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## WHY TRANSACTION COSTS THEORY COULD BE USED TO ANALYSE THE LAW DISSENSION BETWEEN THE EUROPEAN COMMISSION AND THE TACA

### Introduction

The lawful dissension between the European Commission and the collusion between carriers TACA (*Trans Atlantic Conference Agreement*), is a main subject in the shipping sector. It concerns the application of the European antitrust regulation relating to price agreements in the maritime and intermodal transport activity. Intermodal transport is the carriage of goods in a single unit of loading (the container<sup>1</sup>) which borrows successively several way of transport.

Collusions between carriers are named “conference”. Since 1875, some of carriers decided to join a conference agreement, in order to coordinate their activities in a fluctuating and demanding market in terms of technology and investments. Are conferences the most effective organization form? Why are collusions authorized in the maritime sector while they are condemned elsewhere? The European competition regulation considers two articles that stipulate when price collusion could take place. Exemptions are granted if the activity have particular characteristics and

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<sup>1</sup> Container: Box, designed to enable goods to be sent from door to door without the contents being handled. They are several standards sizes used worldwide such that the same container may be transferred from one mode of transport to other modes in the course of a single voyage. The most common sizes of containers are the 20 footer and the 40 footer, we use to say 20 TEU (twenty foot equivalent unit)

difficulties that avoid the development and the efficacy of the sector without a technical collusion. What are the shipping's characteristics? How does a conference work?

We talk about dissension owing to the fact that, in one side, the Commission doubt about the positive effects of conferences in the shipping sector; and in the other side the development of the shipping transport toward terrestrial activity poses some problems concerning pricing agreements and competition regulation. The object of this paper is to illustrate this law dissension using New Institutional Economics theoretical tools: transaction costs theory and contract theory. We will see that the "traditional" competition regulation has vacuums about organization forms others than the spot-market and the integrated firm.

New institutional economics theory lead us to conclusions different from those of the Commission in its regards of organization forms and competition in the shipping and intermodal transport. The study the TACA case shows us the operation and the purpose of a conference agreement in the shipping and allows us to apply economics theories different from the neo-classical core that are more relevant for the analysis of a sector which does not reason only in terms of price and quantities. Indeed, the diversity of the organization forms in the shipping sector can be analyze with the new institutional economics' tools insofar as institutional, transactions throughout the chain of transport, coordination, contracts, uncertainties specific to the sector and assets specificity could be explanatory variables to analyze carriers' organizational choice.

The shipping transport being rather technical as sector, the first part is devoted to a short description of the maritime and intermodal activity. The goal is to introduce the actors, the stakes and the difficulties specific to the sector. Then, we'll analyze the transactions that compose transport chain and some organization forms chosen by carriers, shippers and providers. In the second part, we'll examine shipping conferences: nature, characteristics and transactions. We will see that it is about a *hybrid governance structure*. Then, we'll expose the law dissension between conferences and the institutional environment in the shipping sector. These let to us conclude that a regulation reform is needed with respect to organization forms in shipping and intermodal transport.

## I. Shipping and intermodal transport: a transactional approach

### I.1. Shipping transport sector

We will make a short description of shipping activity while insisting on its definition. Then, we will describe the carrier-haulage service, owing to the fact that intermodal transport under the responsibility of carriers members of a conference is blamed by European competition authorities.

### I.1.1. The shipping cargo liner

Before regular lines, the shipping transport price of was bargained between carriers and shippers according to ships' availability or the waiting in port of the cargoes. We call this service *tramping*. The freight rate strongly varied according to imbalances between supply and demand.<sup>2</sup> The shipping liner appeared in the middle of the 19th century. It answers a request that the tramping by nature was unable to satisfy. The shipping liner is characterized by: service regularity; heterogeneity of cargoes; and reduction of average cost. Carriers were able to guarantee a regular service, on the basis of programmed routes. Moreover, they find a system to distribute their fixed costs and to decrease the risks of chronic surplus production capacity.

The shipping liner imposes to carriers the setting of a transport capacity likely to guarantee the needs for changeable traffic. A carrier knows his capacity offered but he does not know his production.<sup>3</sup> The impossibility of storage of the shipping activity exposes carriers to market's fluctuations and uncertainties. For example, in the last twenty years approximately 20% of the container traffic correspond to empty trips<sup>4</sup> (Drewry, 2000).

Finally, it is interesting to break up the world maritime exchanges according to the type of transported goods. Most of the maritime transport relates to the homogeneous goods: liquid bulk and dry bulk. Liquid bulk corresponds to crude oil and its derivatives. Dry bulk corresponds to raw materials (steel, coal, iron) and to agricultural product (coffee, cereals). Approximately, 50% of the maritime transport corresponds to liquid bulk, 25% with dry bulk and 25% with the goods transported out of containers (Isemar, 2000). Goods transported out of containers take an increasingly significant place in the shipping activity. Indeed, the world containers traffic passed, between 1980 and 1999, from 12 to 62 teu million (Drewry, 2000).

### I.1.2. The carrier-haulage

When the carrier organize by his own the interior carriage of goods, the inland segment is accomplished for its account. This type of activity is known under the name of carrier-haulage. He can use road transport, rail transport, fluvial transport or/and combined transport.

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<sup>2</sup> Freight rate: Amount of money paid to a carrier or shipping line for the carriage of each unit cargo, such as a tone, a cubic meter or container load. Also referred to as a rate of freight.

<sup>3</sup> We define the production of a carrier as the volume of transported goods.

<sup>4</sup> With world scale it is rare that origins and destinations of goods' movements balance. Under such conditions, an accumulation occurs in certain places. Displacements in under use (with vacuum) represent a cost for the transport companies.

