

Frank L. Fine, J.D., LL.M., Ph.D. (Cambridge)
Admitted: Belgium, England and Wales, District of Columbia and California

25 avenue des Gaulois
1040 Brussels, Belgium
frank.fine@skynet.be
frank.fine@dehenglaw.com

Director, EC Competition Law Advocates sprl
Affiliated with DeHeng Law Offices, Beijing
德恒律师事务所高级顾问

Tel: 32-02-735-0880
Fax: 32-02-735-0875

27 July 2020

Mr. Robert Frei
TAC Index
2318 Leighton Centre
77 Leighton Road
Causeway Bay
Hong Kong

Re: EU ANTITRUST ANALYSIS OF THE TAC INDEX

Dear Mr. Frei,

You have requested that we review and analyze the TAC Index for its compliance with the EU antitrust/competition rules, and in particular Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). More specifically, we have considered the compatibility of the TAC Index with the Article 101 rules relating to information exchanges among competitors.

This analysis included a review of TAC documents, a live demonstration of the Index, as well as discussions and correspondence with you, John Peyton Burnett and James Notaras, TAC's head of data processing. The discussions with Mr. Notaras related to TAC Index's construction of datasets and the measures taken by TAC to prevent reverse engineering of the data.

The TAC Index

The TAC Index is a sophisticated market intelligence tool for the air cargo sector, the purpose of which is to provide the air cargo sector (shippers, forwarders and carriers) and financial markets with an impartial, robust benchmarking service which enables all parties directly involved in the air cargo supply chain to more effectively negotiate their air freight contracts, and to more effectively manage their risks and costs. The Index also enables the hard-hit airline industry to more efficiently manage their capacity, thereby increasing their willingness to invest in this sector and better enabling them to purchase new aircraft.

The TAC Index accomplishes these pro-competitive objectives by publishing weekly airport-to-airport general cargo price trends for all types of contracts (BSA (Block Space Agreements with tonnage and price commitments both from forwarders and airlines) ad hoc/spot rates and

weekly allocations/allotments. The Index reports base values involved in the transport of goods from one airport to another. These values do not relate to prices or even average prices, but rather, to base values that may be attached to the transport of products from one airport to another, without taking into account some the critical variables that would affect price, such as direct vs. indirect service, varying service levels around transit time (which relates to the direct/indirect service variable). These contractual adjustments, which are accompanied by discounts or premiums, are in reference to an agreed, negotiated base price. The TAC Index helps enable more effective pricing negotiations by providing price directionality as a function of certain core (commodity) values.

The Index contains three types of calculations based on the data submitted by participating forwarders:¹

1. Actual Net Price (ANP): The per kg rate achieved using the all-in cost as a function of the actual weight declared on the MAWB.
2. Net Achieved Price MAWB (NAP MAWB): The per kg rate achieved using the all-in cost as a function of the chargeable weight declared on the MAWB.
3. Net Achieved Price HAWB (NAP HAWB): The per kg rate achieved using the all-in cost as a function of the chargeable weights declared on the associated HAWBs.

In addition, for each route concerned, the Index contains a number of Key Performance Indicators (KPIs), such as HAWB to MAWB ratio (the ratio of HAWB to MAWB for consolidated shipments); the average HAWB weight; and the average MAWB weight.

TAC has taken various stringent measures to ensure that its published data cannot be disaggregated. We have reviewed and discussed these measures with you, and based on these discussions, we consider that these measures are robust. Among these measures is the TAC Index policy relating to its datasets. TAC Index policy is that there must be at least six data providers on any lane published,² with no one data provider accounting for more than 40% of the volume weighted average price for the week in question. If the route in question cannot meet this cap, the TAC Index broadens the route destination in order to ensure that the cap is not exceeded.

In addition to its rigorous dataset policy, the TAC Index has taken other measures to prevent reverse engineering of its published data. For example, the Index does not disclose any data relating to shipper-forwarder contracts (e.g. their identities, type of goods shipped, or prices, even on an average basis). The Index also does not disclose the total number of carriers operating on any given defined route, the absolute weights on any given route or the relative weightings applied. TAC also monitors the data that it publishes to ensure, on an ongoing basis, that it cannot be disaggregated.

Legal assessment under Article 101

EU antitrust law addresses information exchanges among competitors under TFEU Article 101, the enforcement of which is carried out by the European Commission and competition authorities of the Member States.

