by the Parties to their proposed arrangements for the exchange of information ([42]), neither the TACA secretariat nor the Parties will have access to non-aggregated carrier-specific information relating to cargoes travelling under ISCs and MSCs. The Parties will exchange information relating to such cargoes only on an aggregated conference-wide basis.

(72) It is concluded that the provisions of the Revised TACA relating to individual service contracts are not such as to lead to an appreciable restriction of competition.

8.3. **Effect on trade between Member States**

(73) In its TAA judgment, the Court of First Instance confirmed that intra-Community trade may be appreciably affected by a restriction of competition between members of an international liner conference ([43]). That finding, concerning as it does the predecessor of the TACA, is of direct relevance to the instant case.

([42]) The Parties have, *inter alia*, appointed an independent third party to collect, aggregate and disseminate commercially sensitive data and adopted a resolution setting out the categories of information that may and may not be exchanged.

([43]) Paragraphs 71 to 74. See also the Judgment of the Court of First Instance of 8 October 1996 in Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and others* v *Commission* [1996] ECR II-1201, paragraphs 202 and 203.

(74) As was the case with the TAA, the Revised TACA covers shipping lines established in several Member States and engaged, *inter alia*, in the provision of scheduled maritime transport services between ports in Northern Europe and ports in the United States and Canada. The elimination or diminution of competition between the parties on price or service may therefore have the effect of distorting trade flows through and between the Northern European ports and their respective catchment areas. Furthermore, as the maritime transport service usually constitutes only one link in a supply chain encompassing, *inter alia*, cargo handling services and inland haulage, a restriction of competition on the maritime transport link would inevitably have a collateral effect on these other activities and on trade outside the immediate hinterland of the port. This would be all the more likely when, as in the instant case, the Agreement itself provides for the fixing of a common price for cargo-handling services.

(75) An agreement to fix prices or to limit supply is a serious restriction of competition. Given the market share of the Revised TACA parties, this restriction is liable to have an appreciable effect on trade between Member States.

9. **BLOCK EXEMPTION: ARTICLE 3 OF REGULATION (EEC) No 4056/86**

9.1. **Scope of the block exemption**

(76) Article 3 of Regulation (EEC) No 4056/86 grants exemption from the prohibition under now Article 81(1) of the Treaty to the members of a liner conference in respect of the fixing of uniform or common freight rates and any other agreed conditions with respect to the provision of scheduled maritime transport services. It also grants exemption to a limited number of other activities if one or more of them is carried on by the members of a liner conference in addition to fixing prices and conditions of carriage for maritime transport services. The reasons for which exemption is granted include the benefits to shippers described in the recitals to Regulation (EEC) No 4056/86 ([44]) and in particular the stabilising effect of conferences, which assures shippers of reliable services.

(77) In the TAA Judgment, the Court of First Instance recalled that provisions derogating from Article 81(1) must be interpreted strictly and that this conclusion must apply, *a fortiori*, to the block exemption provisions of Regulation (EEC) No 4056/86:

> '…by virtue of its unlimited duration and the exceptional nature of restrictions on competition authorised (horizontal agreement having as its object the fixing of prices). It follows that the block exemption provided for by Article 3 of Regulation No 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to market conditions.' ([45]).

(78) Accordingly, the block exemption must be interpreted as covering only those provisions of a conference agreement that relate to the operation of, and the fixing of a Tariff for, scheduled maritime transport services.

9.2. **Application of the block exemption to the Revised TACA**

(79) The ESC has submitted that the Commission is precluded from applying Article 3 of Regulation (EEC) No 4056/86, and from granting an individual exemption, since the main cause of commercial stability arising on the TACA trades is said by the lines themselves to be confidential contracts.

([44]) 'Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilising effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services…' (eighth recital in the preamble to Regulation (EEC) No 4056/86).

([45]) Paragraph 146, emphasis added.

(80) Article 3 of Regulation (EEC) No 4056/86 exempts certain conduct of carriers, whether or not associated with other conduct, subject to the possibility for the Commission to take action under Article 7. Thus, the tariff of a liner conference exempted by Article 3 does not cease to be exempted merely because the members of the conference also enter into service contracts.

