4056/86 of 22 December 1986

TECHNICAL PAPER: BURDEN OF PROOF

3 December 2003
3 December 2003

1 Executive Summary

1.1 This paper supplements the Issues Paper submitted by the European Liner Affairs Association to the European Commission in the context of the review of Regulation 4056/86. It contains a detailed technical analysis of the burden of proof applicable in the review process that was summarised at section 6 of the Issues Paper.

1.2 Although Regulation 4056/86 does not contain a review clause and remains in force for an unlimited period of time, the Commission explains in its Consultation Paper that there is a need to review the Regulation due to the, inter alia, changing market conditions in the 15 or more years since the liner conference block exemption entered into force.

1.3 Without prejudice to the question whether the current review is consistent with the Council’s apparent desire to provide a stable platform for the liner industry and comply with the international obligations imposed upon Member States resulting from the ratification of the United Nations Convention (UNCTAD) Code of Conduct for Liner Conferences, the Association and its members recognise that it is good administrative practice for the Commission to review a block exemption that has been in place for some time. The Association is committed to participating constructively in the process and engaging in a dialogue with the Commission, Member States and industry stakeholders on a subject that hitherto has been hampered by the absence of data and evidence.

1.4 However, the Association cannot accept the recent assertion by Commissioner Monti that “the burden of proof lies firmly on those wishing to benefit from exemption to show that it is still justified”.

1.5 The Association respectfully submits that all parties involved in the review of Regulation 4056/86 bear a burden of proof. Mindful that the review process should follow the analytical approach of Article 81(1) and (3) EC, the Association cannot conclude but that, mutatis mutandis, the review of Regulation 4056/86 is clearly a procedure that has the potential outcome of revoking or amending the benefit of the liner conference block exemption. In such a scenario, the burden of proof is on the Commission to show that the underlying facts have changed in such a way to justify revocation or amendment of the liner conference block exemption.

1.6 Regardless of whether the review is ultimately categorised as a revocation, amendment, or renewal of the liner conference block exemption, the Association notes that it has substantiated in all the submissions it has made to the Commission why the present regime remains appropriate, and discharged the burden of proof upon it during the Consultation phase. Given the lack of any substantiated complaints about the way in which the current regime actually operates, the onus must be on any party (including the Commission) proposing any change (a) to identify the circumstances that makes change necessary and (b) to demonstrate that any change will not be a change for the worse in terms of rates, services and competition.
The Review of Regulation 4056/86: Due Process

2.1 The Commission has embarked upon the review of Council Regulation 4056/86\(^1\) to “ascertain whether the immunity [granted by way of the block exemption for liner conferences], which allows companies to fix prices and limit supply, still produces the benefits expected and continues to be justified”.\(^2\)

2.2 Although Regulation 4056/86 does not contain a review clause and remains in force for an unlimited period of time, the Commission\(^3\) explains that there is a need to review the Regulation due to the:

- Changing market conditions in the more than 15 years since Regulation 4056/86 and the liner conference block exemption entered into force, which raise the question of whether reliable scheduled maritime transport services can be achieved by less restrictive means than horizontal price fixing and capacity limitation;
- Re-examination of antitrust immunity in the US, Canada, Australia and Japan;
- Findings of the OECD Report on Competition Policy in Liner Shipping, alleging there would be no evidence that the current conference system (with antitrust immunity and exemption for price-fixing) leads to more stable freight rates or more reliable liner shipping services than in a fully competitive setting;\(^4\) and
- Modernisation of European antitrust procedures consistent with the coming into force of Regulation 1/2003.\(^5\)

2.3 The Association and its members recognise that it is good administrative practice for the Commission to review a block exemption that has been in place for some time. It is committed to participating constructively in the process and engaging in a dialogue with the Commission, Member States and industry stakeholders on a subject that hitherto has been hampered by the absence of data and evidence.

2.4 Commissioner Monti is entitled to demand and expect “well-developed arguments, supported by hard evidence” instead of “unsubstantiated statements and allegations”, bearing in mind the exceptional circumstances of Regulation 4056/86 (i.e. a block exemption adopted by the Council without limit of time) and the polarised nature of the debate to date.\(^6\)

2.5 As a result, the Association and its members have pledged to contribute fully to the Commission’s examination of the issues in a positive and meaningful sense to ensure that the most informed and accurate outcome can be achieved.\(^7\)

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\(^3\) Consultation Paper on the Review of Council Regulation 4056/86, paragraphs 14, 15, 20, and 23.

\(^4\) In this regard, it will be noted that the report was that of the Secretariat, not the OECD itself: see OECD, COMPETITION POLICY IN LINER SHIPPING, FINAL REPORT (2002).


\(^7\) See [Confidential] Letter of the Association to Ms Evans (Director) and Mr Stragier (Head of Unit), DG Competition, dated 18 June 2003.
2.6 Given the complexity of the issues underlying the Commission’s stated aims, it is equally crucial to ensure that the quality and outcome of the review is not undermined by shortcomings in the process itself. On this account, the Association respectfully submits that it is alarmed by what it perceives to be an attempt by the Commission to reverse the burden of proof.

