EUROPEAN COMMISSION
Competition DG

Director-General

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Dear Mr Heimert

Thank you for inviting DG Competition to testify before the Antitrust Review Commission at the hearing on the US Shipping Act to be held on 18 October.

Further to your suggestion we will be presenting the review of the liner conference block exemption and the legal and economic considerations that led to its repeal.

As liner conferences are tolerated in several jurisdictions, throughout our review process we paid special attention to the international dimension of liner shipping and kept regular contacts with our major trading partners. On several occasions we met with the US Administration in particular with the Federal Maritime Commission, the Department of Justice and the State Department. These meetings were very fruitful in terms of exchanges of ideas and information. The most important outcome was the acknowledgement that the repeal of the liner conference by the European Union will not trigger a conflict of law with those jurisdictions that have antitrust immunity for price fixing liner conferences or discussion agreements. A conflict of laws would only arise where one jurisdiction required something that another jurisdiction prohibited. At present no jurisdiction imposes an obligation on liner shipping operators to operate in conferences.

We very much welcome this opportunity to present our findings to the Antitrust Review Commission. Fabrizia Benini who has been dealing with this issue from the outset will present our position. Attached you will find a prepared statement which will be the basis of her testimony.

Yours sincerely

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Encl : 3

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Statement by Fabrizia Benini

Directorate General for Competition of the European Commission

before the

Antitrust Modernization Commission

Hearing on the Shipping Act

18 November 2006

Thank you for inviting me to speak today. On 25 September 2006, the European Union (EU) Council voted unanimously to repeal Regulation 4056/86[1] putting an end to the possibility for liner carriers to meet in conferences, fix prices and regulate capacities on trades to and from the European Union.

I work in the Transport unit of the European Commission's Directorate General for Competition and for the last four years I have been involved in the review of the antitrust immunity for liner conferences. Today I shall be sharing with you the process we went through in the EU to repeal this exemption.

Before presenting you with an overview of the review process in the EU, I would like first to provide you with some general background information on the EU antitrust system.

A brief introduction to the EU antitrust system

Article 81(1)[2] of the European Community (EC) Treaty prohibits agreements which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 81(3), however, recognises that a restrictive agreement caught by Article 81(1) may have pro-competitive effects that outweigh the anti-competitive effects of the restriction. In order to verify whether

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Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, Official Journal L 269, 28 September 2006, page 1

this is the case, it establishes a checklist of conditions, all of which must be met if the restrictive agreement is to qualify for exemption:

- it must contribute to improving production or distribution or to promoting technical or economic progress;
- it must allow consumers (users) a fair share of the benefits;
- the restrictions must be indispensable to the attainment of the objectives;
- it must not lead to the possibility of eliminating competition in respect of 'a substantial part of the products in question'.

Article 82 of the EC Treaty prohibits any abuse of a dominant position by an undertaking within the common market or any substantial part of it that may affect trade between Member States. Article 82 is directly applicable. Abuses of a dominant position are commonly divided into exclusionary abuses, those which exclude competitors from the market, and exploitative abuses, those where the dominant company exploits its market power by – for example – charging excessive prices. In the US the equivalent to this provision is Section 2 of the Sherman Act.

The review of the liner conference block exemption deals mainly with the application of Article 81 of the EC Treaty. Up to 1st May 2004 and for the first 17 years of the liner conference block exemption, Europe was endowed with a **centralised authorisation system for all restrictive practices requiring exemption**[3]. Whilst the Commission, national courts and national authorities could all apply Article 81(1), the power to grant exemptions under Article 81(3) was granted exclusively to the Commission[4]. Prior notification of restrictive practices was not compulsory, but undertakings which wished to benefit from Article 81(3) had to notify their restrictive practices to the Commission. This requirement generated **major costs, particularly for medium-sized undertakings.** Companies also used this centralised authorisation system not only to get legal security but also **to delay private action** before national courts and competition authorities in the EU Member States.

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2 The articles of the Treaty establishing the European Community (EC) were renumbered by the Treaty of Amsterdam. Prior to 1999, Article 81 and 82 were respectively Articles 85 and 86 EC.

3 For a comprehensive overview see European Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, 28.4.1999

4 On the basis of EEC Council Regulation No. 17 the first regulation implementing Articles 85 and 86 of the Treaty, Official Journal 13, 21.2.1962, page 204

The combination of the ex ante control system, **the Commission's limited administrative resources and the complexity of decision-making procedures** meant that, as early as 1967, the Commission was faced with a high backlog of cases. Over the years, the Commission took a number of measures to reduce notifications. It started by using general notices in order to clarify the conditions under which certain restrictive practices would not normally have the object or effect of restricting competition and would not therefore be caught by Article 81(1).

A further effort to reduce the number of individual applications for exemption was the adoption of a series of **block exemption regulations**. This creates a safe harbour for the agreements covered by the regulation, which are all deemed compatible with the competition rules on condition that they respect the rules laid down in the Regulations.

Most block exemption Regulations are granted by the Commission after a thorough consultation process. Before granting a block exemption, the Commission needs to be absolutely certain that the agreements covered are compatible with the competition rules. Moreover, Commission block exemption Regulations are always limited in time so that the Commission can regularly check if market developments have not altered the compatibility conditions.

Two block exemption were adopted in the liner shipping sector: The above mentioned Regulation 4056/86 containing the liner conference block exemption, now repealed and Regulation 823/2000[5] on liner shipping consortia, in force until 2010.

With these and other measures, the Commission managed to stem the **flood of notifications, but at the cost of focusing less on the most serious restrictions of competition** which, generally, were never notified. As an example, in the period 1988-98, own-initiative procedures[6] accounted for only 13% of new cases registered, with the Commission gradually

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5 Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), Official Journal 2000 L 100, 20.04.2000 p. 24 as amended by Commission Regulation (EC) No. 611/2005 of 20 April 2005, Official Journal L 101, 21.4.2005, page 10

6 These are proceedings instigated by the Commission on its own initiative where it wishes to investigate and take action against infringements.

having been reduced to a reactive role in handling the large number of notifications and complaints it receives[7].

On 16 December 2002, the Council adopted a new Regulation implementing Articles 81 and 82 of the EC Treaty[8]. The reform eliminates the notification and exemption system and replaced it by a system of **direct application of the law**, which can be enforced not only by the Commission but also by the national competition authorities and by national courts. This means that an agreement which fulfils the conditions of the exemption rule contained in the Treaty is legal from the outset and enforceable by national courts. Article 81(3) of the Treaty can be invoked as a defence in all proceedings, including before national courts and national competition authorities without the need for an administrative intervention by the Commission. **It is no longer necessary or indeed possible to obtain an individual exemption under Community law either from the Commission or from Member States.** Conversely, just as was the case before the entry into application of Regulation 1/2003, a restrictive agreement which does not fulfil the conditions of the exemption rule under Article 81 (3) of the Treaty will be void and unenforceable from the beginning.

Undertakings are now in the obligation to **self-assess their business practices** to determine whether they comply with competition law. To smooth the shift to the new enforcement regime which became effective on 1 May 2004 and help undertaking to carry out an informed self-assessment; the Commission issued **several notices**[9] providing guidance to undertakings.

Block exemptions regulations were also maintained as a means to provide greater legal certainty. Regulation 1/2003 did not introduce any substantive changes to Regulation 4056/86 containing the liner conference block exemption. As a result, tramp vessel services and

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7 White Paper cit, paragraph 44

8 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pages 1-25

9 Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24, Notice on cooperation within the Network of Competition Authorities, Notice on the co-operation between the Commission and the courts of the EU Member States, Notice on the handling of complaints by the Commission, Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Guidelines on the application of Article 81(3) of the Treaty in Official Journal C 101, 27.04.2004, Notice on the rules for access to the Commission file in Official Journal C 325, 22.12.2005 and Notice on Immunity from fines and reduction of fines in cartel cases OJ C 45, 19.02.2002, p. 3-5

cabotage[10] services continued to be specifically excluded from the scope of application of the rules implementing Articles 81 and 82 EC Treaty[11]. Regulation 1/2003[12] replaced Regulation 17/62[13] as well as the provisions on procedures and sanctions contained in Regulation 4056/86. This means that for the first time in the EU **the same procedural rules apply to all cases** – whether transport-related or not – falling under Articles 81 and 82 of the Treaty.