9.3. **Capacity regulation**

(81) Article 5(3)(iv) of the Revised TACA, as originally notified, authorised the Parties to cooperate with the objective of '…regulation of the carrying capacity offered by each of them'. The wording of this provision mirrored that of Article 3(d) of Regulation (EEC) No 4056/86. In response to the Commission's concerns, the wording has been amended to:

> '…**subject to the provision to the European Commission and FMC of such reports and forecasts as may be agreed between the Parties and the European Commission and the Parties and the FMC respectively**, regulation of the carrying capacity offered by each of them (as may more fully be authorised by Annex B), **always provided that the Parties shall not increase any tariff rates in conjunction with any capacity regulation program on any trade covered by such program or create an artificial peak season**' (emphasis added).

(82) As agreed between the Parties and the Commission, the reports and forecasts to be provided to the latter ([46]) will include:

1. an ex-ante report, submitted before the implementation of any capacity programme, describing the parties' weekly projected cargo liftings and total weekly available capacity for the programme as a whole;

2. a weekly report, submitted for each of the weeks during which the proposed programme will operate, containing the same information as the *ex-ante* report and describing any new revised projection for the week in question;

3. a weekly report, submitted for each of the weeks during which the proposed programme will operate, containing data on each vessel's unused slots and cargo left behind and/or rolled to another vessel during the previous week; and

4. an ex-post report, submitted after the end of the programme, showing the parties' total weekly actual cargo liftings and total weekly actual capacity.

(83) The Parties will also provide a report covering the 18-month period preceding the programme, as a reference period for the assessment of the capacity regulation.

(84) Subject to the Parties' continued compliance with the conditions set out in Article 5(3)(iv), the capacity regulation provisions of the Revised TACA fall within the scope of the liner conference block exemption. This is consistent with the position taken by the Commission in the TAA ([47]) and EATA ([48]) Decisions.

([46]) These reports have already been provided in respect of the Revised TACA 2001/2002 Christmas/New Year capacity regulation programme.
([47]) Recitals 359 to 370.
([48]) Commission Decision 1999/485/EC in Case IV/34.250 — *Europe Asia Trades Agreement* (OJ L 193, 26.7.1999, p. 23), recital 177 et seq.

(85) As regards the ESC's suggestion that the Commission should in this context give further consideration to the TAA judgment, the latter is silent on the issue of whether the TAA capacity management programme would have been covered by the liner conference block exemption had the TAA been a conference. The Court did however uphold the Commission's finding that the TAA, including the provisions relating to capacity management, afforded its members the possibility of eliminating competition in respect of a substantial part of the services in question, and could not therefore qualify for individual exemption under Article 81(3) of the Treaty.

(86) The above finding is not applicable to the Revised TACA capacity regulation provisions, irrespective of whether or not they can be considered to be covered by the block exemption. The TAA parties had a market share of roughly 75 %, while the Revised TACA parties have a combined market share of no more than approximately 50 %. Further, the TAA programme did not involve the actual withdrawal of capacity, and therefore did not result in any significant cost savings that could be passed on to transport users. By contrast, the Revised TACA capacity arrangements, as implemented over the 2000/2001 and 2001/2002 Christmas and New Year low seasons, have involved the withdrawal of vessels and have resulted in significant cost savings. The Revised TACA arrangements, unlike those of the TAA, are also surrounded by safeguards to ward against abuse.

9.4. **Provisions not covered by the block exemption**

(87) To the extent that they may be considered to be restrictive of competition, the block exemption does not cover provisions relating to agreement service contracts and to multicarrier service contracts ([49]).

(88) Further provisions falling outside the scope of Regulation (EEC) No 4056/86, and therefore outside the scope of the block exemption are:

1. those provisions of the Revised TACA which fall within the scope of Regulation (EEC) No 1017/68 (and are therefore outside the scope of this procedure); and

2. the provisions authorising the Parties to agree prices and conditions for those cargo handling services in a port which are not indivisible from the sea voyage.

