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Title:

Theories & Practices of Multimodal Transport in Europe

Abstract:

The purpose of this paper is to illustrate how the liner shipping industry offers multimodal transport services in Europe and what types of regulatory constraints exist in European legislation that may restrict the provision of door-to-door operations by liners companies. A description of two model of multimodal transport systems currently offered by liner operators servicing the European trade is provided as well as a discussion on European transport and competition rules related to transport services, such as Article 81 and 82 of the Treaty of Rome (as amended by the Treaty of Amsterdam, 1999).

Three cases relating to multimodal transport services offered by liner shipping conferences servicing the European trade have been analysed, with a particular emphasis on the provision of collective pricing for inland services when conference members are offering multimodal transport. These three cases clearly show that the European Commission is against multimodal transport price fixing, especially during the inland transport leg, while at the same time accepting the notion of ‘not-below-cost’ rule when conferences provide the inland leg of their multimodal transport service.

Key words: Liner shipping, Conference, Multimodal Transport, European Regulations

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Theories & Practices of Multimodal Transport in Europe

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1. INTRODUCTION

Economic globalisation has resulted in shippers and consignees merging and consolidating into global companies. These global companies are having a large impact on logistics requirement, as most of the mergers are on a world-wide basis and require the establishment of well co-ordinated transport or logistics networks. Shipping and particularly liner companies now find it necessary to form alliances and mergers with other liner companies as well as with other land, rail ports, inland hubs, and freight forwarding companies in order to efficiently serve these global customers (Frankel; 1999b), as the key role of a logistical system is to assist in the production, consumption and distribution - or the supply chain - of goods and services. These horizontal and/or vertical alliances and mergers that lead to industrial concentration not only increase the size of liner operators, but also in the control of logistics services and operations. This has permitted container liner companies to offer total door-to-door services. In container shipping, multinational companies now ship more than 50% of intercontinental containers, and this percentage is expected to grow to 70% by 2010 (Banomyong, 2000). Such customers demand global and efficient service. Today major customers demand and get a one window integrated, just in time and efficient all-inclusive door-to-door service at a pre-determined price.

This paper presents how the liner shipping industry has traditionally offered multimodal transport services, especially in Europe, and how the scope of these services has been constrained by the European Commission's (EC) regulatory framework. In order to explore the extent of these constraints, this paper will discuss three major cases relating to multimodal transport joint price-fixing as decided by the EC.

2. MULTIMODAL TRANSPORT SERVICES IN EUROPE

The terms 'through transport', 'combined transport', 'intermodal transport' and 'multimodal transport' are all used in the context of cargo movement from origin to destination, primarily involving the use of containers. These four terms have very similar meaning, i.e. the transportation of goods by more than one mode of transport and a through single freight rate contract.

Containers ensure the transport of unitised cargo from its origin to its final destination, with efficiency and at least possible risk (UNCTAD, 1993). Containers ultimately enable multimodal transport to be applied to most types of general cargo by means of an international standardised transport unit. Containers are loaded at the shipper premises and sealed, and then are carried over to the consignee's premises intact, without the content being taken out or re-packed en route. This is the essence of container transport as well as multimodal transport, but containerisation is not synonymous with multimodal transport. Containerisation contributes to a higher efficiency in the development of multimodal transport operations (see Table 1). In order to achieve efficient multimodal transport, intensive co-operation and co-ordination among transport modes are essential. This is particularly true for liner shipping where the focus is very much on the synchronisation of integrated logistical system for the benefit of the customers.

Table 1: Keys elements in containerisation and multimodal transport

<i>Containerisation</i>	<i>Multimodal Transport</i>
1. Unitisation	1. System concept
2. Standardisation	2. Management and Co-ordination
3. Cellular ships	3. Control over cargo
4. RoRo vessels	4. Mergers
5. Gantry cranes	5. Multimodal Transport Operators
6. Straddle carriers	6. Modal Integration
7. Specialised terminals	7. Through rates and billing
8. Ship-to-shore productivity	8. Information system
9. Terminal back-up land	9. Logistics channels
10. Multi-rate structure	10. Deregulation

Source: Derived from Hayuth (1987)

In Europe, liner companies are currently offering two types of multimodal transport services:

2.1 ‘Traditional’ multimodal transport services

This multimodal transport service can be described as consisting of up to five elements:

- Inland transport to the port;
- Cargo handling in the port (transfer from inland transport mode to vessel);
- Sea transport (maritime transport from one port to another);
- Cargo handling in the port of destination (transfer from vessel to inland transport mode);
- Inland transport from the port of destination to the place of final destination.

The multimodal transport through rate is based on the tariffs for these five elements (Graham, 1998). These transport elements were traditionally provided separately by various unimodal operators whether in the maritime or in the inland sector. With containerisation it has become increasingly difficult to define the boundaries of ships, port operators and inland hauliers. Thus liner shipping companies are not only providing shipping services, but are now competing with hauliers and transport intermediaries to provide the inland leg of multimodal services on a door to door basis. Liner companies have now integrated the inland leg into their scope of activity, thus offering a one-stop integrated logistics service to their customers. Multimodal transport is therefore a system, which places the responsibility for transport activities under one operator (probably a forwarder or a liner shipping company), who then undertakes, manages and co-ordinate the total task from the shipper’s door to the consignee’s door (see Figure 1).