Carrier-haulage is part of the shipping evolution as far as it is the penetration of carriers toward other ways of transport. Intermodal transport is developed after the container standardization. From 1956, in the USA, the containers gave a new dash to the shipping industry.<sup>5</sup> Carriers had ambitious challenges: to containerize the traffic on which they were present and to increase the rotation of their ships. Volume, time and the way of transporting goods changed.

In fact, containerization reduces the loading and unloading time. It also increases the ship rotation speed. The effectiveness of intermodal transport system rest on the capacity of routing the freight and on the capacity to transshipment. Containers become the most utilized type of forwarding and can be used by several ways of transport. In 1997, the world park of containers arrived at 11 million teu, whose hiring companies were owners of 45% and carriers of 51% (Containerization, 1997).

A container can be handled everywhere in the world, it exists a standardization of handling methods throughout the transport chain. There is a growth of the containers transshipment towards the road, the rail and the river. In Europe during 1996, the container inland traffic reached 23.9 million teu against 17.9 million in 1992, where 75% correspond to movements by the road, 18% by rail and approximately 18% by waterways.<sup>6</sup>

Next to the carrier-haulage we find the merchant-haulage service: in this case, the routing of containers is not carried out by a carrier but by the shipper or his transport agent.<sup>7</sup> In Europe, the merchant-haulage has the greatest market shares of door-to-door service, except for the United Kingdom where 70% of the market is in carrier-haulage hands (figure 1).

Competition between merchants and carriers rests in the type of service they can offer. Several specialists<sup>8</sup> in the shipping sector affirm that merchant-haulage has not the same development conditions that carrier-haulage does because of the financial funds, the cooperation agreements and the logistics structures of carriers.<sup>9</sup> Possible imbalance between carrier-haulage and merchant-haulage remains a debate open nowadays. The competition authorities take into account the complaints of merchants

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<sup>5</sup> In Europe in the '70

<sup>6</sup> Study carried out by MDS Transmodal, cabinet of consulting specialized in the studies and statistics of transport and logistics

<sup>7</sup> Transport agent: Professional or transport organizer who has the obligation of the means but not of the results of the service (it is the shipper who chooses the organization of transport). We appoint by intermediaries of transport the commission agents, the agents or transit with saying those which organize the service of transport in the place of the shipper.

<sup>8</sup> Members of the European Shippers' Councils (ESC), of the Conseil National d'Usagers de Transport, l'OCDE.

<sup>9</sup> Logistics: "activities seeing the physical circulation of the goods" (Comtois, 1993). It gathers the firms of transport, storage, distribution and exchanges. It is responsible for the transport chain : connecting the production systems to the transport systems.

and analyze carriers' possible abuses as regards intermodality, as we will see it in the second part of this paper.

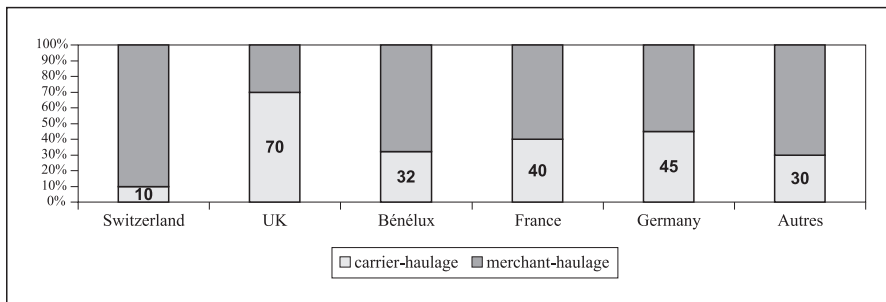


Figure 1.: Market shares of the carrier-haulage in Europe in 1996 (%)

Winkelmanns, 1999

## I.2. The door-to-door transaction chain

Using figure 2, we will analyze some transactions that are carried out in the intermodal transport chain. We can distinguish the relation between carriers and shippers (carriers /shipper) and the relation between carriers and suppliers (carriers /supplier).

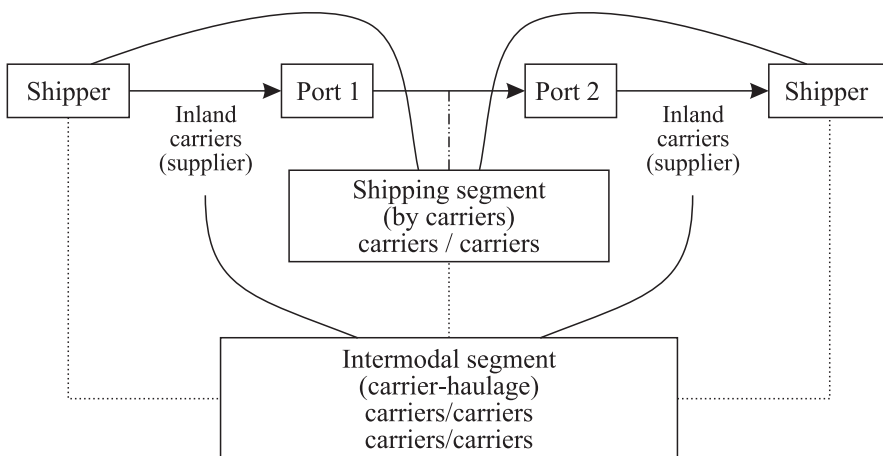


Figure 2.: Door-to-door transport chain

### I.2.1. The carrier /shipper relation

The relation **carriers /shipper**, when it is about carrier-haulage, rests on a transaction framed by a contract of sale-purchase. This contract formalizes obligations and defines responsibilities.<sup>10</sup> The shipper can be an industry or a tradesman of large or small size, but it could also be an agent that represents the shipper near the carriers. The carrier offers the door-to-door service and engages its commitment to the shipper. The price shipper is negotiated between carriers and shippers, even if in most of the cases, the negotiation takes account of the market rates or of the tariff established by a conference, if the carrier is a member of one. The carrier organizes the service, according to the setting conditions: time, distance and volume to be transported, type of service. The shipper buys this service because he does not have the equipments (ships, container, trucks) and the technology (tracking systems) to carry out this activity.