**Commission Position**

2.7 Although the Consultation Paper on the review of Council Regulation 4056/86 does not identify the process the Commission proposes to follow with regard to the mechanics of the review, the Commission’s position has been clarified subsequently.

2.8 In the press release accompanying the publication of the Consultation Paper, the Commission identified a three-phase approach:

- **Consultation**, in which the Commission (a) identifies the issues that require examination given current market conditions, (b) poses questions that go to the heart of the justification for the liner conference block exemption, and (c) invites comments on the need to simplify and modernise Regulation 4056/86, without, however, putting forward either any firm policy options, or carrying out an in-depth market analysis;
- **Policy Options**, in which the Commission puts forward a series of policy options in either a Green Paper (i.e. outlining several policy options) or a White Paper (i.e. outlining a specific proposed policy line), presumably on the basis of an in-depth study of the relevant data (including the submissions received during the consultation process) by specialist consultants; and
- **Legislative Proposals** (if considered necessary).

2.9 Public statements made by Commission officials - in their private capacity - handling the review of Regulation 4056/86 stress that “the Commission’s services embark on this review without any preconceived idea of what the end product should be”, and that “the Consultation Paper does not make any policy choices but rather it seeks to involve both sides of the industry”. The three-phase approach, it is stated, would be “best suited to ensure that the views of governments and industry are adequately heard and that any conclusions that the Commission may draw are soundly based in fact and law”.

2.10 Although Commissioner Monti has similarly stressed that the Commission has “no preconceived idea about what the outcome of the review process should be” and that “all options – from preserving the status quo to a complete repeal of the block exemption – are still on the table”, the Commissioner recently stated that “the burden of proof lies firmly on those wishing to benefit from exemption to show that it is still justified”. According to the Commissioner, “this is consistent with the basic principles, as established by the case law of the Court of Justice, for the application of Article 81(3) EC”.

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9 Speech by the Head of the Transport Unit, DG Competition, delivered in his personal capacity. See J. Strager, “Recent developments in EU competition policy in the maritime sector”, London, 25 April 2002.
10 Speech by a member of the Transport Unit, DG Competition, delivered in her personal capacity. See F. Benini, “Current and future competition policy issues in the maritime sector”, London, 1 April 2003.
11 See J. Strager, o.c.
The Association’s Position

2.11 The Association cannot accept these assertions – which have been adopted by opponents of the block exemption\(^{13}\) – as they threaten seriously to distort the outcome of the review process and ignore a number of important principles of law. As most lucidly pointed out by the German Ministry of Transport, Construction and Housing:\(^{14}\)

"Contrary to what the Commission claims, the need for a review does not derive from Regulation 4056/86. (...) Plainly, Regulation 4056/86 is the result of a European and international consensus in the early 1980s at least about the need to allow a block exemption for liner conferences. The consensus was clearly so great that – unlike what happened with other Regulations – the possibility of later review was not even considered. The reasons for the exemption given in the Regulation itself, i.e. price stability, reliable transport services, and adequate scheduled maritime transport services, are presented in the Regulation as qualitative parameters only. One is bound to ask what the basis is for the Commission’s approach of a reversal of the burden of proof. Judging by its underlying tenor, the Consultation Paper is aimed not at a neutral review but at changing the system."

2.12 Perceptions on the flawed objectivity of the review process are strengthened further by what the Association respectfully submits to be a misinterpretation of a number of important principles of European law.

2.13 As the Commission expressly recognises in its Consultation Paper, the review process should follow the analytical approach of Article 81(1) and (3) EC.\(^{15}\) This follows from two main findings:

- Recital 8 to Regulation 4056/86 refers to all four requirements of Article 81(3) EC necessary for the grant of an exemption; and
- The European Court of First Instance (CFI) has confirmed in its TAA judgment\(^{16}\) that the block exemption provisions of Regulation 4056/86 must be interpreted in such a way as to fit within the parameters for exemption established by Article 81(3) EC.

Indeed, the Association wishes to add that such conformity follows directly from the findings of the European Court of Justice (ECJ) in the Italian Complaint case.\(^{17}\)

2.14 The Association therefore submits that the mechanics of the review process must equally be subject to the functioning of Article 81(1) and (3) EC, and the tests established by the European legislature and Courts in relation to the review of existing exemptions.

2.15 From this perspective, the Association will demonstrate that:

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\(^{13}\) See Response by the European Shippers’ Council, undated, page 9 (“The onus of proof should rest with those industry parties seeking special exemption from the normal application of competition policy”); and Statement of the General Secretary of the European Shippers’ Council in Containerisation International Online, 27 October 2003 (“The Competition Commissioner has made it clear that the burden of proof was on the lines”).

\(^{14}\) See Response by the German Ministry of Transport, Construction and Housing, 3 June 2003, page 2.

\(^{15}\) Consultation Paper on the Review of Council Regulation 4056/86, paragraph 46.