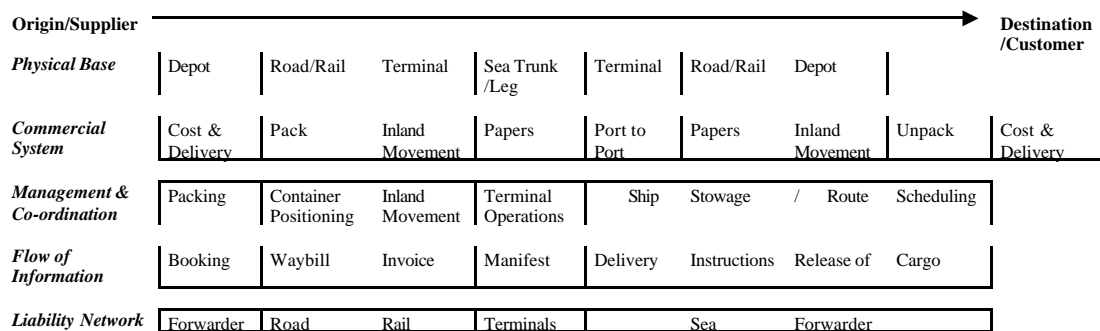


Figure 1: Components of a multimodal transport system
Source: Adapted from D' Este (1996)

2.2 The multimodal transport 'hub & spoke system'

An illustration of multimodal transport systems in Europe was seen when a liner shipping conference, namely the Trans Atlantic Conference Agreement (TACA) introduced their so-called multimodal transport 'hub & spoke system'. This system was preceded by similar systems introduced by the Far Eastern Freight Conference (FEFC) and the Trans Atlantic Agreement (TAA) (European Commission, 1997 & 1998). Under the TACA system, the inland move by carrier haulage between the ocean port and the hub (also called the trunk leg) is required to be made either by rail or inland waterway. The whole economy of the system is based on the need to have sufficient containers in the system for it to achieve critical mass. The usage of road transport for the trunk leg is not considered part of this 'hub & spoke system'. The inland move between the hub and the premises of the client (or the local leg) is usually made by road and is often offered or arranged by the hub operators.

This system is thus based on existing hubs operated by third parties, which have been in operation before the introduction of the TACA system, and which are used in the same way as they have always been. It must also be mentioned that this so-called TACA 'hub & spoke system' is not new or unique in transport logistics. There exist numerous examples of traders using such system in domestic and international distribution. Traders regularly use third party central warehouses from which they employ third party carriers to deliver to their customers. These warehouses or hubs are strategically placed to serve defined geographical areas.

Figure 2 presents the possible movements of goods within a generic multimodal transport 'hub & spoke system', where regional and local transportation systems converge.

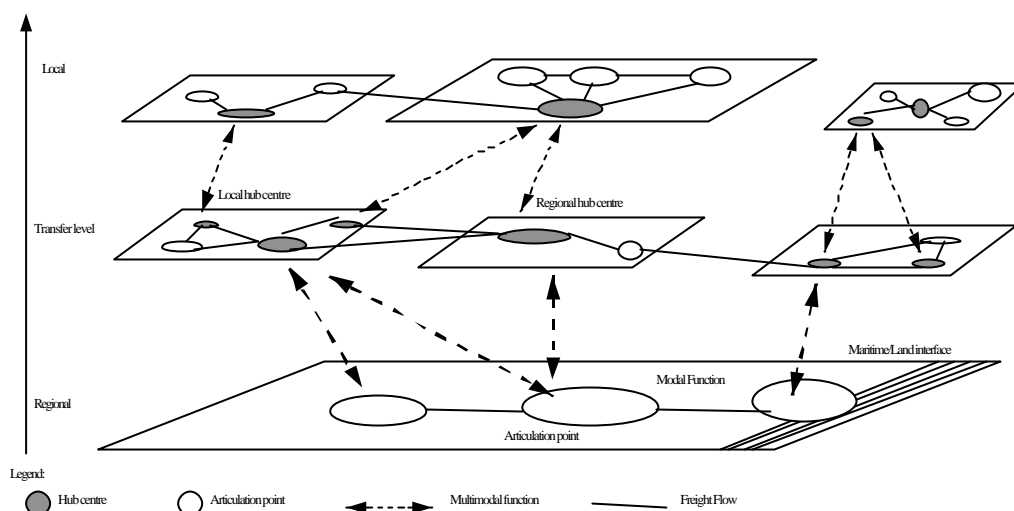


Figure 2: Generic multimodal transport 'hub & spoke system'
Source: Adapted from Rodrigue (1996)

TACA 'hub & spoke system' emphasised the benefits of using rail transfer for movements from port to inland hubs instead of road. TACA stated that for transfers exceeding 150 km, the economic advantage of rail out-weighted road transfer. However, in order to arrange for rail transfer, there was the need for critical mass or else the rail transfer would not be an economic proposition. TACA believed that this critical mass could only be obtained through stricter discipline among its members. This discipline would be achieved through the collective price fixing for the trunk leg of the multimodal transport service. Based on the containers' critical mass that this discipline would generate, the shipping lines, members of TACA, would then be in a better position to offer more competitive and cost-effective intermodal transfers for containers inland into Europe. TACA believed that collective price fixing for the trunk leg of a multimodal transport service would be beneficial to the trade and to consumers. In order to operate this TACA 'hub & spoke system', members had to verify with the European Commission if this particular operational system complied with European competition rules as joint price-fixing is considered unacceptable.