Regulation 4056/86: The liner conference block exemption

Regulation 4056/86 **had a dual function**. First, it enabled the Commission for the first time since the adoption of the EC Treaty in 1957 to apply competition rules (Articles 81 and 82 of the EC Treaty) to the maritime transport services. Secondly, it provided for a block exemption for liner conferences. Article 3 of the Regulation thus provides for an **exemption from the prohibition contained in Article 81(1) of the EC Treaty for agreements between carriers** concerning the operation of scheduled maritime transport services. These agreements must have as their objective the fixing of rates and conditions of carriage, and must in addition cover one or more of the following forms of co-operation:

1. the co-ordination of shipping timetables, sailing dates or dates of calls
2. the determination of the frequency of sailings or calls
3. the co-ordination or allocation of sailings or calls among members of the conference
4. the regulation of the carrying capacity offered by each member
5. the allocation of cargo or revenue among members

Article 4 of the Regulation attached a **condition to the exemption**: the agreement or agreements must not cause detriment to ports, transport users or carriers by applying rates and conditions of carriage which vary without justification according to the country of origin or destination or port of loading or discharge.

Various **other obligations** attach to the block exemption. Lines must consult with transport users; while they may institute loyalty arrangements, such arrangements must contain

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10 Domestic maritime transport services

11 Consistent with the current scope of application of Regulation 4056/86, see Article 32 Regulation 1/2003.

12 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

13 Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ L 13, 21.2.1962, p. 204.

safeguards for transport users. Transport users must also be free to make their own arrangements concerning inland transport and quayside services. Tariffs and other conditions applied by the conference must be made available to transport users on request, or must otherwise be available for examination.

Failure to observe the above and other conditions may cause the Commission to withdraw from the conference the benefit of the block exemption. It may also lead to the imposition of fines. **Regulation 4056/86 is complemented by Commission Regulation 823/2000.** The latter provides for a block exemption for liner shipping consortia, the other main form of co-operation between liner shipping operators.

Why was a review of Regulation 4056/86 necessary?

It is **exceptional** for a block exemption Regulation to be incorporated in a Council Regulation as was the case of the liner conference block exemption[14]. It is also exceptional for such an exemption to be **open-ended** in terms of duration as was Regulation 4056/86 and not to contain any review clause. Most importantly it **permitted hard core restrictions of competition** such as price fixing which were not likely to be exempted in other circumstances[15]. In the TAA case,[16] the Court of First Instance recalled that it is settled case-law that **provisions derogating from Article 81(1) of the EC Treaty must be strictly interpreted.** It found that this conclusion must apply a fortiori to the block exemption provisions of Regulation 4056/86:

"by virtue of its unlimited duration and the exceptional nature of restrictions on competition authorised (horizontal agreement having as its object the fixing of prices). It follows that the block exemption provided for by Article 3 of Regulation No 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to market conditions" (paragraph 146 of the judgment).

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14 This means that the procedure leading to any modification of the Regulation had to be endorsed by a qualified majority of Member States after consultation of the European Parliament. Usually, the European Council empowers the European Commission on a case by case basis to adopt block exemption regulations.

15 See Commission notice on Guidelines on the application of Article 81 (3) of the Treaty, OJ C 101, 27.4.2004, paragraph 46

This exemption has to be seen in its **historical context**. Since the 1870s, liner shipping has been organised in the form of cartels - liner conferences - that bring together all lines operating in a specific geographic zone. Liner conferences were recognised by the 1974 United Nations Convention on a Code of Conduct for Liner conferences. Fourteen Member States of the European Union ratified the Code.

Defenders of liner conferences have always claimed that the liner market is unique and thus required special treatment under competition law. An examination of the market shows this is no longer so today: in the twenty years that the Regulation has been in force the liner **shipping market has changed considerably**. The continuing trend towards containerisation has led to an increase in the number and size of fully-cellular container vessels and to an emphasis on speed, frequency of service and global route networks. This has contributed to the popularity of consortia and alliances as a means of sharing the cost of the investments required to provide a competitive liner shipping service. The growth in importance of these operational arrangements, which do not involve price-fixing, has been accompanied by a decline in the significance of conferences. The latter trend has been particularly marked on the trades between the EU and the United States, largely as a consequence of Commission decisions and changes in US legislation, which have promoted individual service contracts at the expense of carriage under the conference tariff. These developments raise the question of whether reliable scheduled maritime transport services can be achieved by less restrictive means than horizontal price-fixing and capacity limitation. This in itself would be sufficient to justify a review of the EU liner conference block exemption.

Recent years have seen **important international developments**. As part of the **OECD's** general Regulatory Reform Programme,[17] the OECD Secretariat presented a "Discussion document on regulatory reform in international maritime transport"[18] in May 1999. The document recommended *inter alia* that agreements to set common rates should no longer receive automatic antitrust immunity or exemption. The draft report, circulated in November 2001, made, *inter alia*, the following findings of particular interest for EC maritime competition policy:

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16 Judgment of the Court of First Instance of 28.2.2002 in Case T-395/94 *Atlantic Container Line and others* v *Commission* [2002] ECR II-875

17 The Programme is a result of the request by Ministers in 1995 that the OECD should embark on a study of the reform of regulatory regimes in OECD countries. The review of liner shipping has a parallel in a similar OECD review of air cargo transport.

- The liner shipping industry is not 'unique' in the sense that its cost structure does not differ substantially from that of other transport industries and shipping lines do not suffer from exceptionally low returns on investment when compared to other scheduled transport providers. There is therefore no evidence that the industry needs to be protected from competition by anti-trust immunity for price-fixing and rate discussions;
- There is no evidence that the conference system (with anti-trust immunity or exemption for price-fixing) leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. On the contrary, the OECD finds support for the view that the most competitive markets provide the greatest stability.

In the light of its findings, the draft Report came to the conclusion that countries should:

- re-examine anti-trust exemptions for common pricing and rate discussions, with the goal of removing them, except where specifically and exceptionally justified;
- have the discretion to retain exemptions for other operational arrangements so long as these did not result in excessive market power.

Following discussion at the OECD in December 2001, the report was not endorsed by the Members of the OECD because there was no unanimity for the recommendation to suppress price fixing liner conferences. The paper was therefore published by the OECD Secretariat as a **final report on 16 April 2002**[19]. The report essentially endorsed the above findings. In particular, it found that it had not been established that collective price-fixing, whether by conferences or within discussion agreements, was an indispensable pre-requisite for stable freight rates and regular scheduled services[20].

Turning to the implementation of the conference block exemption regulation, we note that contrary to the experience in implementing block exemptions in other sectors, the **implementation of this exemption has not been smooth**. Although the provisions were very generous allowing carriers to jointly fix prices and to regulate capacity, there were regular instances when carriers tried to expand as much as possible the scope of the block exemption. The interpretation of the exemption for rate-fixing was in issue in several competition cases[21].

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18 DSTI/DOT/MTC(99)8, 19.5.1999.
19 DSTI/DOT(2002)2, 16.4.2002
20 Report, pages 69 and 76.
21 L. Pons and E.Fitzgerald, *Competition in the maritime transport sector: a new era*, Competition Policy Newsletter, Vol. 1, February 2002, p. 10

In its 1994 TAA[22] and FEFC[23] decisions, and again in the 1998 TACA[24] decision, the Commission objected, *inter alia,* to the collective fixing of tariffs for the inland leg of multimodal transport operations. In the TACA case, the Commission also objected to attempts by the conference to restrict the availability to shippers of individual and confidential service contracts. Finally, the Commission objected to capacity freezes in the TAA and EATA[25] cases, decided with the obvious purpose of increasing freight rates by limiting supply. In its TAA and EATA decisions the Commission found that these capacity freezes were not consonant with the aim of Article 3(d) of Regulation 4056/86, which was the improvement of the scheduled transport service(s) provided by the members of the conference. The Court upheld the all the Commission's decisions on the substance.

The review process

Exemptions from competition rules are normally reviewed by the Commission every few years to ensure that they continue to fulfil the four cumulative conditions of Article 81.3 EC. Regulation 4056/86 had never been revisited. This until March 2003, when the Commission initiated an extensive review of Regulation 4056/86 to ascertain whether the block exemption delivered the benefits for which it was first established and to determine how best to apply competition rules to liner transport services in today's market conditions.