The transaction between carriers and shippers succeeds if the two parts come out of it satisfied. But, if a single risk on the market harm the exchange, then the costs increase. To go to court and the addition of new clauses in the contract are **transaction costs** for the two parts. To avoid those costs, the parts prefer to have an informal arrangement between them rather than go to court, they know the lawsuit is slow and expensive. The shippers do not change the carrier if the transaction proceeds suitably; with the result that more the transactions are renewed more the link carrier/shipper is strong.

The transaction carrier/shipper could also be done spontaneously on the market. This is the case of freight centers, in which the transport supply and request of finds stability but not always a balance. That's why carriers engage shippers with contracts or agreements.

### I.2.2. The carrier/supplier relation

As for the relation **ship-owner/supplier**, we can say that it appears mostly by a neoclassical contract type.<sup>11</sup> This contract defines obligations and responsibili-

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<sup>10</sup> The contract of sale is a traditional contract here. The opportunism possibilities are limited because of low asset specificity and a short duration; they can be renewable, identity of the parts is not important, terms are strictly defined. Courts are the institutions that have the sanction capacity.

<sup>11</sup> A neoclassical contract, in the direction of Williamson (1991) and Ménard (2000), is used when assets specificity is significant and dependence between parts is strong. Duration of the contract becomes significant for the transaction coordination. Identity of parts matters even if they remain juridical autonomous. It is often incomplete but it adjusts easily.

ties for each part. The more frequent the transaction is, the more carriers tend to make subcontract and long term contracts. Those agreements make possible to reduce transaction costs (Williamson, 1991). The supplier commits himself by offering to carriers a land transport service. The quality of door-to-door service offered by carriers to shippers depends on this operation. Carriers must well choose their suppliers if they want to guarantee a quality service. We notice that it is a chain of **co-operation** coordinated well by responsibilities. This is why the contract appears being the best instrument to control transactions of the intermodal transport.

Carriers use inland suppliers because they do not have the equipment or the knowledge to achieve the inland segment of an intermodal operation. One observes a **vertical co-operation**. Carriers could invest in firms and equipments acquisition to integrate the road, fluvial or railway transport activities, but the internalization still marginal. The carrier-haulage is not a well integrated firm, namely by the transaction cost theory a **hierarchical** organization.

To illustrate this, in France, Hapag-Lloyd has eight subcontracting contracts to guarantee the carrier-haulage service that accounts for 70% of his turnover. The supplier with whom Hapag-Lloyd has subcontracting relations are CNC, which transports 20 to 25% of the goods total volume; carriers by barges (Seine and Rhine) and the feeders<sup>12</sup> that account 45%; and road conveyors who transport approximately 30%. For this armament, the cost is one of the most significant aspects to choose between the road and the rail. Surely, the surface transport is very expensive because of logistic, management and handling charges. As for the rail, it is necessary to pass by the attribution of railway corridors and equipment's investments are hard. This situation pushes carriers to subcontract instead of internalize this transport activity. Hapag-Lloyd has renewed his delegation contracts for a few years. More the transaction proceeds under good conditions more this company may find beneficial to preserve his relation with his supplier.

Carriers should adopt an organization form that reduces production and transaction costs, like guaranteeing the service quality. It is necessary to note the importance of coordination and the cooperation in the door-to-door transport chain. The performance of an intermodal chain is not acquired if one of the transport ways is not adequate: if the connections have imperfections or are not reliable. It is also necessary to target the quality of connections, which determines the value of the final service (the pre and post routing offered by carriers).

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<sup>12</sup> Feeder: Small ships, provided by a shipping line, which carries cargo between ports, which are served by a large ocean ship, and ports which, are not. The cargoes are transhipped, normally at the expense of the shipping line, to or from the ocean ship.

## II. The law dissension between the Commission and conference TACA

### II.1. The conference TACA

We will analyze a particular case: conference TACA to understand why price agreements are allowed by the antitrust authorities in the shipping transport. What do characterize these agreements? What is the governance structure of a conference?

#### II.1.1. Conferences agreements' origins

The shipping companies that offer a liner service are engage to guarantee the regularity on a given traffic. A liner conference is an agreement of at least two carriers, which ensure an international regular service for the carriage of good, in a determined geographical region. This contract is the framework in which carriers operate applying a uniform or common freight; and decide all others transport conditions required to guarantee a regular service.<sup>13</sup> Economically, we can say that a conference is an agreement of producers who fix a price jointly. The purpose is to protect their high investments by the cooperation.<sup>14</sup>

This type of organization proves to be one of the organization forms most adopted by carriers. Conferences remain one of the rare examples of collusion authorized by antitrust authorities. Why are price agreements allowed in the shipping sector while they are condemned elsewhere? It is the question made by the economist when he analyzes the law dissension between the Commission and shipping companies.

In Europe, carriers have the right to relate in conference if the agreement presents the conditions determined by the competition regulation (article 81 and 82). These rules concerned dominant position abuses and agreement's control. Furthermore, the Council Regulation 4056/86 covers specifically the conference case.

European regulation judge that sectors characterized by a strong uncertainty caused by the fast evolution of technology, by request variations, by the need for scale economies, could use collusion agreements. Certainly, collusions can disturb the market competition but at the same time they can have positive effects for the economic effectiveness. Conferences are one example of these provisions.<sup>15</sup> Antitrust

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<sup>13</sup> Regulation 4056/86 of the European Union Council.