3. EUROPEAN RULES AND REGULATIONS

3.1 TRANSPORT REGULATIONS

Until 1987, there was no specific European Community legislation that regulated the practices of liner shipping conferences. However, in 1974, the European Court of Justice had ruled in the Code Maritime Case (*EC Commission v France*), that although the Council of Ministers of the European Communities (Council) had not decided to include sea and air transport under the rules of Title IV of the Treaty of Rome, the general rules of the Treaty, nevertheless, remained applicable to these modes (European Court of Justice, 1974).

Rules relating to competition principles are embodied in Article 85 and 86 of the Treaty of Rome but these principles have been renumbered as Articles 81 and 82 by the Treaty

of Amsterdam effective since May 1999 (Usher, 1998). In December 1986, the Council adopted the “1986 Maritime Package”, a package of four regulations on which the current maritime transport policy of the European Union (EU) is based. These regulations came into force on 1 July 1987. One of these regulations, namely Regulation (EEC) No 4056/86 lays down detailed rules for applying the competition principles of the Treaty to maritime transport. Article 81 of the Treaty of Amsterdam essentially prohibits restrictive agreements and practices, although it includes a provision for exemption under certain strictly defined conditions. Such exemption can either be on an individual basis or by category of agreement. The former is known as an individual exemption and the latter as a block exemption. Agreements within the scope of a block exemption and which meet its conditions are automatically exempt; they do not need, therefore, to be notified to the European Commission. Article 82 of the Treaty of Amsterdam prohibits abuse of a dominant position. There is no possibility of an exemption from prohibition under this article.

Regulation 4056/86 applies to all liner shipping operations from or to one or more ports in the EU. Conferences, as defined by Article 1(3)(b) of the Regulation¹, are granted a block exemption from the prohibition in Article 81(1) of the Treaty, provided they adhere to the one condition and five obligations presented hereunder:

The single condition is that a conference must not discriminate between ports or transport user by applying different rates and conditions of carriage to the same good carried in the same area by the conference unless such differences in rates and conditions can be justified economically. The five obligations relate to (1) consultations between conferences and transport users concerning rates, (2) conditions and quality of service; (3) loyalty arrangements; (4) services not covered by the freight charges, and (5) availability of tariffs and notification to the Commission of awards at arbitration and of recommendations made by conciliators (CEC, 1986).

At the time of adopting Regulation 4056/86, the Council invited the Commission to study liner shipping consortia and consider whether it was necessary to submit new proposals in this field (European Commission, 1999). The objectives of consortia agreement, which are in effect joint ventures between two or more vessel operating carriers, are to bring about co-operation between the parties so as to improve the productivity and quality of liner shipping services and to encourage greater utilisation of the containers and more efficient use of vessel capacity.

On 20 April 1995, the Commission adopted Commission Regulation (EEC) No. 870/95 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No. 479/92. This regulation extended the block exemption from the provision of Article 81 to consortia. This regulation, which was in force for a period of five years expired on 21 April 2000 and was replaced by a new Commission

¹ Article 1(3)(b) of Regulation 4056/86, adopted the definition of the UN Liner Code:

“ [a] ‘Liner conference’ means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and other agreed conditions with respect to the provisions of liner services” .

Regulation No. 823/2000 effective since 22 April 2000 (European Commission, 2000). This new regulation will also be for period of five years until 21 April 2005. The regulatory instrument for the inland modes is Regulation (EEC) No.1017/68, which is the Council regulation applying the rules of competition to transport by rail, road and inland waterway (European Commission, 1968).

3.2 APPLICATION OF EUROPEAN COMPETITION LAW TO MULTIMODAL TRANSPORT

The legality of agreements that restrict competition with regard to multimodal transport can be analysed through the interpretation by the EC of the above instruments. The main issue that will be explored in this paper is the perception of liner conferences serving the EU trade regarding the scope of the exemption available under Regulation 4056/86 (Wood, 1999). In the three cases that were decided by the EC, the agreements in question contained provisions for inland services that were collectively priced as part of multimodal transport services offered by liner shipping conferences. The question that will be explored is how that action on the part of each of the liner shipping conference was interpreted by the EC. The cases discussed are as follows:

3.2.1 Case No 1: The Far Eastern Freight Conference (FEFC)

The FEFC case came to the attention of the EC due to a complaint received from the German Shippers' Council on 28 April 1989 (Commission Decision 21.12.1994 O.J. 1995, 378/17). This complaint was that the members of the FEFC had collectively fixed prices for inland transport services as part of multimodal transport services in Europe and that this action of the FEFC was outside the block exemption contained in Article 3 of Regulation 4056/86. They referred to the scope of that Regulation which is '*...international maritime transport services from or to one or more Community ports, other than tramp vessel services*' and stated that the provision only covered the maritime element of any door-to-door service.