In the three years leading to repeal of the Regulation, the Commission put forward several papers for public consultation, held a public hearing and on several occasions reported results to the Member States. Three independent studies were carried out. Industry contributed with substantive submissions both in favour and against the repeal of the block exemption[26]. Other

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22 Commission decision of 19 October 1994 in Case No IV/34.446 – *Trans-Atlantic Agreement,* Official Journal L 376, 31.12.1994 p. 1

23 Commission decision of 21 December 1994 in Case No IV/33.218 – *Far Eastern Freight Conference,* Official Journal L 378, 31.12.1994 p. 17.

24 Commission decision of 16 September 1998 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement,* Official Journal L 95, 9.4.1999 p. 1.

25 Commission decision of 30 April 1999 in Case No IV/34.250 – *Europe-Asia Trades Agreement,* Official Journal L 193, 26.7.1999 p. 23.

26 F. Benini and C. Bermig, *The Commission proposes to repeal the liner conference block exemption,* Competition Policy Newsletter, Vol. 1, Spring 2006, page 43. All documents relevant for the maritime review are published in the Commission's website: http://europa.eu.int/comm/competition/antitrust/legislation/maritime/

EU institutions and bodies also took an interest in the debate. On 1 December 2005, the European Parliament issued an own initiative report on the Commission's White Paper[27] of October 2004 and a final decision on 4 July 2006. The Economic and Social Committee and the Committee of the Regions adopted opinions[28].

Findings of the review

Recital 8 of Regulation 4056/86 is predicated on the assumption that liner conferences have a stabilising effect, assuring shippers of reliable services and that such results cannot be obtained without joint price fixing and capacity regulation.

The **main objective of the review was to verify whether the legislator's assumption was still valid in today market conditions** and in particular whether the four cumulative conditions of Article 81(3) were fulfilled.

To fulfil the first condition of Article 81(3) of the Treaty, it must be established that concrete economic benefits flow from the price fixing and capacity regulation by conferences. To follow the legislators' assumption, a direct causal link would need to be established between price-fixing and supply regulation within conferences (leading to stability of freight rates), and reliable scheduled maritime transport services.

"Price stability" has been defined in the TAA decision as "the maintenance of freight rates at a more or less constant level by liner conferences, in accordance with a set structure over a substantial period of time"29. It is questionable however if price stability as such would be regarded as sufficient for the fulfilment of the first condition of Article 81(3). Price stability only becomes relevant if it is read in conjunction with the concept of "reliable services" meaning "the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs". Data put forward during the review process did not show that actual freight rates have been stable or that conferences have contributed to rate

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27 White Paper on the review of Regulation 4056/86 applying competition rules to maritime transport, COM(2004) 654 final, 13.10.2004.

28 European Parliament resolution on the application of EC competition rules to maritime transport (2005/2033(INI)) of 1 December 2005 (P6_TA-PROV(2005)0466, A6-0314/2005), Economic and Social Committee TEN/208, CESE 1650/2004 of 16 December 2004. and Opinion of the Committee of the Regions of 13 April 2005, CdR 485/2004.

29 Recital 388.

stability, i.e. with or without conferences there is price volatility. It was found that with conferences the source of price volatility comes from the structural instability of market participation and conference membership. This can be a fundamental and wasteful problem, since market entry and exit can be associated with transaction and investment costs. In contrast, without conferences price volatility will continue. This is due to revenue maximising behaviour which is normal competitive conduct.

Carriers consider the **reliability of service** as the main benefit that derives from conferences. However, in today's market, conferences are not able to enforce the conference tariff and do not manage the capacity that is made available on the market. The majority of cargo is carried under confidential individual agreements between carriers and transport users ("contract cargo") rather than under the conference tariff. The proportion of contract cargo is very high ranging from 90% and above in the transatlantic trade to 75% in the Europe to Australian trade. The same occurs in the Europe to Far East trades. Regarding capacity regulation, this is a decision that is taken by individual lines or by consortia. Thus, it is difficult to claim that the provision of reliable services results directly from conference price fixing and capacity regulation. The alleged causal link between the restrictions and the claimed efficiencies is therefore too tenuous to meet the first condition of Article 81 (3).

The second condition of Article 81(3) of the Treaty requires that, if liner conferences were to achieve economic benefits, **a fair share of these benefits should be passed on to consumers**. In the case of a hard-core restriction of competition such as horizontal price fixing the negative effects are very serious and the benefits have to be very clear cut. However, no clear positive effects have been identified in the review process. **Transport users (shippers and freight forwarders) have systematically opposed the conference system** which they consider does not deliver adequate, efficient and reliable services suited to their needs. They call for the abolition of conferences and consider the existing consortia block exemption to provide an adequate framework for co-operation among liner shipping carriers. It should be noted that although the conference tariff is no longer enforced it may act as a benchmark for the setting of individual contracts. This results in a reduction of shippers' negotiating power. Moreover the common setting of surcharges and ancillary charges and its application by non-conference members leads to, on average, 30% of the price of transport being fixed jointly. To the detriment of shippers there is no price competition between

conference members and non-conference members for this part of the price. The second condition is therefore not fulfilled.

Under the third condition of Article 81(3) of the Treaty, the test is basically whether there are **less restrictive alternatives** than conference price fixing which would assure reliable liner services to the benefit of consumers. Today, scheduled liner services are provided in several ways. Independent carriers operate outside conferences on all main trades to and from Europe. Co-operation arrangements between liner shipping lines not involving price fixing, such as consortia and alliances[30], have increased and have important shares of the market in all major trades. Under certain conditions, consortia are block exempted from the prohibition set out in Article 81(1) of the Treaty by Commission Regulation (EC) No 823/200 on account of the rationalisation they bring to the activities of member companies and the economies of scale they allow in the operation of vessels and port facilities. Moreover, confidential individual service contracts between individual carriers and individual shippers account for the majority of cargo transported. Finally it should be noted that in some trades, conferences do not exist and this has not affected the regularity of the services. The restrictions permitted under Regulation 4056/86 (price fixing and capacity regulation) are therefore not indispensable for the provision of reliable shipping services. The third condition is therefore not fulfilled.

Finally, the fourth condition of Article 81(3) of the Treaty requires that **competition should not be eliminated on a substantial part of the market.** Conferences operate alongside consortia, alliances and independent operators. It would appear therefore that the fourth condition of Article 81(3) of the Treaty may be fulfilled. However, since the four conditions of Article 81(3) of the Treaty are cumulative and the first three conditions are not fulfilled for the reasons explained above, the question whether or not the fourth condition is fulfilled could be left open.

This said, carriers are likely to be members of a conference on a trade and outsiders in another. They may also be members of conferences and of consortia or alliances on the same market thus cumulating the benefits of the two block exemptions. In all cases, they exchange commercially sensitive information with their competitors that may allow them to adapt their

[30] Council Regulation (EEC) No 479/92, based on Article 87 [now 83] of the Treaty empowered the Commission to apply Article 81(3) of the Treaty to liner shipping companies grouped in consortia and providing a joint service (OJ L 55, 22.9.1992, p.3)

conduct on the market. In addition for charges and surcharges there is clearly no price competition between conference and non-conference carriers. Given the increasing number of links between carriers, determining the extent to which a particular conference is subject to effective competition is a case by case assessment.

In conclusion, **the four cumulative conditions of Article 81(3) of the Treaty that would justify an exemption are not fulfilled by conferences in present day market circumstances.**

Besides fixing the tariff, conferences jointly fix certain surcharges and ancillary charges in particular currency and bunker adjustment factors (CAFs and BAFs) and terminal handling charges. As explained above, the same level of charges or adjustment factors is often applied by non-conference members. It is questionable whether joint fixing of terminal handling charges falls within the scope of the conference block exemption regulation. Moreover, fixing of charges and surcharges by lines that are not members of a conference is not foreseen by Regulation 4056/86. This means that in practice carriers are going beyond what is allowed in the very generous block exemption.