<sup>14</sup> To give an idea of the investment amount: the cost of an ocean ship of 4000 teu build in Asia will be US\$55 millions. Carriers must lay out a container park of 2.5 time the static capacity of their fleet. They must therefore, buy 10 000 containers at US\$ 25 million (Gouvenal, 1998). In 2001, some carriers like OOCL, CMA-CGM, China Shipping made some ship containers commands to increase their capacity of 51%, 61% and 66% respectively (BRL Shipping Consult)

<sup>15</sup> More examples look in Caspari, 1989 et Glais, 1993,1993



authorities estimate that shipping activity is particular and that a price agreement is necessary for the development of this sector.

The union in conference by carriers must have as purpose: to coordinate the schedules, to determine the line frequency and stopovers, to distribute itineraries or stopovers between the conference's members, to fix prices and conditions of transport, to regulate transport capacity, to distribute between members the request or profits.<sup>16</sup>

## II.1.2. The TACA

TACA gathers 7 carriers of various nationalities that offer a liner service on the transatlantic traffic.<sup>17</sup> This conference covers Northern Europe / United States traffic. The TACA is a conference agreement concluded for one unspecified **duration**. Carriers who want to leave the conference can do it without penalty (if they notice their decision 90 days before leaving). The conference has a role of **consultant**: members meet to discuss about market evolution or to exchange appreciations about several subjects concerning shipping transport. These discussions take place each time members test the need to meet to exchange their opinions and to adopt measures relating to their activities in conference.

Conference's members adopt a set of rules and have a secretariat, which acts like an **authority**. The secretariat is a private body charged to control rights and obligations of carriers. The secretariat can carry out surveys into any infringement to the provisions of the agreement. The services of the secretariat are varied: it organizes meetings, it supervises the traffic conditions, and it collects statistics on transported volumes, destinations and contracts prices. These information is provided to him by the members. The secretariat has a total access to all documents concerning the conference activities. This authority publishes the tariff and information concerning the conference.

The benefits of carriers of being part of conference TACA are varied: access to information, access on the transatlantic traffic and costs reductions by the means of the co-operation. In fact, belonging to a conference make possible to have access

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<sup>16</sup> Official Journal L 353,17.12.1990

<sup>17</sup> In 1994, when the TACA borne, 17 maritime lines were part of it: A.P Moller-Maersk Line (Maersk), Atlantic Container Line AB (ACL), Hapag-Lloyd AG (Hapag Loyd), Nedlloyd Lijnen Bv (Nedlloyd), P&O Containers Limited (P&O), Sea-Land Services Inc (Sea-Land), Mediterranean Shipping Co (MSC), Orient Overseas Container Line Ltd (OOCL), Polish Ocean Lines (POL), DRS/Senator Lines (DRS/Senator), Cho Yang Shipping Co Ltd (Cho Yang), Neptune Orient Lines ltd (NOL), Nippon Yusen Kaisha (NYK), Transportacion Maritima Mexicana SA (TMM), Tecomar, Hanjin et Hyundai. After the law dissension the number of members fall to 7 in 2000: Hapag Loyd, NYC, Maersk, OOCL, P&O Nedlloyd, ACL, NYK.

to **information** too expensive to have elsewhere. For instance, in 1994, wanting to enter in the transatlantic traffic, Hanjin asked to the secretariat information concerning the tariff, service contracts, stopovers, loadings, and the financial results of the conference to prepare its commercial activity. We are here in the presence of a sharing of information who would be found with difficulty in the absence of a conference. The conference is a way of reducing the costs related to information.

TACA provides that its members agree on: freight rates, loads and other transport conditions. Its common tariff include port to port rates and some door-to-door rates. The common **tariff** contains a grid of prices concerning the transport between definite points. They are envisaged twenty-six categories of goods, a rate being fixed for each one of them.<sup>18</sup> The tariff is published by the TACA and is available to all shippers. Currently, the freight rate is negotiated by container: whatever the type of good inside the container the shipping price is always the same one. This is due because of the standardization of containers processing and equipment. In fact, FAK tariff (freight all kind) corresponds to the transport price according to a container size and type. We can say that carriers do not take account of the nature of goods to fix their price. However, even if goods are in a container, each contract is different: neither the responsibilities, nor the obligations are the same ones. The price takes account of the transport conditions, deadlines and final destination. What explains why each shipper has different prices. It is advisable to recall that shippers sometimes must pay taxes to compensate bunker fluctuations,<sup>19</sup> BAF (Bunker Adjustment Factor), or exchange rates, CAF (Currency Adjustment Factor). This way carriers protect against some market **uncertainties**.

The TACA wants also reduce opportunist behaviors from shippers and carriers. TACA wants to guarantee transparency to shippers.<sup>20</sup> We talk about capacity regulation when carriers agree “to manipulate” their capacity: they will not use, voluntarily, their capacity even if it is available. The consequence of this action would be to cause a fall of the transport supply and thus to make increase freight rates. That behavior of carriers would be, obviously, negative to shippers who would face a rise on prices without a service quality in benefit. The fact that TACA’s carriers give up this sort of practice decreases uncertainties on the market. However, for the competition authorities this behavior is not easy to identify and cases of cheating are frequent.<sup>21</sup>

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<sup>18</sup> Document 3999D0243. Decision of the Commission of September 16, 1998 relating to a procedure of the application of articles 81 and 82 of EC Treaty. Official Journal n°L095 of the 09/04/1999 p.0001-0112

<sup>19</sup> Bunker : A ship’s fuel

<sup>20</sup> Document 3999D0243

<sup>21</sup> Document 3999D0243

Let us see some examples of **cooperation** within the conference and the conference with institutional environment. Since 1995, TACA's members permanently evaluate supply and demand on the traffic. Then while acting in concert with the European Commission and shippers, it determines that the capacity to provide on the market is 125% of the freight demand envisaged on the traffic. On this capacity, 85% are distributed between members and 15% are not allotted.<sup>22</sup> This agreement between the TACA and the Commission seeks to rationalize the demand present on the market. In addition, members of the TACA can cooperate between them to get informed of their needs or their capacities to ensure the service to the 85% allowed.