The FEFC offered the following services in the Far East to Europe route: maritime transport services; port handling services; and inland transport services. Since the first two services did not raise anti-competitive issues, and were not discussed in the EC decision, the provision of inland transport services will be the focus of the discussion. The FEFC inland service was not only offered as part of a multimodal transport service but was also priced collectively by the FEFC. This was a consequence of containerisation that changed the role of carriers as logistics service providers in competition with freight forwarders and other transport intermediaries such as non-vessel operating common carriers (NVOCC). In line with these developments carriers began to offer inland services largely by purchasing it from inland hauliers and offering it to shippers as 'carrier haulage'². This freight paid by shippers is not the one that is negotiated between the shipping line and the land transport sub-contractor, but the rate, which appears in the shipping line's inland tariff schedule.

In the case of the FEFC, its agreement for multimodal service from the Far East to Europe included a collectively agreed inland tariff. This tariff was set collectively by the

² When independent inland hauliers or freight forwarders provide the services the service would be referred to as 'merchant haulage'.

conference and was integrated into the total multimodal transport price of the conference. The conference then offered the multimodal service together with the maritime sector service to shippers and charged them the multimodal tariff where ‘carrier’ haulage was used. The exemption granted under Article 3 of Regulation 4056/86 to liner conferences from the competition laws of the European Union contained the obligation in Article 5(3) that these conferences should allow their customers to retain the option of using merchant haulage for their inland transport. This was necessary for the following reasons :

- to prevent shipping companies operating in conferences from dominating the services by providing such services in combination with the maritime services;
- to reduce risks from foreign exchange costs by providing that inland haulage services could be purchased in local currency; and
- to ensure that FOB buyers who nominate their own vessels are able to obtain separate inland tariffs.

Only when this option is available would the agreement be eligible for the exemption under Article 3 of Regulation 4056/86. Although there was no dispute that the agreement to fix prices in the maritime leg came under the exemption contained in Regulation 4056/86, the position was not so clear with regard to price fixing for the inland tariff.

Notion of stability

In order to support its case for exemption for multimodal pricing, the FEFC argued that the provision of scheduled services required that there be stability in the trade. In the maritime sector this stability could be achieved through restriction of price competition through conference agreements. The penetration of containers in the transport of general cargo trade has led liner shipping companies to offer integrated multimodal transport services (Frankel, 1999a; Gilman, 1983; Gardner, 1985; Hayuth, 1987; Marx, 1953; Sletmo & Williams Jr., 1981). As a consequence, it is necessary to extend the concept of stability to the inland component of multimodal transport, too. It was argued that with the integration of transport services on a multimodal basis the regulations regarding competition viz. Regulation 4056/86 should also allow conferences to offer collectively fixed prices for through transport services. This argument was supported in a report prepared by Gilman and Graham (Para: 123 of the Decision), which indicated that:

“...in an integrated intermodal environment, conferences cannot perform their functions of stabilising rates or promoting efficiency and rationalisation unless their rate making authority extends to the inland sector.”

This report argued that in order to prevent loss of maritime freight rate stability the relationship between sea freight and inland transport revenues should be established. The EC, however, did not accept this argument and stated that if that was accepted it would mean that any revenue producing activities linked to an agreement exempted in the maritime sector could also automatically enjoy a similar exemption. The EC argued that this would mean reading the exemption too widely, which could undermine the maritime policy framework.

Application of Regulation 1017/68

The EC was of the view that the appropriate instrument to consider restrictive practices under the inland segment was Regulation 1017/68. Since this regulation provided rules for examination price fixing agreements in the inland segment, the EC argued that the case for price fixing should not be examined under Regulation 4056/86. The EC then raised several arguments to dispose of the application of this maritime sector regulation. The EC then referred to the 11th Recital of that Regulation which was as follows:

“whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference since in the case of inland transport organised by carriers the latter continue to be subject to Regulation (EEC) No 1017/68”

Then the EC mentioned that at the time of the consultations leading to the adoption of this regulation when the Council proposed the draft regulation 4056/86, the European Parliament made a suggestion to add the following words to Article 3 of the regulation:

‘...the aforesaid exemption shall also apply to “intermodal transport” (i.e. maritime transport including transport to and from ports)’

The Council, indicating that it was the intention of the Council that price fixing agreement for inland transport services should not be covered by the group exemption contained in Article 3 of Council Regulation No 4056/86, did not adopt this proposed amendment. The EC was also not prepared to accept the argument that price fixing activity in any sector linked to the exempted maritime sector should enjoy similar exemption. Hence the EC maintained that the appropriate legal instrument for the inland sector should be Regulation 1017/68. This Regulation, 1017/68, provides:

- *Article 1* that it applies to restrictive practices ‘...in the field of transport by rail, road, and inland waterway.’;
- *Article 2* that restrictive practices that are liable to affect trade between Member States shall be prohibited as incompatible with the common market; and
- *Article 3* that there could be exemption for technical agreements that have the objective to achieve technical improvements or technical co-operation.