\(^{17}\) Case 32/65 Italy v Commission [1966] ECR 457, paragraph 483.
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- All parties involved in the review of Council Regulation 4056/86 bear a burden of proof, regardless of whether the review is categorised as a revocation, amendment, or renewal of the liner conference block exemption;
- The Association has substantiated throughout its submissions why the present regime remains appropriate, and discharged the burden of proof upon it as part of the review's Consultation phase;
- Based on the evidence currently available, it appears the current regime is the best means of achieving the level of stability necessary to ensure shippers of reliable scheduled services;
- Given the lack of any substantiated complaints about the way in which the current regime actually operates, the onus must be on any party (including the Commission) proposing any change (a) to identify the circumstances that makes change necessary and (b) to demonstrate that any change will not be a change for the worse in terms of rates, services and competition; and
- While the Association recognises that all interested parties have an obligation to assist the Commission in the review of Regulation 4056/86, the burden of proof is ultimately on the Commission to show that the underlying facts have changed in such a way as justifies revocation or amendment of the liner conference block exemption.

3 The Burden of Proof under Article 81 EC

3.1 As the review process should follow the analytical approach of Article 81(1) and (3) EC and the tests established by the European legislature and Courts in relation to the review of existing exemptions, the question arises as to how the current process can be characterised from that perspective. The answer to this question will, in turn, determine the applicable mechanics of the review process and thus the extent of the burden of proof upon the various parties involved.

3.2 Given the unprecedented nature of Regulation 4056/86 as it (a) contains a block exemption adopted by the Council, which (b) remains in force for an unlimited time period, and (c) does not contain a review clause, the Association will explore in the following paragraphs the applicable rules by analogy with those governing a “normal” exemption. Taking into account the modernisation of European competition rules, the Association will explore the lifespan and review of “normal” exemptions, as well as the mechanics of this process. On this basis, relevant analogies can be drawn that apply to the review of the liner conference block exemption contained in Regulation 4056/86.

The Exemption Rule of Article 81(3) EC

3.3 Generally, Article 81(3) EC sets out an exemption rule, which provides a defence against a finding of an infringement of Article 81(1) EC. Under the current system as contained in Regulation 17, the Commission has exclusive competence to grant individual exemptions on the basis of prior notification. At the same time, agreements that fall within block exemptions adopted by the Council or the Commission are automatically exempted from Article 81(1) EC, without any need for notification to the Commission. As far as liner shipping is concerned, Article 12 of Regulation 4056/86 provides for an exception to this general rule, as a special “objections” procedure for exemptions other than those granted in Articles 2, 3 and 6 is applicable. Under this procedure, applications for exemptions are

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18 See paragraph 2.13, above.
20 See Article 9(1) Regulation 17.
21 See Articles 4(1) and 6(1) Regulation 17.
published inviting interested parties to comment, and unless the Commission issues a letter of serious doubt within 90 days upon publication, the notified practice is deemed exempt. Save for the strict timeline requiring the Commission to adopt a position, the system is broadly in line with “normal” applications under Regulation 17.

3.4 Post-modernisation, agreements, decisions, and concerted practices caught by Article 81(1) EC that satisfy the conditions of Article 81(3) EC are valid and enforceable, no prior decision to that effect being required. For the present purposes relating to the review of the liner conference block exemption, the changes brought about by modernisation appear to be minimal, as Regulation 1/2003 does not affect the validity and legal nature of block exemption regulations and there are no substantive changes to Regulation 4056/86, nor has the scope of the Regulation been modified. Regulation 1/2003 brings the liner conference block exemption in line with the general competition rules so far as the exceptional “objections” procedure is concerned, as Article 12 Regulation 4056/86 is repealed.

Lifespan and Review of an Exemption: The General Rule

3.5 An individual exemption is adopted for a specified period of time. In European Night Services, the CFI held that depending on the specific circumstances of each individual case, the duration specified should be sufficient to allow parties a reasonable time in which to realise the objectives of the agreement and to achieve the benefits justifying the exemption. Previously, the Commission had pursued a policy of granting exemptions for a policy of 10 years, or for the duration of the agreement if less. Commission decisions subsequent to European Night Services have shown a trend towards a greater explanation of the Commission’s reasons for the period of exemption in line with the principles contained in that judgment. Rather than relying on the risk of adverse changes in market circumstances as a reason for limiting the specified duration, the Commission has given warnings that certain developments might lead to revocation of the exemption. Exceptionally, exemptions of more than ten years, and up to 30 years have been granted in the past.