The TACA adopted, in 1995, an **equipment exchange** agreement (European Inland Equipment Interchanges Arrangement).<sup>23</sup> The purpose of this agreement is to improve management of empty containers in Europe by encouraging containers exchange between members. The agreement foresees the adoption of a system in which members can indicate if its stock of container is in surplus or overdrawn and its localization. This system allows members to know if some equipment is available and where it is. This way, carriers can offer a service more quickly (owing to the fact that they must not mobilize the container since another point). According to the TACA, this agreement allowed an exchange of 3600 containers during the first seven months of operation.<sup>24</sup>

On the other hand, members have the right of going apart from the conference tariff taking **independent actions**. The rate of these contracts being different from that of the common tariff. However, carriers must always announce the conference of their intention to take an independent action. On this subject, it is necessary to distinguish between the TACA contracts service and the individual service contracts. The individual service contracts are negotiated between TACA's carriers and shippers, in fact they determine the transport service conditions. Indeed, the carrier can fix a price according to his experience and according to some market indicators (capacity, destination, volume, envisaged demand). Each carrier is free to sign contracts with shippers in an independent way.

### II.1.3. Transactions and TACA's governance structure

We will analyze, with new institutional theory's tools, how carriers inside a conference organize their transactions. By definition, a conference is a **horizontal**

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<sup>22</sup> Document 3999D0243

<sup>23</sup> Document 3999D0243

<sup>24</sup> Document 3999D0243

**agreement.** The transactions within conference TACA represent the exchanges **carrier/carrier**. These exchanges, as we note before, can be exchanges of cooperation, information, and capacities. What are the attributes of the carrier/carrier transaction within conference? Could the theoretical contributions of Williamson or Masten (1991) about transactions attribute (uncertainty, assets specificity, and frequency) and governance structures ( market, hybrid, hierarchy) be applied to a horizontal agreement? Must we analyze the governance structures choice through the enforcement type, as Ménard suggests (1997; 2000)?

If we observe the degree of **assets specificity** inside the TACA, we can say that each carrier is independent and that there is not a property rights exchange. It is about a cooperation agreement and coordination to achieve a transport service required by shippers. Insofar as assets specificity not raised, carriers do not feel the necessity to be united and to consolidate a hierarchical organization. The contractual relations between them are a mechanism of coordination adapted to their need.

The association in conference reduces **uncertainty** and risk on the market. The fact that carriers meet, discuss and exchange information is an advantage. Cooperation reduces opportunist behaviors in the shipping sector (Clydes, 1995). For example, if the demand fluctuates on the transatlantic traffic, carriers help each other to face this constraint and to reduce losses. By sharing the capacity, they would not attribute two ships for a traffic, there will be just one to transport the cargoes of members of the conference. However, imbalances are frequent and sometimes to find a partner is not easy. Rules adopted by the TACA are a mechanism to control, supervise and sanction this type of behavior. Nevertheless, there are risks that even a conference cannot avoid (too brutal demand fluctuation, natural catastrophes, delays in the frequency, accidents, and so on).

As for the **frequency** of carrier/carrier transaction inside the TACA, we can say that it is recurring but it does not happen always between the same members. For example, a carrier can make an exchange of containers with another member but this operation depends on the availability and the place of stock of its partner: If a carrier needs an empty container in Rotterdam he seeks a member present in this port, they make the arrangement even if cooperation happens seldom between them. Thus, we can say that transactions are repeated but that the identity of partners can change. Since a carrier is member of the TACA there is a certification of his quality. This can be a way of reducing transaction cost such as North develops it in his article about the reputation and the champagne fairs (1990).

What **organization form** to frame the carrier/carrier transaction? A conference is an association between carriers, it is not a firm because there is not commandment hierarchy (Ménard, 2000). It is not either organized by the market since the relations are not spontaneous. The type of contract that frames the relations between members is of a multilateral contract (neoclassical). Could we talk about a hybrid governance structure?

To tackle this question, we will use the theoretical contributions of Ménard (1997, 2000). In cases of horizontal agreements, Ménard considers that is the **enforcement** that determines the governance structure choice. Once the transactions described and the type of contract defined, it is appropriate to look at the enforcement mechanism which controls the TACA. Enforcement contained by this conference, is not the same that we find in the market organizations (courts), nor in the hierarchical organizations (command). The piloting of the TACA adopts an *ad hoc* mechanism (the secretariat), as do hybrid organizations.

Let us recall, that the TACA's secretariat is create by members with an aim of taking care of internal rules. Disagreements are rare between members, but it should be known that the mechanism exists. Even if carriers remain autonomous when they sign multilateral contract they acquire engagements and rights, that era well to protect. The secretariat also acts as an instrument of coordination of the carrier/carrier relation insofar as it is a place of meeting and discussion.

By considering the transaction attributes and the enforcement mechanism inside the TACA, we can thus determine the nature of the governance structure. The relation carrier/carrier is characterized by a regular degree of assets specificity and uncertainty. This relation is framed by a multilateral arrangement where coordination is done by the renewal of relations. The mechanism which ensures the relation correct operation are the rules and the secretariat. Consequently, if we admit that carrier/carrier relation is a transaction and that the secretariat is an ad hoc enforcement, then the conference is a **hybrid** governance structure.