The EC thus applied the rules in Regulation 1017/68 and raised the following points in order to refuse exemption to the FEFC:

- the agreement for inland prices are commercial agreements and do not involve technical improvements or co-operation;
- the FEFC does not provide the inland transport themselves but instead subcontracts it from others;
- there are other transport intermediaries such as freight forwarders and railway companies that do not enjoy such exemptions; and
- there are independent shipping lines that provide similar services without the protection of exemptions.

In order to clarify the application of the regulation the EC stated that the exemption refers to ‘successive, complementary, substitute or combined transport operation’ between inland modes and not between inland and sea modes and therefore the exemption could only be invoked when the transport is performed wholly inland. Thus, since the FEFC

inland services are provided as part of the multimodal transport service together with the maritime component they do not qualify for the exemption. As a matter of interest, it should be noted that the EC stated that although the FEFC had infringed the law with regard to restriction on competition, the fact remained that this was the first infringement by an agreement in the liner sector on this issue. In view of that the EC decided that only a token fine should be imposed for the breach and this amounted to 10,000 ECU for each member line of the FEFC. This decision has been appealed by the FEFC to the Court of First Instance.

3.2.2 Case No 2: Trans Atlantic Agreement (TAA)

The North Europe-USA Rate Agreement (NEUSARA) and the USA-North Europe Rate Agreement (USANERA) conferences served the North Atlantic trade from 1984 until 1992. By 1985, however, the original members of Usanera and Neusara were co-operating with independents in the trade through the Eurocorde and the Gulfway agreements. The outside lines were Evergreen, Polish Ocean Lines, Mediterranean Shipping Co., OOCL, and Lykes. The conferences were suspended and the Eurocorde and Gulfway agreements were dropped in 1992 and the TAA came into being. The members of these conferences i.e. ACL, Hapag Lloyd, P&O, Nedlloyd, Sealand and Maersk plus OOCL and NYK formed the TAA. The TAA applied to the EC on 28 August 1992 to seek exemption for its agreement from Article 81(1) of the EC Treaty as provided under Regulation 4056/86 (European Commission, 1994). The main provisions in the agreement were as follows:

- price agreements on maritime transport;
- capacity management programmes for maritime transport; and
- price agreements on inland transport.

In view of the fact that the agreement contained one element on inland price fixing, the EC in its reply of 24 September 1992 informed the TAA that the agreement would also be examined under Regulation 1017/68. On 14 April 1993, the EC decided to initiate proceedings in this case.

Notion of Stability

The TAA stated that the objective of the agreement was to achieve stability in its operations on the North Atlantic trade (European Commission, 1994, p L376/2). This stability would be through the control of supply of capacity and which would then provide the stability in prices. This agreement had three components:

- tight control over supply;
- a two tier class of membership; and
- collective inland price fixing as part of the multimodal transport service.

The TAA argued that the entire agreement should be considered within the framework of the exemption for liner shipping conferences under Regulation 4056/86.

Decision of the EC on the maritime segment

The EC, however, separated the agreement into two components by joining those pertaining to capacity management and the two tier pricing under Regulation 4056/86 and that on inland prices to Regulation 1017/68. In examining the TAA with regard to the maritime component, the EC looked at the model of a traditional conference. This model was defined in Article 1(3)(b) of Regulation 4056/86. In the TAA, there were two levels of membership with a two tier pricing structure. This allowed the traditional conference lines to have one price and the former independents who joined the agreement to have a different price, although there was a specific difference maintained over the two price levels. The EC stated that although this two-tier level was ‘agreed in common’, it was not a ‘common’ price. In order to satisfy the legal concept of a conference, the price had to be ‘uniform or common’ similar to the definition as provided in the UN Liner Code. On this point it was the view of the EC that the TAA did not satisfy the criteria that was necessary to be classified as a traditional conference. The agreement also provided for the management of capacity viz. the ‘Capacity Management Programme’ (CMP). The purpose of the programme was to achieve control over the supply of space placed in the trade and thereby maintains rate stability. The CMP effectively meant that members had to withhold about 10% of their capacity, regardless of the fact that they were carrying it. Members thus could not offer capacity in the trade if they had already utilised their quota of space in the service, but those who could not use their spare capacity could, however, sell it to other members who had not utilised their share and needed it for their operations. There was an internal policing mechanism established whereby those who sold more than their quota of space to shippers had to pay a penalty of \$500 per TEU to the Conference Secretariat.

The EC argued that in a traditional conference, the exemption is granted because capacity regulation is regarded as a positive measure reflecting the obligation of conferences to provide an adequate and regular level of service in a trade. As stated in Para 364 of the Decision, “... *it is intended to allow all goods, even the least remunerative, to be carried, and all ports, even those handling the smallest volumes of cargo, to be properly served, so that a regular service can be offered.*” While that was the principle contained in the UN Liner Code, in the case of the TAA the EC stated that the CMP was in effect a freeze on capacity rather than one to regulate it as in the context of the traditional conference. Consequently, the EC was of the view that Article 3(d) of Regulation 4056/86 could not envisage exempting a conference agreement that allowed a freeze on capacity but rather only if it regulated such capacity to meet seasonal or cyclical variations in demand. The EC stated that evidence adduced in the hearing did not point to adjustments in supply to satisfy this criterion. The EC decided that since these two important provisions did not conform to the element needed to exist within a traditional conference, the TAA could not be regarded as one and this would not qualify for the exemption provided under Regulation 4056/86.