10. **INDIVIDUAL EXEMPTION: ARTICLE 81(3) OF THE TREATY (AND ARTICLE 53(3) OF THE EEA AGREEMENT)**

10.1. **Service contracts**

(89) In the TACA Decision, the Commission found, *inter alia*, that the TACA parties had infringed Articles 85 of the Treaty by agreeing the terms and conditions on and under which they might enter into service contracts with shippers ([50]). The Commission also found that the TACA parties had infringed Article 82 of the Treaty by placing restrictions on the availability and contents of these contracts ([51]). Both types of conduct were prohibited ([52]). The TACA Decision did not prohibit the parties from offering joint service contracts (that is to say, agreement service contracts or multicarrier service contracts) ([53]).

([49]) See TACA Decision, recitals 454 to 462.
([50]) Article 3.
([51]) Article 6.
([52]) Articles 4 and 7.
([53]) Article 3 of the Decision contains no such prohibition. Instead, it concerns two main types of restriction: (i) where the agreement prevented TACA members from entering into individual service contracts with shippers or restricts their freedom to do so, and (ii) where the agreement restricted the terms which could be included in ISCs. The Revised TACA does not contain such restrictions; no restrictions are placed on the availability of ISCs.

10.1.1. *Agreement service contracts (ASCs) and multicarrier service contracts (MSCs)*

(90) The Agreement provides that the lines may enter into ASCs or MSCs, and adopt a standard form of ASC, relating to services provided between ports within the EEA and ports and inland points outside the EEA. As indicated (recital 40), such contracts may include a price for all services, closely related to the activity of maritime transport, provided between the vessel and the port gate ([54]). To the extent that those provisions may be considered to be restrictive of competition, they do not fall under the liner conference block exemption contained in Regulation (EEC) No 4056/86 ([55]), but they do qualify for individual exemption under Article 81(3). Two main benefits of service contracts were identified in the TACA decision ([56]): the provision of special services which improve the supply chain, and the contribution they make to price stability. Service contracts can also reduce search costs and administrative costs. The provision by the Revised TACA lines of ASCs and MSCs to shippers who want such contracts will contribute to stability, may make provision for special services, and will help reduce search, negotiation and monitoring costs ([57]).

(91) Now that the availability of ISCs is not restricted, and indeed ISCs now constitute the preferred form of arrangement on the trade covered by the Revised TACA, it is sufficient that there are at least some cases where joint service contracts bring additional benefits for shippers as compared to ISCs. As the periodic reports supplied by the Parties show, some shippers have continued to opt for joint service contracts in an environment where ISCs are freely and widely available; this is in itself sufficient evidence that there are circumstances where joint service contracts bring benefits for shippers. The setting of a joint contract price is an essential and non-severable element of a joint service contract and is hence indispensable to the achievement of those benefits.

(92) Competition is unlikely to be eliminated within the meaning of Article 81(3). In addition to competition from outside the conference altogether, there is considerable internal competition from individual service contracts (see recital 46).

10.2. **Cargo-handling services in a port**

(93) Conferences, including the TACA, had the practice of dividing their tariffs into five parts showing rates for each of the following services: inland transport to the port; cargo handling in the port (transfer from the mode of inland transport to the vessel); sea transport; cargo handling in the port of destination (transfer from the vessel to the mode of inland transport), and inland transport to the place of final destination ([58]). The Parties no longer agree prices for inland transport in the EEA. Thus, as far as the EEA is concerned, the Tariff sets prices only for cargo-handling in the port of departure or destination.

(94) While the Court of First Instance has not ruled on the precise dividing line between cargo handling services and maritime transport services, it has made clear that Regulation (EEC) No 4056/86 must be understood as applying only to transport by sea from port to port and that the maritime transport service ceases on arrival at the port ([59]). It follows that Tariff charges for cargo handling operations within the port can fall within the scope of the liner conference block exemption contained in that Regulation only to the extent that these operations are indivisible from the sea voyage (see recital 41).