Impact of a repeal of the liner conference block exemption

In Economic Terms

Defenders of liner shipping conferences have often put forward the argument that perfect competition does not function since the industry has a number of features that are inconsistent with the requirements of perfect competition[31]. This means in certain situations the market does not have an equilibrium ("empty core"), which would endanger the provision of regular and reliable services and price instability. This economic approach is referred to as the "theory of the core". There is a fairly large body of theoretical literature supporting the view that the liner shipping market has an empty core and, therefore, liner shipping is characterised by an "inherent instability". However, the theory of the core dates back to the 1960s and comes up with idealised market scenarios in order to show that the market is indeed suffering

[31] The line shipping market's features are notably regular scheduled services, economies of scale and density, capacity indivisibilities, high fixed avoidable costs, divisible and variable demand, inventories are not feasible and network effects.

from an empty core. The basic problem with the core-theory approach is that it does not take due account of the working of competition and competition policy.[32]

Modern industrial organisation, notably non-cooperative game theory, which is characterised by a more restrictive view about the implementability of coalitions among market participants, appears to be a more appropriate framework for analysing the liner shipping market. A game theoretic model of the liner shipping market actually shows that **conferences could lead to excess capacity or excess pricing and endanger service reliability.** In any case, the model provides no evidence that competition between liner shipping carriers leads to "inherent market instability". Recent real-world experiences appear to confirm the theoretical model[33]. Furthermore, the cost structure of liner shipping does not differ substantially from that of other transport industries. In short, there is no empirical or theoretical economic evidence that the industry needs to be protected from competition.

The Commission's **impact assessment[34] analysed the economic, social and environmental impact of the repeal of the conference block exemption.** The economic assessment comprised the potential impact of the repeal on transport prices and price stability, long-term economic growth and the Lisbon objectives, the reliability of liner transport services, service quality and innovation, competitiveness of the EU liner shipping industry in particular small EU carriers, trade and cross-border investment flows, market concentration and competition in the Internal Market, specific maritime regions and ports, small shippers and consumers as well as developing countries.

Summarising the main results of the impact assessment, the repeal of the conference block exemption is **likely to result in lower transport costs**. While the ocean transport prices will only moderately drop, the reductions in charges and surcharges are expected to be considerable. About 20% of EU external trade will thus directly profit from lower transport prices for liner shipping services to the benefit of shippers and the final consumer. The repeal

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32 The core theory's assumption that each side of the market (carriers and shippers) can coalesce in any form, using enforceable contracts, is unrealistic and appears to violate competition law in any jurisdiction.

33 On the West African trade conferences are likely to have de-stabilising effects on liner markets. On the other hand, the termination of a conference on the Europe-West Coast South America trade did not have any negative impacts on the stability of supply or regularity of services on this trade.

34 SEC (2005) 1641.

is also likely to have a positive impact on developing countries since they typically export low-value commodities with a relatively high transport cost share.

The abolition of liner conferences would reduce structural overcapacity in the market while ensuring reliable liner services, i.e. **a positive impact on service reliability can be expected**. This applies to all trades – whether the volume of transactions is high (thick trades) versus or low (thin trades), North-South versus East-West and deep sea and short sea.

Market concentration in liner shipping will not be affected by the abolition of conferences. Concentration is a process independent of the repeal of the block exemption. Liner carriers are integrating horizontally and vertically as a reaction to customer demand for door-to-door services. Vertical integration provides greater reliability to the carriers to provide such services if they control all the key elements of the transportation chain.

The effects on the EU liner shipping industry itself are also expected to be positive. Experience from other recently liberalised transport sectors shows that service quality and innovation are likely to be improved. Since four out of the top five world-wide liner shipping carriers are European, a more competitive environment should allow EU liner shipping carriers to compete, even more successfully, and grow. Liberalisation gives 'smaller EU carriers'[35] the opportunity to grow fast if they follow an innovative business model. The success of small carriers depends on their ability to adapt to a competitive environment and not on their actual size.

It should be noted that conference members come from all over the world. Liner conferences serving EU trades contain EU liner shipping carriers as well as carriers from third countries. EU carriers are also conference members on non-EU trades. As stated above EU carriers have a strong position on all world trades not only on EU trades. Therefore **the competitiveness of EU carriers** relative to non-EU carriers would not, in principle, be altered by the removal of the exemption.

[35] It should be noted that there is no EU liner shipping carrier that would fall within the Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of small and medium sized enterprises (OJ L 124, 20 May 2003).

The repeal of the block exemption will **not bring about any social impacts or impacts on employment.** Finally, the environmental impact is expected to be neutral since positive and negative impacts[36] are likely to offset each other.

International considerations

Liner conferences have traditionally been tolerated worldwide. This said they do not benefit from anti-trust immunity in all jurisdictions. However, in jurisdictions where such immunity or exemption exists, it has not so far been entirely removed, despite the 2002 OECD call to its member countries to do so.

If the EU were the first to repeal the liner conference system, the question arises of whether there is a risk of a conflict of international laws. The Commission considers that such a risk is unlikely. A conflict of laws arises only where one jurisdiction requires undertakings to do something that another jurisdiction prohibits. No jurisdiction imposes an obligation on liner shipping operators to operate in conferences or to fix prices jointly. If this happened it would go against the way operators have organised themselves in the market as there are several carriers that do not belong to conferences and operate as individual lines.

Given the nature of the industry, attention has been paid to the international dimension of liner shipping. Throughout the review process bilateral contacts with the major trading partners (e.g. US, Canada, Japan), as well as with developing countries, have taken place. The result of these contacts is encouraging. Several authorities question whether liner shipping conference cartels are indispensable for the provision of reliable shipping services.

Need for a new framework to replace the conference system?

Industry is divided on the need for a substantive alternative to Regulation 4056/86. The **European Liner Affairs Association (ELAA) has proposed that the conference block exemption should be replaced with an exchange of information system**. Transport users

[36] Positive environmental impacts would stem from the abolition of joint fixing bunker charges (so-called bunker adjustment factors) which will put liner carriers under competitive pressure with respect to bunker costs. As a result carriers might invest in vessels that consume less bunker bringing about less individual greenhouse gas emissions. Negative environmental effects could emerge when the reductions

do not consider this to be necessary. They regard the consortia block exemption as allowing for all the co-operation necessary for the provision of reliable services by carriers.
The proposed ELAA system would potentially cover the whole liner shipping market and thus be broader in scope than the exchange of information within the present conference system. To be acceptable, any new system must respect the competition rules. Some elements of the ELAA proposal appear to be in line with these requirements. However, others are problematic notably because they do not differ in effect from what conferences do today. Accepting the proposal as initially presented would remove all the pro-competitive effects of the abolition of the conference system. This said, the Commission remains committed to continuing the dialogue with the ELAA with a view to assisting it in developing an alternative system compliant with EU competition rules. It has acknowledged that exchanges of information leading to greater market transparency may contribute to the improvement in the way liner services are provided, in the interest of carriers, transport users and the public in general. Discussions will be focusing on the details of the various parts of the ELAA proposal.

Given that competition rules have never applied fully to the liner sector, **the Commission will issue appropriate guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime**. The purpose of these guidelines is to explain, *inter alia*, how the competition rules apply to the liner sector in general. They are due to be adopted before the end of the transitional period for existing liner conferences set to expire on 18 October 2008. As an interim step in the preparation of guidelines, DG COMP on 29 September 2006 published a **staff paper on the potential impact of information exchanges between liner carriers on the market for liner shipping.** We are concerned that exchanges of information could lead in practice to a co-ordination of prices and other trading conditions between liner carriers. Stakeholders are invited to submit their comments by 31st October.

The extension of the general competition implementing rules to cover cabotage and tramp vessel services

Regulation 1419/2005 also amended Regulation 1/2003 so as to include in its scope cabotage and tramp vessel services. Maritime transport services are key to the development of the EU economy. Tramp vessel services account for the major part of the volume of these

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of transport prices lead to accelerated growth in transport demand. In this case, even with reductions from individual vessels, emissions from the sector could be expected to increase.

services. Tramp vessel services are unscheduled transport services of bulk and break-bulk cargo. Cabotage is defined as maritime transport services between ports of one and the same Member State.

The decision to bring these services under the common competition implementing rules **does not involve a substantive change for the industry** as the substantive competition rules, set out in Articles 81 and 82 of the Treaty, already apply. It rather establishes equality of treatment between these sectors of the economy and all others. The maritime sector Guidelines due for end 2007 will also deal with the application of the EU competition rules to tramp services.