## II.2. Economic analysis of the law dissension

In this section we will analyze the law dissension to understand why the Commission doesn't authorize a price collusion when it is about a door-to-door transport service offered by a conference. Then, we are going to have a new reading to this disagreement using the transaction costs theory.

### II.2.1. The TACA and the carrier-haulage service

There's a dissension because of the way the Commission consider the intermodal transport service. Indeed, this law institution divides into **two segments** the intermodal transport: shipping segment and inland segment. While the TACA considers the door-to-door service as one activity which cannot be broken up because it is an all service. In countries like the United States, New Zealand, Japan or Australia, conferences are allowed to offer a carrier-haulage service. A conference can thus fix a common rate for this service. The Federal Maritime Commission (FMC), the Ameri-

can regulation institution, declares on this subject that carriers' freedom to engage independent actions is a way of ensuring competition and to prevent dominant position abuses.<sup>25</sup>

The European Commission refuses to authorize an exemption owing to the fact that rule 4056/86 is conceived only for the shipping sector. The regulation text specifies that it concerns the "services covered by maritime transport", which according to the interpretation of the Commission excludes the terrestrial segment of an intermodal operation. This way, the Brussels thinks that a conference does not have the right to collude on prices of the inland transport.

The Commission considers that it's impossible to apply the existing legislation as regards shipping transport for an activity of intermodal transport. Furthermore, this institution stresses that rule 1017/68 envisages competition exemptions for the inland transport. This means that it is crucial to create a **regulation** specific to the intermodal transport. This lack of clearness of the European regulation, is an institutional constraint that increase uncertainties (and cost) in this activity (North, 1990, 1994).

To understand the Commission's decisions about granted an antitrust exemption to the TACA, it is advisable to briefly present the theoretical bases of this legal resolution. European competition regulation is inspired by standard economic principles about **perfect competition**.<sup>26</sup> The Commission holds three tools to sanction and control bad behaviors: control of commercial agreements, sanction of dominant position abuses, and control of mergers and market concentration. In general, the common principle to all antitrust regulation is the opposition between consumers and producers (Gabzewicz, 1994). For instance, the antitrust acts have as an aim "to ensure competitiveness while being based on the assumption according to which, thanks to competition, desires of consumers will be satisfied at lower price and goods will be produced at lower cost, with the use of the smallest quantity of possible resources [...] In economic terms, competition maximizes the welfare of consumers and producers, on one hand by increasing the productive efficiency and, on the other hand, by supporting dynamic efficiency" (Gelhorn, 1984). In this direction, the Commission protects consumers and prohibits behaviors likely to restrict competition in order to guarantee economic efficiency.

Then again, door-to-door service is a transaction chain, which requires a strong degree of coordination between several actors. These transactions could change in time and in space. This intermodal chain is an **articulation of transactions** framed by contracts, thus we can say that door-to-door service offered by the TACA is not a

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<sup>25</sup> [www.fmc.com](http://www.fmc.com)

<sup>26</sup> By standard economic theory we means neoclassical economic theory. See Varian (1984) and Kreps (1990).

**vertical integration.** Do a range of arrangements through the intermodal chain affect market competition? The competition level is not reduced because shippers can choose between merchant-haulage and carrier-haulage to buy a door-to-door service. Moreover, carriers of the TACA can choose their providers among all those that are present on the market. Indeed, the TACA affirms “even when shippers conclude a TACA contract, they do not call upon the same carrier every year”.<sup>27</sup> It is the case of Allied Colloids, company of chemical products, which in 1994 have charge 51% of his volume with ACL and Hapag-Lloyd, then have decide in 1995 to transport 71% with ACL, and in 1996 passed a contract with a consortium to transport 58%.

The analysis of the judgment of the Commission makes think that the TACA is a horizontal integration: a firm. However, we should not associate the TACA with a horizontal integration, because by nature it is a multilateral contract between carriers. The carrier-haulage offered by the TACA is a sequence of transactions framed contracts: bilateral agreements between carriers and suppliers. This leads us to think differently on this law conflict.

## II.2.2. A possible solution using the transaction cost theory

Economic theories used by the Commission to support her position can be relevant for the analysis of several economic phenomena. However, concerning shipping and intermodal transport, it is interesting to use another theoretical framework in order to include agent behaviors, information asymmetries, transaction attributes, institutional environment, contracts, property rights and other explanatory variables. In addition, economic efficiency and competition can be two incompatible terms: for economists when a conflict exists between competition and efficiency, less competition is preferable to more efficiency (Jenny, 1993). To explain this argument is relevant to analyze new institutional economics and industrial economics.

The diversity of cooperation agreements that frame intermodal transactions can justify an antitrust exemption. The European competition regulation must evolve and integrate different types of contracts and governance structure used by agents to manage their relations. Economics theories developed recently can be relevant to analyze carrier-haulage offered by a maritime conference. As for the analysis of **governance structures** in the door-to-door transport, we can say that the introduction of Williamson (1991, 1996) and Ménard (2000, 2001) assumptions about vertical and horizontal agreements are relevant insofar as the transport chain adopts these organization forms.

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<sup>27</sup> Document 3999D0243

New institutional economics theory can help us to study this dissension; because it comes out of the bipolar framework between two organization forms. Between the firm and the spot market we find hybrids organizations. One difficulty of analyzing the TACA case is that it is about a **horizontal cooperation** (the TACA) that wants to make a **vertical cooperation** (carrier-haulage). We have to look if these governance structure are effective or not. The service of carrier-haulage offered by a conference is more efficient than if it is offered by other form of organization (market, firm, consortium,<sup>28</sup> alliance<sup>29</sup>)?

