ABUSE OF A DOMINANT POSITION (LINERS): THE TACA CASE

Subject: Abuse of a dominant position

Industry: Liners; shipping

Parties: Parties to TACA (See the list in the text below)
Commission of the European Communities
European Council of Transport Users ASBL (Intervener)

Source: Judgment of the Court of First Instance, dated 30 September 2003, in Joined Cases T-191/98 and T-212-4/98, (Atlantic Container Line and Others v Commission); Court Press Release 78/03

(Note. In this case, the Court of First Instance set aside record fines totalling €273m imposed by the Commission for abuse of a collective dominant position on shipping companies forming a conference, the Transatlantic Conference Agreement or TACA. It was an odd case, inasmuch as the Commission Decision covered infringements of both Articles 81 and 82 of the EC Treaty. However, while no fine was imposed in respect of the restrictive agreements, heavy fines were imposed in respect of the abuse of a dominant position. The Court left intact the part of the Commission's Decision relating to the former and struck down the part relating to the latter. The report below sets out:
- the operative part of the contested Commission Decision;
- the Court's Ruling; and
- the Court Summary of the judgment.
The Court's judgment itself comprised a record-breaking 1400 paragraphs, a reflection of the complexity of the case and of the large number of pleas.)

Operative part of the contested Commission Decision

Article 1

The undertakings listed in Annex I have infringed the provisions of Article 85(1) [now Article 81(1)] of the EC Treaty, Article 53(1) of the EEA Agreement and Article 2 of Regulation EEC/1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America. The conditions of Article 85(3) of the EC Treaty, Article 53(3) of the EEA Agreement and of Article 5 of Regulation EEC 1017/68 are not fulfilled.

Article 2

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by fixing the amounts,

levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 3

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by agreeing the terms and conditions on and under which they may enter into service contracts with shippers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 4

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 1, 2 and 3 and are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreements referred to in Articles 1, 2 and 3.

Article 5

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce the dominant position of the Transatlantic Conference Agreement.

Article 6

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by placing restrictions on the availability and contents of service contracts.

Article 7

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 5 and 6 and are hereby required to refrain in future from any action having the same or a similar object or effect to the infringements referred to in Articles 5 and 6.

Article 8

In respect of the infringement of the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement referred to in Articles 5 and 6, the following fines are imposed: A.P. Møller-Mærsk Line, €27.5m; Atlantic Container Line AB, €6.88m; Hapag Lloyd Container Linie GmbH, €20.63m; P&O Nedlloyd Container Line Limited, €41.26m; Sea-Land Service Inc, €27.5m; Mediterranean Shipping Co, €13.75m; Orient Overseas Container Line (UK) Ltd, €20.63m; Polish Ocean Lines, €6.88m; DSR-Senator Lines, €13.75m; Cho Yang Shipping

Co Ltd €13.75m; Neptune Orient Lines Ltd, €13.75m; Nippon Yusen Kaisha, €20.63m; Transportación Maritima Mexicana SA de CV/Tecomar SA de CV, €6.88m; Hanjin Shipping Co Ltd, €20.63; Hyundai Merchant Marine Co Ltd, €18.56m.

The Court's Ruling

The Court hereby:
1. Annuls Article 5 of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - Trans-Atlantic Conference Agreement);
2. Annuls Article 6 of Decision 1999/243 in so far as it applies to mutual disclosure by the applicants of the availability and content of their individual service contracts;
3. Annuls Article 7 of Decision 1999/243 to the extent required by the annulment of Articles 5 and 6;
4. Annuls Article 8 of Decision 1999/243;
5. Dismisses the remainder of the applications;
6. Orders the applicants and the Commission each to bear their own costs;
7. Orders the European Council of Transport Users ASBL to bear its own costs.

Court Summary of the Judgment

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 in the light of the detailed rules for the application of the competition rules laid down in a 1986 Community regulation.

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 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 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 (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 €273 million, the highest amount ever imposed on undertakings in a collective dominant position. [See the list in Article 8 of the Commission's Decision, reproduced above.] 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 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:
- 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
- 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. ■

The Altair / ENEL Case

In Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, the Court of Justice of the European Communities held, on 11 September 2003, that Articles 81, 82 and 85 EC and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that they do not preclude a national rule providing for the levy of surcharges on the price of electricity such as those at issue in the main proceedings when the electricity is used in an electro-chemical process and that Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community is not capable of preventing a Member State from levying such surcharges. The applicants in the case had claimed that the imposition of the surcharge had been an abuse of a dominant position on the market.