Conclusions

Existing liner conferences will be able to continue operating on routes to and from Europe until **18 October 2008**. After that date, conference activities and in particular price fixing and capacity regulation will no longer be permitted.

This decision **will affect all EU and non EU carriers and shippers** operating on trades to and from the EU. The market distorting effects of price fixing will be corrected, and lower prices for sea containers are likely to result. However nothing would prevent carriers from taking part in price fixing conferences or discussion agreements on non-EU trade routes. To give a concrete example, an EU carrier like Maersk Line, member of the Trans-Atlantic Conference Agreement (TACA), can no longer be involved in price fixing and capacity regulation on the North Atlantic-EU and EU-North Atlantic trades as of October 2008, but could still do so on the US-Pacific trades. The same applies to non-EU carriers. This is a logical consequence of the fact that different competition regimes are in force world-wide. In fact, already today there are differences in what liner shipping companies are allowed to do in different jurisdictions. For example, today US law allows carriers to fix prices jointly on inland transport, while EU law has never allowed it.

Liner carriers will continue to be allowed to offer joint services. Block Exemption Regulation 823/2000 on maritime consortia allows shipping lines to engage in extensive operational co-operation (vessel-sharing, co-ordination of routes and schedules) but not to fix prices. In 2005, this Regulation was reviewed and extended until 2010 after it was found

to be working well by both shipping lines and transport users. This exemption is of particular significance in terms of volume of trade. For example, the majority of cargo between the EU and the US is transported by shipping lines in consortia and alliances using individual service contracts instead of conference tariff prices.

Given that the competition rules have never fully applied to the liner sector, Competition Commissioner Neelie Kroes is keen to ensure that guidance is provided to market participants so as to foster a more competitive environment. Before the end of the two-year transitional period, the Commission will publish **Guidelines on the application of the competition rules to maritime transport services.** Their purpose is to explain how competition rules apply to maritime transport services in general and in particular to the liner and tramp sectors Guidelines are prepared and issued by the European Commission in consultation with stakeholders. The Commission has already been discussing with the liner and tramp shipping industries how best to issue appropriate guidance on how competition law should apply to the sector, once the abolition of Regulation 4056/86 enters into force. This dialogue has resulted in a number of submissions from the shipping industry, which are all available on the Commission website. The Commission will adopt draft Guidelines, which will be published in draft form to allow all interested parties to make submissions. The consultation period will last one month from the date of publication. Following this public consultation, final guidelines will be adopted by the Commission taking into account stakeholders' comments.

Brussels, 10 October 2006

Annex 1: Regulation 4056/86 containing the liner conference block exemption

Annex 2: Regulation 1419/2005 repealing the liner conference block exemption

32006R1419

Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (Text with EEA relevance)

Official Journal L 269 , 28/09/2006 P. 0001 - 0003

Council Regulation (EC) No 1419/2006

of 25 September 2006

repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the European Economic and Social Committee [2],

After consulting the Committee of the Regions,

Whereas:

(1) Application of the rules on competition in the maritime transport sector has been subject to the provisions of Regulation (EEC) No 4056/86 [3] since 1987. Regulation (EEC) No 4056/86 originally had two functions. Firstly, it contained procedural provisions for the enforcement of Community competition rules in the maritime transport sector. Secondly, it laid down certain specific substantive competition provisions for the maritime sector and notably a block exemption for liner shipping conferences, allowing them to fix prices and regulate capacity under certain conditions, the exclusion of purely technical agreements from the application of Article 81(1) of the Treaty and a procedure for dealing with conflicts of international law. It did not apply to maritime transport services between ports in one or to the same Member State (cabotage) and international tramp vessel services.

(2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [4] amended Regulation (EEC) No 4056/86 to bring maritime transport under the common competition enforcement rules applicable to all sectors with effect from 1 May 2004, with the exception of cabotage and international tramp vessel services. However, the specific substantive competition provisions relating to the maritime sector continue to fall within the scope of Regulation (EEC) No 4056/86.

(3) The liner shipping conference block exemption provided for in Regulation (EEC) No 4056/86 exempts from the prohibition of Article 81(1) of the Treaty agreements, decisions and concerted practices of all or part of the members of one or more liner conferences which fulfil certain conditions. The justification for the block exemption in essence assumes that conferences bring stability, ensuring exporters reliable services which cannot be achieved by less restrictive means. However, a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition.

(4) The first condition for exemption under Article 81(3) requires that the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. As regards the efficiencies generated by conferences, liner conferences are no longer able to enforce the conference tariff although they still manage to set charges and surcharges which are a part of the price of transport. There is also no evidence that the conference system leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. Conference members increasingly offer their services via individual service agreements entered into with individual exporters. In addition, conferences do not manage the carrying capacity that is available as this is an individual decision taken by each carrier. Under current market conditions price stability and the reliability of services are brought about by individual service agreements. The alleged causal link between the restrictions (price fixing and supply regulation) and the claimed efficiencies (reliable services) therefore appears too tenuous to meet the first condition of Article 81(3).

(5) The second condition for exemption under Article 81(3) is that consumers must be compensated for the negative effects resulting from the restriction of competition. In the case of hard core restrictions, such as horizontal price fixing which occur when the conference tariff is set and charges and surcharges are jointly fixed, the negative effects are very serious. However no clearly positive effects have been identified. Transport users consider that conferences operate for the benefit of the least efficient members and call for their abolishment. Conferences no longer fulfil the second condition of Article 81(3).

(6) The third condition for exemption under Article 81(3) is that the conduct must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of its objectives. Consortia are cooperative agreements between liner shipping lines that do not involve price fixing and are therefore less restrictive than conferences. Transport users consider them to provide adequate, reliable and efficient scheduled maritime services. In addition the use of individual service agreements has increased significantly in recent years. By definition, such individual service agreements do not restrict competition and provide benefits to exporters as they make it possible to tailor special services. Furthermore, because the price is established in advance and does not fluctuate for a predetermined period (usually up to one year), service contracts can contribute to price stability. It has therefore not been established that the restrictions of competition permitted under Regulation (EEC) No 4056/86 (price fixing and capacity regulation) are indispensable for the provision of reliable shipping services to transport users as these can be achieved by less restrictive means. The third condition under Article 81(3) is therefore not satisfied.

(7) Finally, the fourth condition under Article 81(3) requires that the conference should remain subject to effective competitive constraints. In current market circumstances conferences are present in nearly all major trade lanes and they compete with carriers grouped in consortia and with independent lines. Whilst there may be price competition on the ocean freight rate due to the weakening of the conference system there is hardly any price competition with respect to the surcharges and ancillary charges. These are set by the conference and the same level of charges is often applied by non-conference carriers. In addition, carriers participate in conferences and consortia on the same trade, exchanging commercially sensitive information and cumulating the benefits of the conference (price fixing and capacity regulation) and of the consortia (operational cooperation for the provision of a joint service) block exemptions. Given the increasing number of links between carriers in the same trade, determining the extent to which conferences are subject to effective internal and external competition is a very complex exercise and one that can only be done on a case by case basis.

(8) Liner shipping conferences therefore no longer fulfil the four cumulative conditions for exemption under Article 81(3) of the Treaty and the block exemption in respect of such conferences should therefore be abolished.

(9) The exclusion from the prohibition of Article 81(1) of the Treaty of purely technical agreements and the procedure for dealing with conflicts of law which may arise are also redundant. Those provisions should therefore also be deleted.

(10) In the light of the above, Regulation (EEC) No 4056/86 should be repealed in its entirety.

(11) Liner conferences are tolerated in several jurisdictions. In this, as in other sectors, competition law is not applied in the same way worldwide. In light of the global nature of the liner shipping industry, the Commission should take the appropriate steps to advance the removal of the price fixing exemption for liner conferences that exist elsewhere whilst

maintaining the exemption for operational cooperation between shipping lines grouped in consortia and alliances, in line with the recommendations of the OECD Secretariat in 2002.

(12) Cabotage and international tramp vessel services have been excluded from the rules implementing Articles 81 and 82 of the Treaty originally laid down in Regulation (EEC) No 4056/86 and subsequently in Regulation (EC) No 1/2003. They are currently the only remaining sectors to be excluded from the Community competition implementing rules. The lack of effective enforcement powers for these sectors is an anomaly from a regulatory point of view.