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24 See Article 8(1) of Regulation 17.
3.6 With the sole exception of Regulation 4056/86, all other block exemptions comply with the common temporal limitation rule. When first enabling the Commission to adopt block exceptions, the Council stipulated in Article 2(1) of Regulation 19/65 that “a [block exemption] shall be made for a specific period”. All block exemptions subsequently adopted by the Commission have been of limited duration:

- Regulation 1105/2002 amending Regulation 1617/1993 (Passenger tariffs and slot allocations at airports), [2002] OJ L 167/6, 3 years;
- Regulation 240/96 (Technology transfer agreements) [1996] OJ L 31/2, 10 years (a draft new Regulation, [2003] OJ C 235/10, has also a 10-year duration);
- Regulation 2790/99 (Vertical agreements) [1999] OJ L 336/21, 10 years and 4 months;
- Regulation 823/2000 (Liner consortia), [2000] OJ L 100/24, 5 years;
- Regulation 2658/2000 (Specialisation agreements) [2000] OJ L 304/3, 10 years;
- Regulation 2659/2000 (R&D agreements) [2000] OJ L 304/7, 10 years;
- Regulation 1400/2002 (Motor vehicles) [2002] OJ L 203/30, 7 years and 8 months; and

3.7 The temporal limitation of block exemptions is intended to enable them to be adapted to changing market conditions as necessary, consistent with Article 8 of Regulation 17.

3.8 The question subsequently arises as to what happens at the end of an exemption’s lifespan given the limited duration of all block exemptions, other than Regulation 4056/86.

3.9 As far as individual exemptions are concerned, the relevant provisions are contained in Article 8(2) and (3) of Regulation 17, which stipulate that “[an exemption] may on application be renewed if the requirements of [Article 81(3) EC] continue to be satisfied. The Commission may revoke or amend its decision or prohibit specified acts by the parties (a) where there has been a change on any of the facts which were basic to the making of the decision (…)”. Without prejudice to the application of Regulation 17 and in accordance with Article 81(3) EC, the Council specifically stated in Article 2(2) of Regulation 19/65 that when enabling the Commission to adopt block exemptions these “may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made; in such cases, a period shall be fixed for modification of the agreements and concerted practices to which the earlier [block exemption] applies.”

3.10 It follows that:

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31 The Association will deal with the Council block exemptions as contained in Regulation 4056/86 and Regulation 1017/68, at paragraphs 3.12 et seq below.


34 See W. Veelken, in EG-WETTBEWERBRECHT KOMMENTAR (Immenga & Mestmäcker eds., Vol. 1, 1997), GFVO, paragraph 9, with further references contained.

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- During their regular lifespan, exemptions may be amended or revoked if, inter alia, the basic facts underlying the exemption have changed;
- At the end of their regular lifespan, an exemption is generally renewable (if the requirements of Article 81(3) EC continue to be satisfied), while a revised block exemption is usually introduced when the existing exemption expires; and
- In individual cases, the benefit of an exemption may also be withdrawn if agreements previously exempted are nevertheless later found to have effects incompatible with the conditions set out in Article 81(3) EC. Although lacking express legal basis in Regulation 17, the European Courts have confirmed that the withdrawal procedure is based on Article 3 of Regulation 17 in combination with the relevant regime as contained in the enabling Regulations of the Council and subsequently incorporated into the various block exemptions.

3.11 The principles of law governing a renewal procedure are distinct from the principles of law governing a procedure amending or revoking the benefit of an exemption, or from the principles of law governing a withdrawal procedure. Similarly, the burden of proof upon the Commission and the parties involved differs depending on which scenario is applicable. The mechanics of these processes are dealt with below, at paragraph 3.16 et seq.

**Lifespan and Review of an Exemption: The Council Block Exemptions**

3.12 The Council has adopted two block exemptions itself, namely Regulation 4056/86 and Regulation 1017/68 which applies the competition rules to transport by rail, road, and inland waterway. Both these block exemptions are unusual as:

- They were adopted by the Council, and not by the Commission enabled by a Council Regulation;
- They remain in force for an unlimited time period; and
- While Article 31 of Regulation 1017/68 contains a (so far unused) review clause, such clause is absent from Regulation 4056/86.

3.13 Contrary to normal practice, the review of Regulation 4056/86 that the Commission has embarked upon has no legislative basis in the Council’s wording of Regulation 4056/86 itself. Considerations of good administrative practice notwithstanding, the Association wonders whether the current review is consistent with the Council’s apparent desire to provide a stable platform for the liner industry and comply with the international obligations imposed upon Member States resulting from the ratification of the UNCTAD Code of Conduct for Liner Conferences. Without prejudice to the legal implications of

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37 See Article 7 of Regulation 19/65, Article 7 of Regulation 2821/71, Article 7 of Regulation 1534/91, Article 7(2) of Regulation 3976/87, and Article 5(2) of Regulation 479/92.

38 All block exemptions provide that their benefit may be withdrawn by the Commission when it finds in a particular case that an agreement which is exempted nevertheless has certain effects which are incompatible with one or more of the four conditions set out in Article 81(3) EC. See Article 6 of Regulation 1617/93, Article 7 of Regulation 240/96, Article 6 of Regulation 2790/99, Article 12 of Regulation 823/2000, Article 7 of Regulation 2658/2000, Article 7 of Regulation 2659/2000, Article 6 of Regulation 1400/2002, and Article 10 of Regulation 358/2003. On Article 13 of Regulation 4056/86, see paragraph 3.21 below.


40 See Council Regulation 954/79 [1979] OJ L 121/1; and Recitals 3 and 8 of Regulation 4056/86.
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this issue, it is safe to say that the Commission’s review of the type of block exemption contained in Regulation 4056/86 has no legal precedent.