First of all, it is necessary to define the **efficacy** criterion of transaction costs theory. Economic agents constrained by the institutional environment choose the organization form, which enables them to coordinate transactions and to face uncertainties on the market. Thus, the most effective governance structure will be the least expensive one. The transactional effectiveness will be determined by formulating a presumption which will be subjected to refutation (Lotter, 1995). It is a question of comparing realizable situations and then the least expensive situation will be elected. This reasoning always includes carriers, contracts, institutions and transaction costs.

New institutional economic school, include the **institutional environment** in its analysis as the rules of the game (North, 1990; 1994). The study of the law dissension between the TACA and the Commission must take account of the institutional environment, of the agents' behaviors in relation to these rules imposed by the institutional authorities, and of the influence of the institutional framework on the organization forms.

The definition of the institutional framework and the elaboration of policies must move at the same rhythm as the industries does.<sup>30</sup> It should be said that the evolution of the regulations is rather slow and this for purely administrative reasons and procedures. Obviously, to change the legislation as regards competition is not an easy change, it is a major reform and some alternatives must be studied. Concerning the European Union legislation, we can say that the regulation is recent: it goes back to 1957 (the Treaty of Rome) and the last reforms took place in 1992 (Treaty of Maastricht) and in 2001 (Summit of Nice).

On the other hand, the American legislation concerning the shipping and intermodal transport underwent several modifications.<sup>31</sup> The American legislation as

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<sup>28</sup> Consortium: Group of shipping lines, normally members of a conference, who pool together their ships and others resources to provide a combined service in a particular trade.

<sup>29</sup> Alliance: Cooperation agreement between carriers who choose the scale of production collectively in order to get agree on quantities (Massac, 1998).

<sup>30</sup> OCDE, 2001

<sup>31</sup> Mrs. Douet, carries out a search on the American legislation as regards shipping transport. The information on this subject corresponds to the conclusions of a meeting on April 26th 2001., INRETS.



regards maritime transport finds its first bases in the 1916 law (Shipping Act) which exempts conferences of the antitrust regulation.<sup>32</sup> In 1961 this law had an amendment concerning the fixing of rates. Then in 1984, the regulation recognizes intermodal transport and authorizes the contracts service. In 1998 (Ocean Shipping Reform Act) the law gives more freedom in the usage of contracts service. We do not want to say that the American institutional framework is better than the European framework; it is about to compare the evolution of the organization forms of intermodal and shipping transport and to observe the needs of actors on the Common Market for thus adopting a suitable regulation to develop this transport activity.

The Commission criticizes the fact that conference TACA organizes intermodal transport with contracts of subcontracting.<sup>33</sup> According to the Commission the TACA acts not like a conference but as an individual, and thus fixing a common price distort the competition on the market. This conclusion is different if we take account of the new institutional assumptions. The coordination of the transactions through contractual relations is a mechanism specific to the hybrid forms. Do these contracts harm economic efficiency? Cooperation is a coordination mechanism of transactions. Without these arrangements door-to-door service would be, perhaps, possible at a higher cost. It is important to determine if the organization of carrier-haulage by the TACA is an effective hybrid governance structure.

## Conclusion

We tried to analyze with a new institutional approach, the law dissension between the European Commission and the TACA, while starting with an analysis of the activities of the conference, for then passing to an analysis of its organization.

We can conclude that conference TACA is a multilateral agreement, which uses a hybrid governance structure. When this conference wants to offer a service of carrier-haulage, it signs contracts of bilateral type which correspond to structures of market. However, these remarks come of an observation and of a study that will be necessary to widen by a major observation to make an analysis of structural alternatives.

What is the economic theory that can help us to understand the articulation between horizontal agreements and vertical agreements? We think that the theory of the transaction costs can be a solution. This track of search is still with its first phase.

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<sup>32</sup> The antitrust acts are the whole of the American laws (Sherman Act, Clayton Act), of the end of the XIX<sup>o</sup> century, prohibiting any agreement having the aim of restricting the freedom of the trade.