(13) The exclusion of tramp vessel services from Regulation (EC) No 1/2003 was based on the fact that rates for these services are freely negotiated on a case by case basis in accordance with supply and demand conditions. However, such market conditions are present in other sectors and the substantive provisions of Articles 81 and 82 already apply to these services. No convincing reason has been brought forward to maintain the current exclusion of these services from the rules implementing Articles 81 and 82 of the Treaty. Similarly, although cabotage services often have no effect on intra Community trade, this does not mean that they should be excluded from the scope of Regulation (EC) No 1/2003 from the outset.

(14) As the mechanisms enshrined in Regulation (EC) No 1/2003 are appropriate for applying the competition rules to all sectors, the scope of that Regulation should be amended so as to include cabotage and tramp vessel services.

(15) Regulation (EC) No 1/2003 should therefore be amended accordingly.

(16) Since Member States may need to adjust their international commitments in the light of the abolition of the conference system, the provisions of Regulation (EEC) No 4056/86 relating to the liner conference block exemption should continue to apply to conferences satisfying the requirements of Regulation (EEC) No 4056/86 on the date of entry into force of this Regulation for a transitional period,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 4056/86 shall be repealed.

However, Article 1(3)(b) and (c), Articles 3 to 7, Article 8(2) and Article 26 of Regulation (EEC) No 4056/86 shall continue to apply in respect of liner shipping conferences satisfying the requirements of Regulation (EEC) No 4056/86 on 18 October 2006, for a transitional period of two years from that date.

Article 2

Article 32 of Regulation (EC) No 1/2003 shall be deleted.

Article 3

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 25 September 2006.

For the Council

The President

M. Pekkarinen

[1] Opinion of 4 July 2006 (not yet published in the Official Journal).

[2] Opinion delivered on 5 July 2006 (not yet published in the Official Journal).

[3] OJ L 378, 31.12.1986, p. 4. Regulation as last amended by the 2003 Act of Accession.

[4] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

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Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport

Official Journal L 378 , 31/12/1986 P. 0004 - 0013

COUNCIL REGULATION (EEC) N° 4056/86

of 22 December 1986

laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Whereas the rules on competition form part of the Treaty's general provisions which also apply to maritime transport; whereas detailed rules for applying those provisions are set out in the Chapter of the Treaty dealing with the rules on competition or are to be determined by the procedures laid down therein;

Whereas according to Council Regulation N° 141 (3), Council Regulation N° 17 (4) does not apply to transport; whereas Council Regulation (EEC) N° 1017/68 (5) applies to inland transport only; whereas, consequently, the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 in maritime transport; whereas, moreover, the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas this situation necessitates the adoption of a Regulation applying the rules of competition to maritime transport; whereas Council Regulation (EEC) N° 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conference (6) will result in the application of the Code of Conduct to a considerable number of conferences serving the Community; whereas the Regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) N° 954/79 should take account of the adoption of the Code;

whereas, as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise;

Whereas it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions;

Whereas this Regulation should take account of the necessity, on the one hand to provide for implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market, and on the other hand to avoid excessive regulation of the sector;

Whereas this Regulation should define the scope of the provisions of Articles 85 and 86 of the Treaty, taking into account the distinctive characteristics of maritime transport; whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and

secondly, between activities in those catchment areas, and disturb trade patterns within the common market;

Whereas certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition;

Whereas provision should be made for block exemption

of liner conferences; whereas liner conferences have a stabilizing effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned;

Whereas, however, in order to prevent conferences from engaging in practices which are incompatible with Article 85 (3) of the Treaty, certain conditions and obligations should be attached to the exemption;

Whereas the aim of the conditions should be to prevent conferences from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted; whereas, to this end, confernces should not, in respect of a given route, apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary

to transport; whereas, furthermore, loyalty arrangements should be permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference; whereas users must be free to determine the undertakings to which they have recourse in respect of inland transport or quayside services not covered by the freight charge or by other charges agreed with the shipping line;

Whereas certain obligations should also attached to the exemption; 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 transports organized by shippers, the latter continue to be subject to Regulation (EEC) N° 1017/68; whereas provision should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the Commission in order to enable it to verify that conferences are not thereby exempted from the conditions provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86;

Whereas consultations between users or associations of

users and conferences are liable to secure a more efficient

operation of maritime transport services which takes better account of users' requirements; whereas, consequently, certain restrictive practices which could ensue from such consultations should be exempted;

Whereas there can be no exemption if the conditions set out in Article 85 (3) are not satisfied; whereas the Commission

must therefore have power to take the appropriate measures

where an agreement or concerted practice owing to special

circumstances proves to have certain effects incompatible

with Article 85 (3); whereas, in view of the specific

role fulfilled by the conferences in the sector of the liner services, the reaction of the Commission should be progressive and proportionate; whereas the Commission should consequently have the power first to address recommendations, then to take decisions;

Whereas the automatic nullity provided for in Article 85 (3)

in respect of agreements or decisions which have not been

granted exemption pursuant to Article 85 (3) owing to their discriminatory or other features applies only to the elements of the agreement covered by the prohibition of Article 85 (1) and applies to the agreement in its entirety only if those elements do not appear to be severable from the whole of the agreement whereas the Commission should therefore, if it finds an infringement of the block exemption, either specify what elements of the agreement are by the prohibition and consequently automatically void, or indicate the reasons why those elements are not severable from the rest of the agreement and why the agreement is therefore void in its entirety;

Whereas, in view of the characteristics of international maritime transport, account should be taken of the fact that the application of this Regulation to certain restrictive practices or abuses may result in conflicts with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests; whereas consultations and, where appropriate, negotiations authorized by the Council should be undertaken by the Commission with those countries in pursuance of the maritime transport policy of the Community;

Whereas this Regulation should make provision for the procedures, decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85 (1) and Article 86, as well as the conditions governing the application of Article 85 (3);

Whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) N° 1017/68 applicable to inland transport operations which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas, in particular, in view of the special characteristics of maritime transport, it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory;

Whereas in certain circumstances undertakings may, however, wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are in conformity with the provisions in force; whereas a simplified procedure should be laid down for such cases,

HAS ADOPTED THIS REGULATION:

SECTION I

Article 1

Subject-matter and scope of the Regulation

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services.

2. It shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services.

3. For the purposes of this Regulation:

(a) 'tramp vessel services' means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand;

(b) '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 any other agreed conditions with respect to the provision of liner services;

(c) 'transport user' means an undertaking (e.g. shippers, consignees, forwarders, etc.) provided it has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a conference or shipping line for the shipment of goods, or any association of shippers.

Article 2

Technical agreements

1. The prohibition laid down in Article 85 (1) of the Treaty shall not apply to agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:

(a)

the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations;

(b)

the exchange or pooling for the purpose of operating transport services, of vessels, space on vessels or slots and other means of transport, staff, equipment or fixed installations;

(c)

the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

(d)

the coordination of transport timetables for connecting routes;

(e)

the consolidation of individual consignments;

(f)

the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.

2. The Commission shall, if necessary, submit to the Council proposals for the amendment of the list contained in paragraph 1.

Article 3

Exemption for agreements between carriers concerning the operation of scheduled maritime transport services

Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85 (1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.

Article 4

Condition attaching to exemption

The exemption provided for in Articles 3 and 6 shall be granted subject to the condition that the agreement, decision or concerted practice shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

Any agreement or decision or, if it is severable, any part of such an agreement or decision not complying with the preceding paragraph shall automatically be void pursuant to Article 85 (2) of the Treaty.

Article 5

Obligations attaching to exemption

The following obligations shall be attached to the exemption provided for in Article 3:

1.

Consultations

There shall be consultations for the purpose of seeking solutions on general issues of principle

between transport users on the one hand and conferences on the other concerning the rates, conditions and quality of scheduled maritime transport services.

These consultations shall take place whenever requested by any of the abovementioned parties.

2.

Loyalty arrangements

The shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations. These loyalty arrangements shall provide safeguards making explicit the rights of transport users and conference members. These arrangements shall be based on the contract system or any other system which is also lawful.

Loyalty arrangements must comply with the following conditions:

(a)

Each conference shall offer transport users a system of immediate rebates or the choice between such a system and a system of deferred rebates:

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under the system of immediate rebates each of the parties shall be entitled to terminate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months; this period shall be reduced to three months when the conference rate is the subject of a dispute;

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under the system of deferred rebates neither the loyalty period on the basis of which the rebate is calculated nor the subsequent loyalty period required before payment of the rebate may exceed six months; this period shall be reduced to three months where the conference rate is the subject of a dispute.