Multimodal pricing

The third element in the TAA was the agreement to provide multimodal transport service together with a collectively agreed price for the inland transport segment. The parties sought exemption for this inland segment on the basis that it was linked to an exempted agreement in the maritime segment.

In the case of this agreement, its maritime segment was not exempted by the EC, since it was held not to have met the criteria of a traditional conference on account of the two elements viz. the two tier membership and the capacity management system and therefore could not be exempted. Thus the first argument (mentioned earlier) that the inland price fixing agreement was linked to an exempted agreement did not succeed and defeated the contention of the TAA that this should be considered under the same regulation of the exempted maritime agreement. Establishing that the TAA was not a traditional conference therefore reinforced the EC's position that the agreement on inland price fixing as part of the multimodal services in a containerised trade had to be considered separately. It was an agreement that restricted competition and could only operate if the exemption was given under Regulation 1017/68. The EC thus went on to consider the case within the scope of *Article 1* of Regulation 1017/68 and stated that the fixing of rates fell within *Article 2* of that Regulation.

The EC once again highlighted the limited scope and purpose of Regulation 4056/86 in order to reinforce its argument that the agreement would have to be examined under regulation 1017/68. The EC stated that the exemption under Article of Regulation 4056/86 should not be wider than its scope, which is provided in Article 1(1) viz.:

"...This Regulation lays down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport services." (Paragraph 373 of the Decision)

The EC then made reference to the 11th Recital of the regulation similar to the one made in the FEFC decision, which stated that:

"...since in the case of inland transport organised by carriers, the latter continues to be subject to Regulation (EEC) No 1017/68"

The EC also stated that the TAA misinterpreted Article 5(3) and (4) of this regulation, which states that lines wishing to rely upon the benefit of the block exemption should permit merchant haulage and be transparent with regard to carrier haulage. The EC stated that the need to permit merchant haulage was an obligation prior to benefiting from the exemption as a cartel. It was not the same thing as setting common tariffs for carrier haulage but merely stipulated obligations on the conference to ensure that shippers' choice with regard to inland hauliers were not excluded by conference members. The EC then referred to the adoption of the Regulation when the proposal from the European Parliament to include multimodal transport was not accepted by the European Council. The same point was made in the FEFC decision. After deciding that the applicable instrument in the case was Regulation 1017/68, the EC made the following points:

- the price agreement was not a technical agreement and did not have as its sole effect to achieve technical improvement or co-operation;
- the services were subcontracted from other inland hauliers rather than provided by the conference; and
- there were complaints from shippers about the inland price fixing agreement and this meant that the benefits had not been passed to consumers.

The EC also referred to the FEFC case and said that the arguments contained therein with regard to inland pricing were deemed applicable here. The EC, therefore, in this case reiterated the principles it considered valid in order to determine the validity of inland

price fixing by exempted liner conferences. The EC pointed (in *Paragraph 485* of the Decision) to the fact that independent operators outside the TAA were providing multimodal transport services without the protection of immunity and were doing it without any problems. This meant that price fixing was not indispensable to the provision of an efficient multimodal transport service.

The EC then made the decision on this agreement, which was given on 19 October 1994 as follows:

- the provision on price fixing and capacity infringes Article 81(1) of the EC Treaty; and that
- the application of Article 81(3) of the Treaty and Article 5 of Regulation 1017/68 is refused.

Subsequently, this decision was challenged on appeal by the TAA in the Court of First Instance by action brought under Article 173 of the EC Treaty on 23 December 1994. At the same time, the TAA sought the suspension of the EC's decision under Article 185 and 186 for interim measures. By order of the President of the Court of First Instance, on 10 March 1995, this suspension was granted in so far as it prohibited member lines of TAA to jointly fix rates for inland portions of through intermodal services. The appeal of the EC to the Court of First Instance was dismissed by order of the President of the European Court of Justice on 19 July 1995.

3.2.3 Case No 3: The Trans Atlantic Conference Agreement (TACA)

The parties to TACA, which was the successor agreement to the TAA, submitted an application on 5 July 1994 seeking an exemption under Article 81(3) of the EC Treaty. This Agreement was also filed with the Federal Maritime Commission and permitted to operate under US Law from 24 October 1994. TACA members wanted to avoid the problems that they faced with the EC with regard to the TAA (*Paragraph 12 of the Decision*). Lord Sterling of Plaistow (in his capacity as Chairman of TACA) wrote in a letter dated 21 June 1994, to Mr Van Miert, Member of the Commission, responsible for competition matters, in the following terms:

“ It seems to me that the changes we propose are so substantial that they result in a new agreement rather than an amended old one. This being so, I think the most clear-cut thing we can do is to notify the Commission that the lines are abandoning the old TAA and formally notify the new agreement.”

In view of the earlier decision of the EC on the TAA, TACA did not contain the following provisions:

- the capacity management programme; and
- the two tier pricing arrangement with the two classes of membership.