Article 101(1) prohibits agreements and concerted practices between two or more parties which have the “object or effect” of restricting or distorting competition. Article 101(3) exempts from the application of Paragraph (1) agreements and concerted practices that are pro-competitive (promoting production, distribution or economic or technical progress), provided that: the arrangements in question are indispensable for the achievement of these objectives (i.e. not overly broad), a fair share of the benefits are passed on to consumers, and the arrangements do not eliminate competition.

The 2011 EU Commission Guidelines on horizontal agreements (the “Horizontal Guidelines”)³ are broadly applicable to the analysis of all information exchanges (including benchmarking tools), unless sector-specific rules exist.⁴ There are no horizontal guidelines governing the air transport sector. However, the Horizontal Guidelines explicitly defer to the EU guidelines concerning the applicability of Article 101 to the maritime sector. Due to the similarities between air and sea cargo, the Commission’s 2008 Guidelines on Maritime Transport Services (hereinafter “Maritime Guidelines”)⁵ have persuasive value when analyzing the TAC Index under Article 101.

The Horizontal Guidelines take a number of factors into account in the analysis of whether an information exchange has anti-competitive effects, including the age of the data, the frequency of the exchanges, and whether the data is public or private. However, these guidelines also clarify that “the exchange of *aggregated* data is unlikely to give rise to restrictive effects on competition.”⁶

The Maritime Guidelines take virtually the same position. They state that, “A price index based on appropriately aggregated price data is unlikely to infringe Article 101(1), provided that the *level of aggregation is such that the information cannot be disaggregated.*”⁷ Similarly, the Maritime Guidelines also state that aggregated “*recent* data on volume and capacity” are “unlikely” to infringe Article 101(1) if the data cannot be disaggregated.⁸ For these purposes, the Maritime Guidelines indicate that data is considered “recent” if it is less than one year old.⁹

Since the TAC Index publishes “recent” data, the critical question under both the Horizontal and Maritime Guidelines in the Article 101 analysis of the Index, is whether its published aggregated data can be disaggregated. As noted earlier, TAC has implemented a rigorous policy with regard to dataset construction. This policy is more stringent than the dataset parameters recommended in the Article 101 case law.¹⁰ It has also taken other robust measures to prevent the reverse engineering of the data which are not even suggested in the case law.

The Horizontal Guidelines (unlike the Maritime Guidelines) suggest exceptionally that aggregated data may in itself be problematic if its exchange takes place in a tight oligopoly. The specific concern is whether in such narrow markets, which are non-dynamic, stable (i.e. hardly changing market shares, high barriers to entry), transparent and symmetrical, a market participant is able to discern a “market price” from the aggregated data, rather than a company-specific price, thereby enabling potential retaliation if any competitor deviates from this market price.¹¹

Even if the language of the Horizontal Guidelines relating to tight oligopolies is applicable to the air cargo sector, and it is not certain that it is, a review of EU case law and recent market analysis shows that the markets for air forwarding and air cargo would not be characterized as tight oligopolies.¹² To the contrary, the markets are dynamic, unstable, opaque and non-symmetrical.

Also, as noted earlier, if the number of participants on airport-to-airport routes exceed TAC’s weighting cap, TAC will broaden the geographic scope of the destination to ensure that the cap is not exceeded. This measure, in particular, provides assurance that the Index’s published aggregated data cannot be used strategically to achieve a collusive outcome and, in particular, to permit the detection of a so-called “market price.”

Conclusion

For the above reasons, there appears to be no appreciable risk that the TAC Index infringes Article 101(1).

However, in the unlikely event that an EU or national antitrust regulator were to conclude that the TAC Index infringes Article 101(1), there are strong arguments pursuant to Article 101(3) that the TAC Index is a pro-competitive tool which embodies the positive attributes of benchmarking, such as the enhancement of efficiencies. These benefits would be asserted to exempt the Index from the application of Article 101(1).

Kind regards,


FRANK FINE

¹ Contributing forwarders are requested to furnish data from House Air Waybills (HAWB) and Master Air Waybills (MAWB) for the previous week. The HAWB and MAWB data include such items as the origin of the shipment, destination, flight number, actual weight and chargeable weight. The MAWB data includes additional data relating to the cost of the flight to the carrier, i.e., all-in costs, as well as airline rates, fuel and security surcharges.