3.14 Hence, the Association submits that this uncharted domain is best assessed by way of analogy to the rules governing block exemptions adopted by the Commission.

**The Burden of Proof in the Review of the Liner Conference Block Exemption**

3.15 Consistent with the general rules governing block exemptions described above, at paragraph 3.5 et seq., the Association respectfully submits that, mutatis mutandis, the review of Regulation 4056/86 is clearly a procedure that has the potential outcome of amending or revoking the benefit of the liner conference block exemption.41

3.16 Regulation 4056/86 does not contain a review clause, and remains in force for an unlimited time period. It follows that:

- Although Regulation 4056/86 contains a withdrawal procedure (Article 7) and a procedure amending or revoking the benefit of the block exemption (Article 13), these refer only to individual decisions based upon Articles 11(4) and 12(4) of Regulation 4056/86;
- Due to the timeless nature of Regulation 4056/86, there can be no reasonable means of identifying or categorising the current review process as being an expiry procedure (i.e. one in which the Commission is required to assess whether there should be a renewal);
- If the Commission wishes to introduce changes to Regulation 4056/86, which is still in force (and without prejudice to the legal basis thereof) those changes will necessarily need to qualify as an amendment or revocation of the existing block exemption *erga omnes*, and valid ex nunc; and
- Disregarding such basic principles would be contrary to the apparent wish of the Council to provide a stable platform for the liner industry and comply with the international obligations imposed upon the Member States as a result of the ratification of the UNCTAD Code of Conduct for Liner Conferences.

3.17 In the following paragraphs, the Association explores the principles of law governing a procedure amending or revoking the benefit of an exemption, pointing out the burden of proof upon the Commission and the parties involved. For the sake of completeness, the Association also summarises the procedure governing the alternative scenario, i.e. the renewal of a block exemption. Although there are some differences between both scenarios regarding the allocation of the burden of proof between the Commission and the parties involved, it is evident that all sides involved in the review of Council Regulation 4056/86 bear a burden of proof, regardless of whether the review is categorised as an amendment/revocation or a renewal of the liner conference block exemption. Indeed, given the lack of any substantiated complaints about the way in which the current regime actually operates, the onus must be on any party (including the Commission) proposing any change (a) to identify the circumstances that makes change necessary and (b) to demonstrate that any change will not be a change for the worse in terms of rates, services and competition. While the Association recognises that all interested parties have an obligation to assist the Commission in the review of Regulation 4056/86, the burden of proof is ultimately on the Commission to show that the underlying facts have changed in such a way as justifies revocation or amendment of the liner conference block exemption.

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41 This characterisation is explicitly recognised in a speech by a member of the Transport Unit, DG Competition, delivered in his personal capacity. See F. Fitzgerald, “Stability v Competitiveness”, Hong Kong, 25 August 1999, page 5.
3.18 The Association submits that the withdrawal procedure is of no relevance to the current review of Regulation 4056/86. This procedure is applicable to individual cases only, where agreements that are exempted nevertheless have effects incompatible with the conditions set out in Article 81(3) EC.\textsuperscript{42} Indeed, as the CFI confirmed in Langnese-Iglo\textsuperscript{43},

"According to the hierarchy of legal rules, the Commission is not empowered, by means of an individual decision \textit{in casu} the withdrawal decision, to restrict or limit the legal effects of a legislative measure \textit{in casu} the block exemption, unless the latter expressly provides a legal basis for that purpose".

Given the limitation of Article 7 of Regulation 4056/86 to individual cases, and the absence of a general clause to that effect applying to the liner conference block exemption contained in Regulation 4056/86, the Association submits that the application \textit{erga omnes} of the withdrawal procedure to the review of the liner conference block exemption would be contrary to the hierarchy of legal rules.

\textit{Scenario 1: Amendment/Revocation of the Block Exemption}

3.19 As explained at paragraph 3.15 above, the Association submits that the review of Regulation 4056/86 must be categorised as a procedure potentially amending or revoking the benefit of the liner conference block exemption.

3.20 Given that the amendment or revocation of the benefit of a block exemption is an exceptional procedure which does not concern the exemption’s fate at the end of its specified lifespan, but rather a review of the exemption during its regular lifespan as a result of \textit{inter alia} an alleged change in the basic facts underlying the exemption, this scenario places a rather stringent onus upon the Commission. To quote Kerse:

"[t]he burden of proof in revocation proceedings would appear to be on the Commission. It must show that there are ‘grounds’ and also that such grounds give sufficient reason to justify revocation".\textsuperscript{44}

3.21 The stringent burden of proof upon the Commission cannot be a surprise. Article 8(3) of Regulation 17 provides as follows:

"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; (d) where the parties abuse the exemption from the provisions of [Article 81 (1) EC] granted to them by the decision."