The parties were informed that the Commission intended to examine the application for individual exemption made under Regulation 17/62 and Regulation 1017/68 because some of the notified events fell outside the scope of Regulation 4056/86.

Abuse of Dominant Position

TACA was a landmark case, and it contained issues other than multimodal price fixing that also raised the concern of the EC. The main element of the EC decision was with regard to the fact that members of TACA were considered to be in a collective dominant position in the relevant market and had abused their dominant position. In order to come to this conclusion, the EC referred to two actions viz. one concerning members' agreement relating to service contracts and the other regarding their actions with regard to competitors. Under TACA, members were not allowed to enter into service contracts either jointly or on individual basis except under strict conditions laid down by the agreement. Apart from that, it was contended by the EC that the agreement had also altered the structure of the market by removing potential competition on the transatlantic trade route. This was done by ensuring that potential competitors were induced to enter the trade by joining TACA rather than participating as independents. As a result of these findings, the parties were found to have infringed Article 86 of the EC Treaty and fined a total of 273 millions ECU by the decision of the EC of 16 September 1998. TACA has appealed the EC decision to the Court of First Instance.

Multimodal pricing

Although the EC decision on TACA was basically with regard to abuse of dominant position, it also considered the legality of joint multimodal pricing for the inland component. This agreement contained provisions identical to those contained in the TAA regarding the fixing of prices for inland transport services as part of multimodal services provided within the territory of the Community. The main difference with the TAA was the fact the multimodal pricing authority was sought together with two specific programmes designed to improve operations and management of containers in Europe. These programmes were as follows:

The European Inland Equipment Interchange Arrangement (EIEIA)

On 29 November 1995, TACA notified to the Commission the establishment of the 'European Inland Equipment Interchange Arrangement' (EIEIA). The objective of the EIEIA was to improve efficiency with regard to the inland positioning of empty containers in Europe. This would be achieved by:

- promoting interchanges of empty containers between the parties to the agreement;
- providing an information base with computerised facilities to co-ordinate data among members regarding the position and volumes of empty containers; and
- facilitating the mutual sharing of empties without each having to locate their own stock of empties.

This system was reported to be in operation on 1 August 1995, starting from key locations in Antwerp and Paris.

The 'Hub and Spoke' system.

On 10 January 1997, TACA notified the EC regarding the implementation, with effect from 1 January 1997, of a 'hub and spoke system'. TACA argued that this 'hub and spoke system' contributed to improving the transport service and thus fulfilled one of the

necessary criteria for receiving an individual exemption. They stated that this system would reduce congestion and would bring about environmental benefits, since the objective was promote the inland transfer by rail. TACA sought exemption for this system under Regulation 4056/86. TACA argued that the collective fixing of prices for all their inland transport activities should be granted exemption now that this new co-operation system was in place. The price for carrier haulage or basic hub rate that was set by TACA within this system was as follows:

- the portion of the haulage between the port and the inland hub was referred to as the *trunk leg* and that part from the inland hub to the shippers' premises as the *local leg*;
- the rates for the trunk leg were calculated on the basis of the one way average cost incurred by the parties. This could be the average rail cost from the port to the inland hub actually paid to the railway operator; and
- the other charges such as handling, storage of laden and empties and administration costs were included as separate charges.

This basic hub rate is therefore fixed at a single level applicable to all carriers, regardless of the address of the nominated terminal and the election by the individual carrier to operate that leg. The agreement also provided for the option of carrier haulage for the local leg and to receive empty containers from those shippers or forwarders who used merchant haulage. Thus TACA wanted to seek:

- exemption for multimodal transport pricing for inland services that are linked to maritime services;
- exemption for specific programmes such as the hub and spoke system that could provide perceptible benefits to the economy; and
- exemption for multimodal transport pricing within that system where the transport services is provided through carrier haulage.

TACA sought specific exemption for these two programmes, which contained co-operation agreements as well as immunity for the price fixing for the inland portion of the multimodal transport based on the benefits of the two programmes.

Notion of Stability

In order to support its case for inland price fixing as well as other restrictions that could possibly go beyond the exemptions granted under Regulation 4056/86, TACA argued for the concept of stability. It should be recalled that parties in the FEFC and TAA cases also put this concept forward. According to the TACA, the notion of stability should amount to an “...assurance that any particular shipping line on any particular trade should be guaranteed sufficient return on its capital that its owners should not be tempted to invest that capital elsewhere.”(Para 332 of the Decision). The parties referred to the very high fixed costs of scheduled services and the existence of reserve capacity, the latter, which could give rise to short term price competition at levels close to marginal costs that could lead to instability. This instability could result in major price change, which respond to withdrawal and entry of capacity in the face of intense price competition among the competitors in a particular trade. To avoid such instability, the parties to the agreement said that there should be strict price discipline to prevent lines from offering space below certain agreed prices otherwise there could be the ‘destructive price competition’. TACA contended that this rationale for price discipline was recognised and contained in

Regulation 4056/86. TACA further contended that price fixing alone was not sufficient; and additional measures were needed to sustain the stability required for the service provided and would include the following:

- Capacity Management Programme that restricted output of agreement members. The TACA argued that such restrictions in capacity would not give the members the power to raise price above competitive levels because the threat of potential competition remained; and
- the ability to offer joint price fixing should be extended to the inland sector where the lines offer multimodal service. The exemption granted for multimodal transport pricing will ensure that the possibility of the maritime rates being undermined by the land transport costs will be avoided (*Paragraph 337 of the Decision*).