<sup>33</sup> Document 3999D0243

## References:

- CASPARI M., *EEC Competition and Trade Law*, Fordham University School of Law, 1989
- GABZEWICZ J., *La concurrence imparfaite*, Repères, la Découverte, Paris, 1994
- GELHORN E., *Antitrust Law and Economics*, Nutshell Series, West Publishing Company, 1984.
- GLAIS M., *Analyse typologique des ententes illicites soumises à l'appréciation des autorités concurrentielles françaises et communautaires*, Revue d'Economie Industrielle, n°63, 1<sup>er</sup> trim, 1993, p.45-75
- JENNY F., *Droit européen de la concurrence et efficience économique*, Revue d'Economie Industrielle, n°63, 1<sup>er</sup> trim, 1993, p.193-206
- KREPS DM., *A Course in Microeconomics Theory*, Harvester Wheatsheaf, 1990
- LOTTER F., *Coûts de transaction et fondements de l'intervention publique*, Revue d'économie industrielle, n°71, 1995
- LOTTER F., *Efficacité transactionnelle versus efficacité parietienne*, Communication au colloque d'économie publique ENST de Bretagne, septembre 1995
- MASTEN S., MEEHAN J., et SNYDER E., *The cost of organization*, Journal of Law, Economics, and Organization, 7(1), p.1-25, 1991
- MASTEN S. et WILLIAMSON O., *The Economics of Transaction Costs*, EE Cheltenham, UK., 1999
- MENARD C., *Enforcement procedures and governance structures: what relationships?*, Institutions, Contracts and Organizations: Perspectives from New Institutional Economics, EE Cheltenham U.K, 2000, p.234-253
- MENARD C., *Règles Concurrentielles et Formes Organisationnelles Hybrides*, Centre ATOM, Université de Paris 1 (Panthéon-Sorbonne), Colloque du 28 mars 2001
- NORTH D., *Institutions, Institutional Change and Economics Performance*, Cambridge University Press, 1990
- NORTH D.; MILGROM P.; WEINGAST B., *The role of institutions in the revival of trade: the law merchant, private judges, and the champagne fairs*, Economics and Politics, vol.2, n°1, march 1990
- VARIAN, *Microeconomic Analysis*, 2nd Ed., New York, London, W.W. Norton, 1984
- WILLIAMSON O., *Comparative economic organization: the analysis of discrete structural alternatives*, Administrative Science Quaterly, 36, june, 1991, p. 269-296
- WILLIAMSON O., *The Mechanisms of Governance*, 1996
- Maritime transport:
- CLYDE P.S et REITZES J., *The effectiveness of Collusion Under Antitrust Immunity. The case of liner Shipping Conferences*, Federal Trade Commission, December, 1995
- COMTOIS C., *Considérations portuaires dans la planification régionale du Québec*, vol 7, n°102, 1993, p.451-475
- CONFAVREUX R., *Le droit de la Concurrence et les Transports Maritimes*, Editions Moreaux, Paris, 1998
- Containerisation Internationale*, juillet, 1997
- Document 399D0243, Législation communautaire en vigueur, Journal officiel n°L095, avril 1999, p.001-0112
- DOUET M., *Les consortiums maritimes de lignes régulières*, Paradigme, Caen, 1985
- ESC, European Shipper's Council, *Maritime regulatory Reform*, 10 April 2001
- EUROSTAT, CEMT, CEE-ONU, *Glossaire des statistiques de transport*, Transport maritime, 1997
- GOUVERNAL E. et HUCHET JP., *La logistique de conteneurs. Le principal enjeu de l'industrie maritime de ligne régulière*, 1998
- FICHES TECHNIQUES du parlement européen, 3.3.2. *Les abus de position dominante et le contrôle des concentrations*, octobre, 1999
- Journal officiel* L 378,31.12.1986
- Journal officiel* L376, 31.12.1988
- Journal officiel* L 353,17.12.1990

MASSAC G., *Le transport maritime par conteneurs : concentrations et globalisation*, 1998  
OCDE, *Liner shipping competition policy report*, directorate for science, technology and industry, Division of transport, November, 2001  
OCDE, *Transport intermodal de marchandises, Aspects institutionnels*, Transport, OCDE, France, 2001

## Internet Sites

[www.drewy.co.uk](http://www.drewy.co.uk)  
[www.europa.eu.int](http://www.europa.eu.int)  
[www.isemar.asso.fr](http://www.isemar.asso.fr)  
[www.fmc.org](http://www.fmc.org)

Erika Lopez

# MOGUĆNOSTI KORIŠTENJA TEORIJE TROŠKOVA TRANSAKCIJA U ANALIZIRANJU NEPODUDARNOSTI PROPISA IZMEĐU EUROPSKE KOMISIJE I TACA

## Sažetak

Nepodudarnost propisa između Europske komisije i tajnoga sporazuma članova TACA (*Trans Atlantic Conference Agreement* / Transatlantski konferencijski ugovor) značajno je pitanje na području brodarstva. Radi se o primjeni europskog antitrustovskog propisa o tarifnim ugovorima u pomorskom i intermodalnom prijevozu.

Svrha je ovoga rada ilustrirati tu nepodudarnost propisa uz pomoć teoretskih sredstava nove institucionalne ekonomike: teorije troškova transakcija i teorije ugovora. Ta nas analiza dovodi do zaključaka koji se razlikuju od zaključaka Komisije o organizacijskim oblicima i konkurenciji u pomorskom i intermodalnom prijevozu. Naime, raznolikost organizacijskih oblika na području brodarstva moguće je analizirati pomoću sredstava nove institucionalne ekonomike na način da transakcije od kojih se sastoji prijevozni lanac, usklađivanje rada, ugovori, suradnja, samostalnost, poslovne obveze i rizici predstavljaju eksplanatorne varijable za proučavanje brodarevog organizacijskog odabira.

Ključne riječi: Europski propisi o konkurenciji, konferencijski ugovori, intermodalni prijevoz, organizacijski oblici, troškovi transakcije

## PERCHÈ LA TEORIA DEI COSTI DI TRANSAZIONE POTREBBE VENIR IMPIEGATA PER ANALIZZARE LA DISPUTA LEGALE TRA LA COMMISSIONE EUROPEA E LA TACA

### Sommario

La disputa legale tra la Commissione europea e l'accorso collusivo tra i vettori membri del TACA (*Trans Atlantic Conference Agreement* - Accordo di Consultazione Transatlantica) costituisce l'argomento principe nel settore delle spedizioni marittime. Esso riguarda l'applicazione del regolamento antimonopolistico europeo riguardante gli accordi sui compensi delle attività marittime e del trasporto intermodale.

Scopo dell'articolo è di illustrare la disputa legale adoperando gli strumenti teorici della Nuova economia istituzionale (*New Institutional Economics*): la teoria dei costi di transazione e teoria dei contratti. L'analisi ci porta a conclusioni diverse da quelle della Commissione e che concernono le forme di organizzazione e concorrenza delle spedizioni marittime e del trasporto intermodale. Infatti, la diversità delle forme di organizzazione nel settore delle spedizioni marittime si possono analizzare in base ai nuovi strumenti di economia istituzionale in quanto le transazioni in tutta la catena di trasporto che riguardano la coordinazione, i contratti, la cooperazione, l'autonomia, le obbligazioni e gli incerti possono venir considerati come entità variabili esplicative adeguate a studiare la scelta organizzativa dei vettori.

Parole chiave: regolamento di competizione europea, conferenza sui contratti, trasporto intermodale, forme organizzative, costi di transazione