(b)

The conference shall, after consulting the transport users concerned, set out:

i(i)

a list of cargo and any portion of cargo agreed with transport users which is specifically excluded from the scope of the loyalty arrangement; 100 % loyalty arrangements may be offered but may not be unilaterally imposed;

(ii)

a list of circumstances in which transport users are released from their obligation of loyalty; these shall include:

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circumstances in which consignments are dispatched from or to a port in the area covered by the conference but not advertised and where the request for a waiver can be justified, and

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those in which waiting time at a port exceeds a period to be determined for each port and for each commodity or class of commodities following consultation of the transport users directly concerned with the proper servicing of the port.

The conference must, however, be informed in advance by the transport user, within a specified period, of his intention to dispatch the consignment from a port not advertised by the conference or to make use of a non-conference vessel at a port served by the conference as soon as he has been able to establish from the published schedule of sailings that the maximum waiting period will be exceeded.

3.

Services not covered by the freight charges

Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.

4.

Availability of tariffs

Tariffs, related conditions, regulations and any amendments thereto shall be made available on request to transport users at reasonable cost, or they shall be available for examination at offices of shipping lines and their agents. They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.

5.

Notification to the Commission of awards at arbitration and recommendations

Awards given at arbitration and recommendations made by conciliators that are accepted by the parties shall be notified forthwith to the Commission when they resolve disputes relating to the practices of conferences referred to in Article 4 and in points 2 and 3 above.

Article 6

Exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services

Agreements, decisions and concerned practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5 (1) and (2) are hereby exempted from the prohibition laid down in Article 85 (1) of the Treaty.

Article 7

Monitoring of exempted agreements

1.

Breach of an obligation

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the

exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Section II:

- address recommendations to the persons concerned;

- in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11 (4) or withdraws the benefit of the block exemption which they enjoyed.

2.

Effects incompatible with Article 85 (3)

(a)

Where, owing to special circumstances as described below, agreements, decisions and concerted practices which qualify for the exemption provided for in Articles 3 and 6 have nevertheless effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, the Commission, on receipt of a complaint or on its own initiative, under the conditions laid down in Section II, shall take the measures described in (c) below. The severity of these measures must be in proportion to the gravity of the situation.

(b)

Special circumstances are, inter alia, created by:

ii(I)

acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or

I(ii)

acts of conference which may prevent technical or economic progress or user participation in the benefits;

(III)

acts of third countries which:

- prevent the operation of outsiders in a trade,

- impose unfair tariffs on conference members,

- impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on types of vessels).

(c)

ii(i)

If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation.

If the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85 (3) (b) of the Treaty the Commission shall withdraw the benefit of the block exemption. At the same time it shall rule on whether and, if so, under what additional conditions and obligations an individual exemption should be granted to the relevant conference agreement with a view, inter alia, to obtaining access to the market for non-conference lines;

i(ii)

If, as a result of special circumstances as set out in (b), there are effects other than those referred to in (i) hereof, the Commission shall take one or more of the measures described in paragraph 1.

Article 8

Effects incompatible with Article 86 of the Treaty

1. The abuse of a dominant position within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty.

3. Before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement.

Article 9

Conflicts of international law

1. Where the application of this Regulation to certain restrictive practices or clauses is liable to enter into conflict with the provisions laid down by law, regulation or administrative action of certain third countries which would compromise important Community trading and shipping interests, the Commission shall, at the earliest opportunity, undertake with the competent authorities of the third countries concerned, consultations aimed at reconciling as far as possible the abovementioned interest with the respect of Community law. The Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations.

2. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with an Advisory Committee as referred to in Article 15 and within the framework of such directives as the Council may issue to it.

3. In exercising the powers conferred on it by this Article, the Council shall act in accordance with the decision-making procedure laid down in Article 84 (2) of the Treaty.

SECTION II

RULES OF PROCEDURE

Article 10

Procedures on complaint or on the Commission's own initiative

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85 (1) or 86 of the Treaty or to enforce Article 7 of this Regulation.

Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

Article 11

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85 (1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 7 of this Regulation.

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Articles 85 (1) or 86 of the Treaty or Article 7 of this Regulation, in respect of any agreement, decision or practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an

agreement, decision or concerted practice satisfies the provisions both of Article 85 (1) and of Article 85 (3) of the Treaty, it shall issue a decision applying Article 85 (3). Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 12

Application of Article 85 (3) - objections

1. Undertakings and associations of undertakings which seek application of Article 85 (3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of Article 85 (1) to which they are parties shall submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the Official Journal of the European Communities a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the Official Journal of the European Communities, that there are serious doubts as to the applicability of Article 85 (3), the agreement, decision or concerted practice shall be deemed exempt, insofar as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the Official Journal of the European Communities.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six year period, that the conditions for applying Article 85 (3) are not satisfied, it shall issue a decision declaring that the prohibition in Article 85 (1) is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 85 (1).

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3 and shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 15 (2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85 (1) and of Article 85 (3) are satisfied, the Commission shall issue a decision

applying Article 85 (3). The decision shall indicate the date from which it is to take effect. This

date may be prior to that of the application.

Article 13

Duration and revocation of decisions applying

Article 85 (3)

1. Any decision applying Article 85 (3) taken under Article 11 (4) or under the second subparagraph of Article 12 (4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85 (3) continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit, or

(d) where the parties abuse the exemption from the provisions of Article 85 (1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 14

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

- to impose obligations pursuant to Article 7;

- to issue decisions pursuant to Article 85 (3).

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 85 (1) or Article 86, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 12 (3).

Article 15

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison

with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.

2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.

3. An Advisory Committee on agreements and dominant positions in maritime transport shall be consulted prior to the taking of any decision following upon a procedure under Article 10 or of any decision issued under the second subparagraph of Article 12 (3), or under the second subparagraph of paragraph 4 of the same Article. The Advisory Committee shall also be consulted prior to the adoption of the implementing provisions provided for in Article 26.

4. The Advisory Committee shall be composed of officials competent in the sphere of maritime transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.

5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. This notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 16

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request, the Commission shall state the legal basis and the purpose of the request, and also the penalties provided for in Article 19 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies

or firms, or of associations having no legal personality, the person authorized to represent them by law or by their constitution, shall be bound to supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 19 (1) (b) and Article 20 (1) (c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 17

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 18 (1), or which it has ordered by decision pursuant to Article 18 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of such authority in carrying out their duties.

Article 18

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorized by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records:

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and vehicles of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 19 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of

the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the

investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 19 (1) (c) and Article 20 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. To this end, Member States shall take the necessary measures, after consulting the Commission, before 1 January 1989.

Article 19

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 ECU where, intentionally or negligently:

(a) they supply incorrect or misleading information, either in a communication pursuant to Article 5 (5) or in an application pursuant to Article 12; or

(b) they supply incorrect information in response to a request made pursuant to Article 16 (3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 16 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 17 or Article 18, or refuse to submit to an investigation ordered by decision issued in implementation of Article 18 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to one million ECU, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 85 (1) or Article 86 of the Treaty, or do not comply with an obligation imposed under Article 7 of this Regulation;

(b) they commit a breach of any obligation imposed pursuant to Article 5 or to Article 13 (1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 15 (3) and (4) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place after notification to the Commission and before its Decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that

Article 85 (1) of the Treaty applies and that application of

Article 85 (3) is not justified.

Article 20

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 ECU per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85 (1) or Article 86 of the Treaty the termination of which it has ordered pursuant to Article 11, or to comply with an obligation imposed pursuant to Article 7;

(b) to refrain from any act prohibited under Article

13 (3);

(c) to supply complete and correct information which it

has requested by decision taken pursuant to Article

16 (5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 18 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 15 (3) and (4) shall apply.

Article 21

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 22

Unit of account

For the purpose of applying Articles 19 to 21 the ECU shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 23

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 11, 12 (3) second subparagraph, and 12 (4), 13 (3), 19 and 20, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 85 (3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 24

Professional secrecy

1. Information acquired as a result of the application of Articles 17 and 18 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 23 and 25, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 25

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12 (3), second paragraph,

12 (4) and 13 (3).

