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Judgment of the Court of First Instance in Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98

Atlantic Container Line and Others v *Commission*

THE COURT HAS SET ASIDE RECORD FINES TOTALLING EUR 273 MILLION IMPOSED BY THE COMMISSION FOR ABUSE OF A COLLECTIVE DOMINANT POSITION ON SHIPPING COMPANIES FORMING A CONFERENCE

The annulment is based partly on lack of evidence and infringement of the rights of the defence and partly on the immunity conferred by notification to the Commission. Further, the Court of First Instance has upheld the Commission's refusal to grant exemption to the agreement establishing a transatlantic liner conference (TACA).

A liner conference is a group of vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route and which operates under uniform or common freight rates. The Court of First Instance of the European Communities has today delivered a judgment which brings to an end a series of cases brought before it concerning the legality of the commercial practices of liner conferences[1] in the light of the detailed rules for the application of the competition rules laid down in a 1986 Community regulation.[2]

In 1994, 15 shipping companies initially party to an agreement concerning transatlantic liner services between northern Europe and the United States of America, the Trans-Atlantic Agreement ('TAA'), which was challenged by the Commission, entered into a new agreement

[1] Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875; Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011; judgment of 19 March 2003 in Case T-213/00 *CMA CGM and Others* v *Commission*, not yet published in the ECR; Case T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125 and the order of 4 June 2003 in Case T-224/99 *European Council of Transport Users* v *Commission*, not yet published in the ECR.

[2] 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 (OJ 1986 L 378, p. 4, 'the 1986 regulation').

establishing a liner conference, the Trans-Atlantic Conference Agreement ('TACA') covering the same shipping trade. Two other companies, Hanjin and Hyundai joined the conference at the end of 1994 and in 1995. Amongst other provisions capable of infringing the Community *competition* rules, that agreement: fixed the rates for transatlantic maritime transport services themselves and for inland transport services provided as part of intermodal transport[3] in the Community, set the terms and content of service contracts entered into with shippers and fixed the remuneration of freight forwarders in certain circumstances.

The Court has upheld both the Commission's finding that the TACA infringes the competition rules and its refusal to grant exemption to the member companies.

The TACA **was notified to the Commission** with a view to obtaining an exemption in respect of those provisions restricting competition. The Commission considered that the necessary requirements were not met and **objected to it** and required the member companies of the TACA to put an end to that **first series of infringements**[4] (with the exception of the fixing of the maritime transport rate) without imposing a fine on them in that respect.

The Court has essentially upheld the Commission's finding that the restrictions in relation to service contracts constitute an abuse (the first abuse), but has set aside for lack of evidence and infringement of the rights of defence that part of the decision concerning the measures inducing competitors to join the conference (the second abuse).

The Commission considered that, between 1994 and 1996, the TACA parties had committed **a second series of infringements constituting an abuse of a collective dominant position** on the market for containerised liner shipping between northern Europe and the United States.

The first abuse, according to the Commission, concerned certain *restrictions on the availability and content of service contracts* (in particular a prohibition on member companies entering into individual contracts, and restrictive clauses applied to individual service contracts from 1996, in particular the ban on multiple contracts and contingency clauses).

The second abuse concerned measures seeking to induce potential competitors to join the TACA rather than take part in the transatlantic trade as independent lines.

The Commission penalised those two abuses and imposed fines on each of the member companies of the conference **totalling EUR 273 million, the highest amount ever imposed on undertakings in a collective dominant position.** (See the table annexed below). The fines imposed in respect of the second abuse make up approximately 90% of the total amount.

The Court has confirmed the incompatibility of the practices which the Commission found constituted the *first abuse*, with the exception of the exchange of information between companies in the conference, which the Court did not find to be abusive since that information was published in the United States.

Furthermore, **since the TACA had been notified** to the Commission **as imposing restrictions**

[3] In door-to-door contracts, other forms of transport are used in addition to maritime transport (road, rail...).
[4] Decision 1999/243/EC of 16 September 1998 ('TACA decision').

likely to constitute an abuse, the Court found that **the rules laid down by the 1986 regulation relating to immunity apply, thereby protecting the undertakings from potential financial penalties**. It therefore set aside the fines determined on the basis of that regulation.

As for the inland part of the contracts for transport services provided as part of intermodal transport, in respect of which that immunity does not apply, the Court found that the cooperation of the companies in question, and the legal uncertainty over the finding of abuse and the potential penalties constitute **mitigating circumstances** which justify **no fine being imposed**.

Two types of inducement measure constitute *the second abuse* found by the Commission:

1. *Those addressed specifically to particular competitors* (for example, the disclosure of confidential information, the promise of market share and of immediate participation in existing conference service contracts) and

2. *More general ones addressed to all competitors* (the conclusion of service contracts at advantageous rates and the reservation of certain service contracts).

The Court concluded that **the Commission had not demonstrated that *the specific measures,*** rather than particular commercial considerations, **had induced** the only two shipping companies who joined the conference between 1994 and 1996 – **Hanjin and Hyundai – to become members of the conference**. The Court further held that **the Commission had infringed the rights of the defence** by using documents in support of its complaints concerning the specific measures **without giving the TACA parties the opportunity to comment on the interpretation which the Commission intended to place on them.** Consequently, since those documents were the only evidence of *those specific measures*, the Court found that **those measures were not validly proved.**

The Court held that the Commission had not shown to the requisite legal standard that the *general measures of inducement* constituted an inducement since they had not in themselves resulted in any competitors in fact joining.

The Court therefore annulled the Commission's decision in so far as it found that the TACA parties had abusively altered the structure of the market, together with the fines imposed in respect of the second abuse.

ANNEX

Fines imposed by the Commission and annulled by the Court of First Instance by member company of the TACA

MEMBER COMPANY OF THE TACA	NATIONALITY	FINE (ECU = EURO)
A.P. Møller-Maersk Line	DK	27 500 000
Atlantic Container Line AB	S	6 880 000
Hapag Lloyd Container Line GmbH	D	20 630 000
P&O Nedlloyd Container Line Limited (*merged after the facts giving rise to the dispute*)	UK	41 260 000
Sea-Land Service, Inc	USA	27 500 000
Mediterranean Shipping Co	CH	13 750 000
Orient Overseas Container Line (UK) Ltd	UK	20 630 000
Polish Ocean Lines	PL	6 880 000
DSR-Senator Lines	D	13 750 000
Cho Yang Shipping Co., Ltd	South Korea	13 750 000
Neptune Orient Lines Ltd	Singapore	13 750 000
Nippon Yusen Kaisha	Japan	20 630 000
Transportación Marítima Mexicana SA de CV / Tecomar SA de CV (*merged before the facts giving rise to the dispute*)	Mexico	6 880 000
Hanjin Shipping Co., Ltd	South Korea	20 630 000
Hyundai Merchant Marine Co., Ltd	South Korea	18 560 000
Total		**272 980 000**

<u>Reminder</u>: An appeal against the decision of the CFI, limited to points of law, can be brought before the Court of Justice of the European Communities within two months of delivery.

Available languages: DA, DE, EN and FR.

The full text of the judgment can be found on the internet (www.curia.eu.int).
In principle it will be available from midday CET on the day of delivery.

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