\textsuperscript{42} See W. Veecken, in EG-WETTBEWERBSRECHT KOMMENTAR (Immenga & Mestmäcker eds., Vol. 1, 1997), GFVO, paragraph 51.
\textsuperscript{44} C.S. Kerse, E.C. ANTITRUST PROCEDURE, page 261 (1998).
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Similar wording may be found at Article 13(3) of Regulation 4056/86, as well as Article 6(3) of Regulation 3975/87 and Article 13(3) of Regulation 1017/68. The list of circumstances in which an exemption may be amended or revoked appears to be exhaustive.

3.22 There are a number of precedents in which the Commission has amended an exemption. In particular, it is referred to Transocean Marine Paint Association (2), GEMA (2), NAVEWA/ANSEAU, and BP/Bayer (2). There are no reported revocation cases concerning individual exemptions, although the Commission has threatened to use its powers to do so should circumstances change post-exemption. The only precedent which relates to a revocation of a group exemption is Schöller Lebensmittel GmbH. There are also a number of withdrawal cases that contain useful information concerning revocation proceedings. In particular, the Association refers to Tetra-Pak I (BTG License), Ecosystems/Peugeot and Langnese-Iglo. Finally, the Association also refers to the currently ongoing renewal of the technology transfer block exemption, which will result in the repeal of the existing block exemption. The latter is dealt with in more detail when discussing renewal proceedings, below, at paragraph 3.32 et seq.

3.24 These precedents demonstrate that:

- In amendment or revocation proceedings, the Commission must demonstrate that there are "grounds" for amendment or revocation, which – according to general principles of European law – must be based on carefully examined facts;
- Also, the Commission needs to give sufficient reasons to justify amendment or revocation of the benefit of the block exemption, which – again according to general principles of European law – is part of its duty to examine the facts put forward. As noted before, the Council specifically stipulated – when enabling the Commission to adopt block exemptions – that these "may be repealed or amended where circumstances have changed with respect to any factor which was basic to its

49 GEMA (2) [1972] OJ L 166/22.
51 BP/Bayer (2) [1994] OJ L 174/34.
59 See also Case T-24/90 Automec v Commission [1992] ECR II-2223, paragraphs 79 and 86.
being made; in such cases, a period shall be fixed for modification of the agreements and concerted practices to which the earlier [block exemption] applies, and

- An amendment or revocation based on a change in facts is only valid ex nunc (similar to a withdrawal proceeding).

3.25 Most relevant to the review of the liner conference block exemption contained in Regulation 4056/86 is the ground contained in Article 8(3)(a) of Regulation 17, which deals with the situation where there has been a change in facts. This change of facts could, for example, result from the Commission’s stated need for review (see above, at paragraph 2.2). For this ground of revocation to be applicable, however, it is insufficient that there be just any change in facts. Instead, the Commission must show there is a change in the facts “which were basic to the making of the decision”. A fact is presumably “basic” if it is material in relation to the satisfaction of one or more of the four conditions set out in Article 81(3) EC. There is no requirement that the change be in any way brought about by the undertakings concerned or by the operation of the agreement or practice exempted. Rather, market structure may change through a variety of causes. None of these need, in any sense, be caused by the undertakings concerned, but each may have an impact on the competitive structure of the relevant market. For example, where the undertakings concerned change the ambit of the operation of their activities then this may amount to a change of the facts as described. Merely stating the possible grounds – as in casu the Commission has confined itself to in the Consultation Paper – does not however discharge the Commission’s burden of proof. On the contrary, the burden of proof in this scenario is squarely on the Commission to demonstrate both that (a) there are “grounds” and also that (b) such grounds give sufficient reason to justify amendment or revocation of the benefit of the block exemption.

3.26 The Association would like to stress that this is even more true given that there is no theoretical case against conferences, as was once again confirmed by the Commission’s consultants in the Erasmus Report which concludes (at page 82) that:

“Restrictions on competition, in the form of shipping conferences, are a low cost way to ensure that the liner market is sustainable. (...) Conferences may look like, but do not act as if they are a price fixing cartel”.

3.27 Under such circumstances, it appears reasonable to expect that the Commission would base any potential case for revocation or amendment of Regulation 4056/86 on a thorough review of factual evidence. To allow the Commission to discharge the burden of proof upon it, the Association reiterates once again its pledge to work with the Commission to encourage ship-owners and shippers to provide the appropriate data and analysis.

**Scenario 2: Renewal of the Block Exemption**

3.28 For the sake of completeness, and despite the Association’s opinion that the review of Regulation 4056/86 can only be properly categorised as a procedure potentially amending or revoking the benefit of

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60 Article 2(2) of Regulation 19/65. See also above, at paragraph 3.6, with further references to the other enabling Regulations.
63 The Association notes that a case-specific equivalent is contained in Article 13(3)(a) of Regulation 4056/86.
the liner conference block exemption, the Association will also analyse below the procedure governing the alternative scenario, i.e. the renewal of a block exemption.

3.29 Under the renewal scenario, the allocation of the burden of proof between the Commission and the parties involved differs from the division as described above, at paragraph 3.19 et seq.