In response to the arguments raised by TACA, the EC provided its definition of stability, which is set out in Para 329 of the Decision:

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

This stability in rates would also assure that there are reliable services, which are of a reasonable quality by avoiding damage or loss to shippers' cargo. This guarantees shippers a service that is suited to their needs. As long as they remain subject to effective competition, the agreement of members on rates would benefit from group exemption. The EC has given a very strict and narrow definition of the concept, aware that any departure could lead to difficulties with similar agreements later. The EC then outlined the reasons why the agreement to jointly fix prices for multimodal services did not come within Article 3 of Regulation 4056/86 which were as follows:

- the points raised in the TAA and the FEFC decision where the EC had prohibited these agreements;
- the Report to the Council concerning the Application of the Community's Competition Rules to Maritime Transport stated that it saw that the price fixing was not indispensable to the provision of multimodal services; and
- the ruling of the Court of Justice in the *Spediporto* case (Para: 403) that:

“...Regulation (EEC) No 4055/86 does not apply to transportation by road of goods unloaded from the vessel”.

In the ruling for the *Spediporto* case, the EC argued and confirmed its view stated in the FEFC and TAA decisions that the scope of the group exemption could not be wider than the scope of the regulation itself. If Regulation 4056/86, like Regulation 4055/86 does not apply to the transportation by road of goods unloaded from or loaded onto vessels, then the scope of the group exemption cannot cover price-fixing in respect of carrier haulage services (*Para: 404 of the Decision*). The EC went on to consider whether the agreement could be considered for individual exemption under Regulation 1017/68 and decided that:

- there was no evidence that such collective price fixing contributed to the quality improvement of inland transport. This is because improvements in this case were not due to price fixing but due to individual negotiation between individual shippers and shipping lines;
- there were no temporal fluctuations of supply and demand in the market for haulage transport in which the carrier haulage was offered;
- there was no evidence of increases in productivity to inland services or to multimodal services;
- there was no evidence of any further technical or economic progress in providing inland or multimodal services; and
- there was no account taken of the interest of users because conference members did not perform the services inland as mentioned earlier, and that conferences merely set inland transport prices.

On 26 November 1996, the EC adopted a decision to withdraw the immunity from the imposition of fines in respect of the agreement between the parties to fix prices for inland transport services supplied within the territory of the Community. This decision was adopted, although there was a suspension granted by the European Court of Justice to the TAA with regard to inland price fixing. TACA appealed to the European Court of First Instance for a suspension of the order of the EC regarding the withdrawal of the immunity for multimodal price fixing. The Court of First Instance did not grant this appeal on the grounds that other issues had not then been resolved by the EC. On 11 April 1997, the EC stated that notwithstanding the notification of the 'Hub and Spoke System', it still held the view that collective inland price fixing agreements were not covered under Regulation 4056/86 and Regulation 1017/658 and were therefore outside the scope of Article 81(3).

3.3 NOT-BELOW-COST RULE

Although the EC has shown itself hostile to attempts by shipping conferences to gain exemption for their inland joint price fixing, it is not entirely opposed to arrangements that restrict to some degree the freedom of pricing in this context as its recent approval of TACA's "not-below-cost" rule demonstrates. Under this rule, TACA members have agreed not to charge less than out-of-pocket expenses when supplying inland transport within the European Union as part of an intermodal service (Porter, 1999). It is interesting to note that the Multimodal Group in its report suggested that this practice could be allowed so long as there was the safeguard that members of agreements did not use the exemption to devise a model to calculate common or uniform costs and further that such members did not use the information to predict competitors' prices (European Commission, 1997). The European Council of Transport Users has, however, opposed this decision and has lodged a complaint with the Court of First Instance over the approval granted by the EC.

4. CONCLUSIONS

This paper has demonstrated that the technological evolution initiated by containerisation has led to greater challenges for all parties involved in international trade. Shippers and

consignees have evolved new demand patterns, and have a greater expectation of the types of shipping services offered. However, attempts by liner shipping companies operating in traditional conferences to meet this demand has been met difficulties on the regulatory front. Efforts by liner shipping conferences in EU trades to modernise their agreements in order to offer integrated transport logistics to customers have been largely frustrated by the Commission's interpretation of the EU's competition law. It is clear that over the past decade the regulatory regime within the EU has become far more hostile to shipping conferences and has resulted in a marked diminution in the types of practices that they can safely engage in. Conferences in the EU trades may still determine port-to-port tariffs but the European Commission's regulatory stance has denied them the multimodal pricing authority that they previously thought they had. This is an issue, which is still to be resolved, since the matter will eventually come before the European Court of Justice for a decision. The prospects for conferences operating in EU trade appear bleak, despite the recent favourable EC decision relating to the "not-below-cost" rule.

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