(95) It is not, however, necessary in this procedure to identify with precision which operations fall into which category, because to the extent that the Revised TACA Tariff covers cargo handling services

([54]) For the list of charges that relate to such services, see footnote above.
([55]) See TACA Decision, at recitals 454 to 462. See also TAA Judgment, at paragraph 164.
([56]) See recitals 472 to 476.
([57]) It should be noted that the Commission has already accepted joint service contracting by deciding not to raise serious doubts against such arrangements in the Polfin Liner Conference case (OJ C 396, 19.12.1998, p. 10; IP/99/193).
([58]) TACA Decision, recital 96.
([59]) FEFC Judgment, at paragraphs 239-241.

which fall outside the scope of Regulation (EEC) No 4056/86 but within that of Regulation No 17, it can be considered exemptable ([60]).

(96) The cargo-handling services in question, provided within the port, are economically and physically closely connected to the maritime transport as such. These services have, at least since the advent of containerisation, generally been contracted for by carriers and invoiced directly to the latter by the cargo-handler (the terminal operator or stevedoring company). Transport users, particularly those with only small volumes to be shipped, may benefit from this situation as carriers will generally have greater bargaining power *vis-à-vis* terminal operators and will be able to negotiate a price that is substantially lower than that which might have been obtained by the shipper ([61]). Against that background, and in the very special circumstances of this case, the Commission will not object to the fixing of charges for these services by the Parties to the Revised TACA. The very special circumstances of this case include the fact that only a fraction of Revised TACA cargoes are carried under the conference Tariff, while by far the greatest part are carried under individual service contracts. The Commission has also taken account of the fact that the Revised TACA parties have a combined market share of no more than approximately 50 %. As a result, the Revised TACA Parties are subject to an unprecedented degree of internal and external competition and shippers have a plethora of alternatives to carriage under the conference Tariff.

10.3. **Conclusion**

(97) For all of the above reasons, it is concluded that the aspects of the notified agreement referred to in recitals 89 to 96, falling outside the scope of Article 3 of Regulation (EEC) No 4056/86 but within the scope of that Regulation or of Regulation No 17, may infringe Article 81(1) of the Treaty but meet the criteria for exemption under Article 81(3).

11. **DURATION OF EXEMPTION, CONDITIONS AND OBLIGATIONS**

(98) Pursuant to Article 13 of Regulation (EEC) No 4056/86 and Article 8 of Regulation No 17, a decision applying Article 81(3) of the Treaty is to indicate the period for which it is to be valid; normally such period should not be less than six years. The exemption in this case should take effect, for those elements of the Revised TACA falling within the scope of Regulation (EEC) No 4056/86, from the date of implementation of the Agreement (31 December 1998), and for those elements falling within the scope of Regulation No 17, from the date of notification (29 January 1999), and should terminate six years from the date of publication in the *Official Journal of the European Communities* of the Commission Notice pursuant to Article 12(2) of Regulation (EEC) No 4056/86,

([60]) To the extent that cargo handling services fall within the scope of Regulation (EEC) No 1017/68, they fall outside the scope of this procedure.

([61]) See for instance Lloyd's List of 12.6.2002, page 5: 'Speaking at the same conference [TOC 2002] P&O Ports' chief operating officer Alistair Baillie urged terminal operators to have a complete re-think about pricing. Hard-pressed carriers are driving down terminal handling charges, "reducing the whole industry to sub-economic returns". Furthermore, carriers are never able to retain any savings they obtain for themselves, instead passing them straight on to the customer rather than improving their own bottom lines, said Mr Baillie. For that reason he believes terminal operators should split their charges between shipping lines and shippers, the former paying for ship to shore cargo services and consignees billed for yard to gate moves. […] Dividing services between cargo interests and carriers could form the basis of future pricing policies, Mr Baillie proposed, so reducing terminal operators' exposure to weak ocean freight rates'.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 81(3) of the Treaty, the provisions of Article 81(1) of the Treaty are hereby declared inapplicable to those aspects of the Revised Trans-Atlantic Conference Agreement (TACA) concerning joint service contracts and port handling, falling within the scope of Regulation (EEC) No 4056/86 and Regulation No 17, from 31 December 1998 in the case of Regulation (EEC) No 4056/86, and from 29 January 1999 in the case of Regulation No 17, and for a further period of six years from 6 May 1999.

Article 2

This Decision is addressed to:

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Done at Brussels, 14 November 2002.

For the Commission
Mario MONTI
Member of the Commission