3.30 As far as the renewal of individual exemptions is concerned, the undertakings involved might be expected to show that the four requirements set out in Article 81(3) EC are still satisfied. Therefore, useful reference may be made of the reasons given for exemption in the original decision. It is then for the undertakings to demonstrate that the two positive requirements (i.e. improvement in production/distribution of goods, etc.; and fair share of resulting benefits to consumers) have materialised in the period since the initial grant of the exemption and will continue to do so after renewal, and that the two negative requirements (i.e. indispensability of the restrictions and competition not eliminated) have been and will remain satisfied. In this scenario, it is up to the undertakings to set out their position and present to the Commission “grounds” (based on facts) intended to establish the economic justification for the exemption.65

3.31 As to the Commission’s burden of proof, the ECJ established in its Consten and Grundig66 judgment that “the Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of an exemption, but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances”. As far as the renewal of an individual exemption is concerned, the Commission must “verify whether the competitive situation on the relevant market has not changed to such extent that the preconditions for the grant of an exemption are no longer fulfilled”.67 Therefore, the undertakings’ burden of proof in the procedure for the renewal of individual exemptions does not absolve the Commission from both (a) examining the facts put forward by the undertakings involved and (b) using its own powers of investigation to generate additional evidence to supplement that reasonably obtained by the parties.68 The degree of scrutiny on renewal largely depends on the intervening changes in the legal and economic situation, paying particular attention to any material changes in the facts or circumstances of a given case since the initial exemption was granted.69

3.32 As far as block exemptions are concerned, the burden of proof upon the Commission has been well illustrated during the latest round of block exemption renewals. While the Commission is reviewing the liner conference block exemption, it has recently adopted three major new block exemptions (Vertical Agreements,70 Motor Vehicles,71 and Insurance72), and is reviewing a fourth (Technology Transfer73).

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67 Case 75/84 Metro v Commission (2) [1986] ECR 3021, paragraph 32.


3.33 The following table provides an overview of the Commission’s efforts in these proceedings. For comparative purposes, the Association has also included the state of affairs in the procedure potentially amending or revoking the benefit of the liner conference block exemption to date.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of procedure</td>
<td>Amended renewal of expiring exemptions</td>
<td>Amended renewal of expiring exemption</td>
<td>Amended renewal of expiring exemption</td>
<td>New exemption repealing exemption in force</td>
<td>Potential revocation of exemption in force</td>
</tr>
<tr>
<td>Consultation / Initial fact-finding</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Consultation / Direct follow-up contact with interested parties</td>
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<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>External studies (Number)</td>
<td>At least 15</td>
<td>At least 5</td>
<td>No information available</td>
<td>At least 1</td>
<td></td>
</tr>
<tr>
<td>Green Paper/White Paper</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other published reports</td>
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<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public hearing and further consultation</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Published legislative proposal inviting for comments</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Timeline</td>
<td>66 Months</td>
<td>33 Months</td>
<td>65 Months</td>
<td>At least 24 months to date</td>
<td>7 months to date</td>
</tr>
</tbody>
</table>

Note: Fields marked in-between parenthesis indicate confirmed measures that have not taken place to date.

3.34 The table enables the Association to make some observations on how the Commission has discharged its burden of proof as part of the mechanics of recent block exemption renewal proceedings. The table also enables the Association to draw some comparative conclusions as to the — so far — much more limited efforts the Commission has expended on the review of the liner conference block exemption, in which the Commission is subject to a significantly higher burden of proof (as demonstrated above, at paragraph 3.19 et seq).

3.35 In particular:

- **Consultation/Initial fact finding and direct follow-up contact with interested parties.** During the initial round of consultation (similar to the consultation process in the review of Regulation 4056/86 to date), the Commission sought to contact directly interested third parties, that is other Community Institutions, Member States, industry and consumer organisations as well as the various undertakings and stakeholders concerned. This was carried out either by means of (a) questionnaires (for example, 8 different kinds of questionnaires were sent out in the review of the motor vehicle block exemption, with 117 replies received), (b) interviews were sent out for the review of the technology transfer block exemption with an estimated 25 per cent response rate, (b) interviews (for example, in the review of the vertical agreements block exemption, manufacturers, retailers, trade associations, research institutions and specialist were called for interviews), or (c) market enquiries (as carried out in the review of the insurance block exemption). There are indications that other initiatives were also taken by the Commission, but the Association does not have full knowledge of their scope. The Association notes that so far the Commission has not undertaken any form of direct follow-up contact with interested third parties during the review of Regulation 4056/86.

- **External Studies.** The Commission’s initial findings were also substantiated by various studies carried out by independent contractors. Although publicly available information is incomplete as far as the number and extent of such external studies is concerned, at least 15 in-depth studies were commissioned during the review of the vertical agreements block exemption, at least 5 during the review of the motor vehicle block exemption, and, to date, at least one in-depth study during the review of the technology transfer block exemption. The Association notes that, to date, the Commission has commissioned one limited technical study commenting on the submissions received as part of the consultation concerning the review of Regulation 4056/86. No independent in-depth study seems to have been commissioned so far.