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 26

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the scope of

the obligation of communication pursuant to Article 5 (5), the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23 (1) and (2).

Article 27

Entry into force

This Regulation shall enter into force on 1 July 1987.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 December 1986.

For the Council

The President

G. SHAW

(1) OJ N° C 172, 2. 7. 1984, p. 178; OJ N° C 255, 13. 10. 1986, p. 169.

(2) OJ N° C 77, 21. 3. 1983, p. 13; OJ N° C 344, 31. 12. 1985, p. 31.

(3) OJ N° 124, 28. 11. 1962, p. 2751/62.

(4) OJ N° 13, 21. 2. 1962, p. 204/62.

(5) OJ N° L 175, 23. 7. 1968, p. 1.

(6) OJ N° L 121, 17. 5. 1979, p. 1.

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1419/2006

of 25 September 2006

repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the European Economic and Social Committee [2],

After consulting the Committee of the Regions,

Whereas:

(1) Application of the rules on competition in the maritime transport sector has been subject to the provisions of Regulation (EEC) No 4056/86 [3] since 1987. Regulation (EEC) No 4056/86 originally had two functions. Firstly, it contained procedural provisions for the enforcement of Community competition rules in the maritime transport sector. Secondly, it laid down certain specific substantive competition provisions for the maritime sector and notably a block exemption for liner shipping conferences, allowing them to fix prices and regulate capacity under certain conditions, the exclusion of purely technical agreements from the application of Article 81(1) of the Treaty and a procedure for dealing with conflicts of international law. It did not apply to maritime transport services between ports in one or to the same Member State (cabotage) and international tramp vessel services.

(2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [4] amended Regulation (EEC) No 4056/86 to bring maritime transport under the common competition enforcement rules applicable to all sectors with effect from 1 May 2004, with the exception of cabotage and international tramp vessel services. However, the specific substantive competition provisions relating to the maritime sector continue to fall within the scope of Regulation (EEC) No 4056/86.

(3) The liner shipping conference block exemption provided for in Regulation (EEC) No 4056/86 exempts from the prohibition of Article 81(1) of the Treaty agreements, decisions and concerted practices of all or part of the members of one or more liner conferences which fulfil certain conditions. The justification for the block exemption in essence assumes that conferences bring stability, ensuring exporters reliable services which cannot be achieved by less restrictive means. However, a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition.

[1] Opinion of 4 July 2006 (not yet published in the Official Journal).
[2] Opinion delivered on 5 July 2006 (not yet published in the Official Journal).
[3] OJ L 378, 31.12.1986, p. 4. Regulation as last amended by the 2003 Act of Accession.
[4] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(4) The first condition for exemption under Article 81(3) requires that the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. As regards the efficiencies generated by conferences, liner conferences are no longer able to enforce the conference tariff although they still manage to set charges and surcharges which are a part of the price of transport. There is also no evidence that the conference system leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. Conference members increasingly offer their services via individual service agreements entered into with individual exporters. In addition, conferences do not manage the carrying capacity that is available as this is an individual decision taken by each carrier. Under current market conditions price stability and the reliability of services are brought about by individual service agreements. The alleged causal link between the restrictions (price fixing and supply regulation) and the claimed efficiencies (reliable services) therefore appears too tenuous to meet the first condition of Article 81(3).

(5) The second condition for exemption under Article 81(3) is that consumers must be compensated for the negative effects resulting from the restriction of competition. In the case of hard core restrictions, such as horizontal price fixing which occur when the conference tariff is set and charges and surcharges are jointly fixed, the negative effects are very serious. However no clearly positive effects have been identified. Transport users consider that conferences operate for the benefit of the least efficient members and call for their abolishment. Conferences no longer fulfil the second condition of Article 81(3).

(6) The third condition for exemption under Article 81(3) is that the conduct must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of its objectives. Consortia are cooperative agreements between liner shipping lines that do not involve price fixing and are therefore less restrictive than conferences. Transport users consider them to provide adequate, reliable and efficient scheduled maritime services. In addition the use of individual service agreements has increased significantly in recent years. By definition, such individual service agreements do not restrict competition and provide benefits to exporters as they make it possible to tailor special services. Furthermore, because the price is established in advance and does not fluctuate for a predetermined period (usually up to one year), service contracts can contribute to price stability. It has therefore not been established that the restrictions of competition permitted under Regulation (EEC) No 4056/86 (price fixing and capacity regulation) are indispensable for the provision of reliable shipping services to transport users as these can be achieved by less restrictive means. The third condition under Article 81(3) is therefore not satisfied.

(7) Finally, the fourth condition under Article 81(3) requires that the conference should remain subject to effective competitive constraints. In current market circumstances conferences are present in nearly all major trade lanes and they compete with carriers grouped in consortia and with independent lines. Whilst there may be price competition on the ocean freight rate due to the weakening of the conference system there is hardly any price competition with respect to the surcharges and ancillary charges. These are set by the conference and the same level of charges is often applied by non-conference carriers. In addition, carriers participate in conferences and consortia on the same trade, exchanging commercially sensitive information and cumulating the benefits of the conference (price fixing and capacity regulation) and of the consortia (operational cooperation for the provision of a joint service) block exemptions. Given the increasing number of links between carriers in the same trade, determining the extent to which conferences are subject to effective internal and external competition is a very complex exercise and one that can only be done on a case by case basis.

(8) Liner shipping conferences therefore no longer fulfil the four cumulative conditions for exemption under Article 81(3) of the Treaty and the block exemption in respect of such conferences should therefore be abolished.

(9) The exclusion from the prohibition of Article 81(1) of the Treaty of purely technical agreements and the procedure for dealing with conflicts of law which may arise are also redundant. Those provisions should therefore also be deleted.

(10) In the light of the above, Regulation (EEC) No 4056/86 should be repealed in its entirety.

(11) Liner conferences are tolerated in several jurisdictions. In this, as in other sectors, competition law is not applied in the same way worldwide. In light of the global nature of the liner shipping industry, the Commission should take the appropriate steps to advance the removal of the price fixing exemption for liner conferences that exist elsewhere whilst maintaining the exemption for operational cooperation between shipping lines grouped in consortia and alliances, in line with the recommendations of the OECD Secretariat in 2002.

(12) Cabotage and international tramp vessel services have been excluded from the rules implementing Articles 81 and 82 of the Treaty originally laid down in Regulation (EEC) No 4056/86 and subsequently in Regulation (EC) No 1/2003. They are currently the only remaining sectors to be excluded from the Community competition implementing rules. The lack of effective enforcement powers for these sectors is an anomaly from a regulatory point of view.

(13) The exclusion of tramp vessel services from Regulation (EC) No 1/2003 was based on the fact that rates for these services are freely negotiated on a case by case basis in accordance with supply and demand conditions. However, such market conditions are present in other sectors and the substantive provisions of Articles 81 and 82 already apply to these services. No convincing reason has been brought forward to maintain the current exclusion of these services from the rules implementing Articles 81 and 82 of the Treaty. Similarly, although cabotage services often have no effect on intra Community trade, this does not mean that they should be excluded from the scope of Regulation (EC) No 1/2003 from the outset.

(14) As the mechanisms enshrined in Regulation (EC) No 1/2003 are appropriate for applying the competition rules to all sectors, the scope of that Regulation should be amended so as to include cabotage and tramp vessel services.

(15) Regulation (EC) No 1/2003 should therefore be amended accordingly.

(16) Since Member States may need to adjust their international commitments in the light of the abolition of the conference system, the provisions of Regulation (EEC) No 4056/86 relating to the liner conference block exemption should continue to apply to conferences satisfying the requirements of Regulation (EEC) No 4056/86 on the date of entry into force of this Regulation for a transitional period,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 4056/86 shall be repealed.

However, Article 1(3)(b) and (c), Articles 3 to 7, Article 8(2) and Article 26 of Regulation (EEC) No 4056/86 shall continue to apply in respect of liner shipping conferences satisfying the requirements of Regulation (EEC) No 4056/86 on 18 October 2006, for a transitional period of two years from that date.

Article 2

Article 32 of Regulation (EC) No 1/2003 shall be deleted.

Article 3

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 25 September 2006.

For the Council
The President
M. PEKKARINEN