² TAC Proposal (Jan. 2019), at 4.

³ *Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements*, at paras. 55-110. (hereinafter the “Horizontal Guidelines”), found at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN).

⁴ *Id.*, at para. 18.

⁵ *Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport services*, O.J. C245/2 (2008), at paras. 38-58 (hereinafter “Maritime Guidelines”), found at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0926\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0926(01)&from=EN)

⁶ Horizontal Guidelines, *supra*, at para. 89 (emphasis added).

⁷ Maritime Guidelines, *supra*, at para. 57 (emphasis added).

⁸ *Id.*, at para. 54 (emphasis added). In *CEPI-Cartonboard*, O.J. C310/3(1996), at para. 17, the Commission even suggested that aggregated forecasts of future capacity are non-problematic.

⁹ Maritime Guidelines, *supra*, at para. 54. These guidelines imply that if the data is more than one year old, there is no need for aggregation for the purposes of Article 101.

¹⁰ In *CEPI-Cartonboard*, *supra*, the Commission suggested that a dataset may consist of as few as three competitors. In a UK case under Article 101 involving an exchange of information among UK motor insurers, the former Office of Fair Trading suggested that a dataset consisting of five competitors was sufficient. See Decision to accept binding commitments to modify a data exchange tool used by Motor Insurers (OFT, Dec 2011), found at: <https://assets.publishing.service.gov.uk/media/555de4dbe5274a74ca000159/OFT1395.pdf>

¹¹ Horizontal Guidelines, *supra*, at para. 89.

¹² As regards air freight forwarders, in its *Freight Forwarding* cartel decision, the Commission referred to the “large degree of fragmentation in the [air] freight forwarding industry.” See *Freight Forwarding* (2012), Case AT-39462, at para. 613, found at:

https://ec.europa.eu/competition/antitrust/cases/dec_docs/39462/39462_6408_3.pdf.

Moreover, the 2019 Commission decision relating to the air forwarder merger between DSV and its competitor, Panalpina, involved the Commission’s simplified procedure, indicating that the parties’ combined market share on any relevant market was less than 20%, even though the merger reportedly created the second largest forwarder in the world. See *DSV/Panalpina Welttransport* (2019), Case M. 9371, found at:

https://ec.europa.eu/competition/mergers/cases/decisions/m9371_127_3.pdf.

<https://www.aircargonews.net/freight-forwarder/dsv-panalpina-merger-creates-worlds-second-largest-airfreight-forwarder/>. See also *The future of logistics: What does the future hold for freight forwarders?* (Transport Intelligence, Sept. 2015), at slide 6, found at: http://406wgv3346mpao4bj1jj3ql.wpengine.netdna-cdn.com/wp-content/uploads/2015/10/Ti_The_Future_of_Logistics_Kewill_2015.pdf

Similar non-oligopolistic conditions exist on the air cargo market. The Commission found in *KLM/Martinair* merger decision that the cargo market “is generally competitive [with] a multitude of players competing for business.” Case COMP/M. 5141 (2008), at para. 46,

found at: https://ec.europa.eu/competition/mergers/cases/decisions/m5141_20081217_20682_en.pdf

This same decision states that forwarders exercise substantial purchasing power, that there are relatively low barriers to entry, and that carriers face competition, to some extent, from sea freight operators. The Commission cartel decision in *Airfreight* adds that “pricing complexity [on the air cargo market] is considerable.” *Airfreight*, Case AT.39258 (2010), at para. 2.1(10),

found at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39258/39258_7008_7.pdf

See also *Air cargo market – assessment and forecasts*, (ResearchGate, July 2015), at 2 (“The level of competition in the global air cargo market is intense. The market is characterized by high excess capacity and is extremely fragmented.”), found at:

https://www.researchgate.net/publication/280098178_Air_cargo_market_-_assessments_and_forecasts;

<https://www.mordorintelligence.com/industry-reports/global-airfreight-market-industry> (“The air freight industry is moderately fragmented in nature.”); Global Airfreight Industry (2019-2024), at slide 66 (“Air freight remains a challenging market....pressures from demand, disruption and supply continue to build.”), found at: https://samples.mordorintelligence.com/48696/Air_Freight_Industry.pdf