- **Green Paper/White Paper and other published reports.** After consultation, the Commission has used as the starting point for its own thorough fact finding the market conditions defined in previous block exemptions for the relevant sector, subsequently examining whether the four requirements as set out in Article 81(3) EC are still satisfied, taking into account the Commission’s experience with the previous block exemption, interested parties’ submissions, and the studies commissioned. The Commission’s initial findings were published either in a Green Paper or an Evaluation Report.

- **Public hearing and further consultation.** After publication of the interim findings described in the previous point, the Commission continued its fact finding efforts by, *inter alia*, (a) organising a public hearing during the review of the motor vehicle block exemption, or (b) publishing a follow-up

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78 See, for example, M. Brenning, “Competition policy in the financial services sector”, Brussels, 10 April 2003.
Communication to the Green Paper during the review of the vertical agreements block exemption, and (c) arranging consultation meetings, obtaining Parliament resolutions and Ecosoc opinions during the review of the insurance block exemption. The Association notes that, concerning the review of Regulation 4056/86, the Commission has already set the date for an oral hearing. Given the early stage of the consultation process and the lack of a fact finding exercise undertaken by the Commission itself, the Association respectfully submits that organising an oral hearing is somewhat premature, and would point to an intermediate exercise at this point.

- Published legislative proposal inviting for comments. In the recent renewal proceedings, the Commission subsequently issued a legislative proposal (on occasion with an explanatory note attached), triggering a third consultative period before the adoption of the new block exemption regulations.

- Timeline. It is clear from the recent renewal proceedings that renewals of block exemptions are time-consuming exercises, where the Commission needs to gather and process the relevant facts available, and give parties sufficient time to make the necessary submissions. Based on the factual “grounds” for renewal as provided by the interested third parties involved, the Commission has carried out an objective and thorough assessment of the market conditions. In the recent renewal proceedings as listed, it has not been unusual for this process to last over a period of up to five and a half years.

3.36 If any inference can be drawn from the recent the renewal proceedings, the Association notes that the review of Regulation 4056/86 is a mere seven months old. As such, and if the renewal proceedings are of any reference value to the review of the liner conferences block exemption – in which the Commission is subject to a significantly higher burden of proof – then the Commission’s own fact finding efforts should significantly increase following the current consultation process.

4 Conclusion on the Burden of Proof in the Review of the Liner Conference Block Exemption

4.1 Clearly, the Commission is right to expect the Association and its members (as well as the other interested third parties to the review process) to provide well-developed arguments, supported by hard evidence. The Association respectfully submits that the benefits of liner conferences have been consistently recognised throughout the origins of Regulation 4056/86 and the full body of precedent case law of both the Commission and the European Courts, the Court of First Instance’s most recent TACA judgment included. Furthermore, and following the analytical approach of Article 81(1) and (3) EC, the Association has demonstrated in its various submissions under the Commission’s consultation on the review of Regulation 4056/86 that due to the block exemption as granted, liner conferences have been and remain able to generate a truly stabilising effect for the industry, offering adequate and efficient scheduled maritime transport services while giving fair consideration to the interests of their customers, the shippers, and ultimately consumers. At the same time, the Association recognises that better data sources need to be developed as the review process progresses, and has consistently offered to assist the Commission in developing those sources.

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4.2 However, the Commission has its own burden of proof to discharge regardless of whether the review is categorised as amendment/revocation or renewal of the block exemption on liner conferences. The Association respectfully submits that:

- Given the lack of any substantiated complaints about the way in which the current regime actually operates, the onus must be on any party (including the Commission) proposing any change (a) to identify the circumstances that makes change necessary and (b) to demonstrate that any change will not be a change for the worse in terms of rates, services and competition; and
- While the Association recognises that all interested parties have an obligation to assist the Commission in the review of Regulation 4056/86, the burden of proof is ultimately on the Commission to show that the underlying facts have changed in such a way as justifies revocation or amendment of the liner conference block exemption.

4.3 As already argued in its Comments on Responses Submitted by Third Parties (at paragraph 3.5), the Association is of the opinion that the Commission should address a number of critical questions, such as the following:

- What inefficiencies would be driven out of the market by substantial change or repeal of the block exemption?
- How would entry into the market be improved – or would it be more difficult?
- How would capital investment be affected?
- What sustainable improvements would result from substantial change or repeal? Nobody should assume that changes would be without substantial impact. What are they likely to be and what would their effect be? The third party comments so far submitted to the Commission do not make any kind of convincing argument or seriously try to address what would happen with substantial change or repeal of the block exemption.
- Would substantial change or repeal offer a better transportation system? If so, what changes would be produced by such proposals? How would a changed system be better than the status quo? The carriers cannot be the only entity or group of undertakings with a burden of proof in this important exercise, particularly when there is no tangible manifestation of the industry’s failure to fully meet service requirements or offer shippers a wide array of competitive service choices.

4.4 A careful examination of these issues would go a long way to bring the mechanics of the review process – again in line with the analytical approach of Article 81(1) and (3) EC – while equally ensuring that the objectivity of the review process can be maintained.