The Commission proposes to repeal the Liner Conference Block Exemption

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On 14 December 2005 the Commission adopted a proposal for a Council Regulation repealing Council Regulation 4056/86 applying Articles 81 and 82 EC to maritime transport services and amending Regulation 1/2003 (1) to extent its scope to cabotage and tramp vessel services (2).

Regulation 4056/86 (3) contains a block exemption for liner conferences, allowing providers of regular liner services to fix prices and to regulate capacity. This is the most exceptional exemption from competition rules in force today.

1. Historical context

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.

In 1962, the Council adopted Regulation 17/62 setting out the first procedural framework for the Commission’s application of EU Competition rules (4). It took another 24 years before the Commission was endowed with powers to apply competition rules to the maritime transport sector. One of the reasons is that in the preceding decades, there had been some uncertainty concerning the application of EU competition rules to the transport sector and this until the Court of Justice ruled on the subject. In its 1974 French Seamen (5) judgement, the Court held that the transport sector was subject to the ‘fundamental’ and ‘general’ rules of the Treaty. In 1986, it clarified in Nouvelles frontières (6) that this expression clearly encompassed the Treaty’s competition rules. Against this background, when Regulation 4056/86 was adopted on 22 December 1986, it reflected the legislator’s reticence to apply competition rules fully to the sector. Moreover, it excluded cabotage and tramp vessel services from the implementing rules, de facto creating a safe harbour for these sectors. Significantly it formalised in EC law the acceptance of the international cartel for liner conferences.

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. Furthermore, the implementation of the block exemption has not been smooth as the interpretation of the exemption for rate-fixing has been in issue in several competition cases (7). In its 1994 TAA (8) and FEFC (9) decisions, and again in the 1998 TACA decision, (10) 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 cases, decided with the obvious purpose of increasing freight rates by limiting supply. In its TAA and EATA (11) 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 Commission’s decisions on the substance.


(4) Regulation 141/62 explicitly excluded transport from the scope of Regulation 17.


2. The review process

Exemptions from competition rules are reviewed every few years to ensure that they continue to fulfil four cumulative conditions of Article 81.3. Regulation 4056/86 had never been reviewed. 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 the adoption of the proposal to repeal the Regulation, the Commission put forward several papers for public consultation, held a public hearing and 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.

All documents were 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 (12) of October 2004. The Economic and Social Committee and the Committee of the Regions adopted opinions (13).

3. Liner Shipping Services

Liner shipping conferences are associations of ship-owners served by a secretariat. The block exemption contained in Regulation 4056/86 allows them to set common freight rates, to regulate capacity jointly and to coordinate timetables on the assumption that this was necessary for the provision of regular scheduled maritime services. Yet conferences do not provide services. Liner services are provided either by individual lines that may or may not be part of conferences or by groups of carriers organised in consortia and alliances.

Price fixing and capacity regulation are hard core restrictions of competition. This means that they are likely to produce a negative effect — they lead to higher prices — without producing any countervailing value to consumers. As such, the Commission has stated that its general policy is to consider them likely to be in breach of EU competition rules (14).

Liner shipping is an important part of the EU economy: it represents about 18% of all imports and 21% of all exports transported by land, sea or air. Considering the importance of the sector to the EU25 economy, this means that 18% of EU imports and 21% of exports are affected by carriers’ ability to fix prices in the liner conference block exemption.

The liner shipping market has changed considerably since Regulation 4056/86 was adopted. The continuing trend towards containerisation has led to an emphasis on global route networks. This has contributed to the popularity of co-operation agreements between shipping lines in the form of consortia and alliances as a means for carriers to share the costs of providing regular services but without jointly fixing freight rates. The growth in importance of these operational arrangements has been accompanied by a decline in the significance of conferences.

European liner shipping operators are very successful in the world market. Four out of the top five carriers are European carriers and these four carriers control 33% of global liner capacity. Between 2000 and 2005, European carriers increased their global capacity share in liner shipping. During the same period, the share of Chinese, Japanese and other South East Asian carriers decreased. European carriers have a strong position on all international trade routes, not only on EU trades. For example, the Commission’s analysis shows that EU carriers rank among the top 3 in almost all US trades.

4. 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’ (15). 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 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 price-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 (16), 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 of 19 April 2000 (17) 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

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Recital 388.
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 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 (CAFIs 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.

5. Impact of a repeal of the liner conference block exemption

5.1. 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. 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 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.

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. 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.

(18) The liner 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.

(19) 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.

(20) 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.

(19)
The Commission’s impact assessment (21) 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 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 — thin versus thick, 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 worldwide 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’ (22) 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.

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 (23) are likely to offset each other.

5.2. 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 countries also realise that liner shipping conference cartels are not indispensable for the provision of reliable shipping services.

6. 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 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, including timely and regular exchange and publication of information on capacity and utilisation.

They are due to be promulgated by end 2007. As an interim step in the preparation of guidelines, DG COMP will publish an ‘issues paper’ on liner shipping in September 2006.

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

The Commission is proposing to amend 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 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.

Regulation 4056/86 does not explain why cabotage is excluded from its scope. The only indirect reference is to be found in recital 6 which states that the Regulation’s objective is to avoid excessive regulation of the sector, implying that in a majority of cases cabotage services would not affect intra-Community trade. However, this does not justify why these services should from the outset be excluded from the scope of Regulation 1/2003. Similarly, The fourth recital of Regulation 4056/86 suggests that the exclusion is due to these services operating on a free and competitive market. This however is presumed to be the case for all de-regulated services, without it being deemed necessary to exclude such services from the implementing regulations.

The proposal 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. To that end, the Commission services are engaged in discussions with tramp operators so as better to understand the issues at stake. Whilst formal guidance could be issued only after Regulation 1/2003 is modified, if necessary, informal guidance can be provided beforehand.
Parallel import of motor vehicles: the Peugeot case

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The Peugeot decision, adopted by the Commission on 5 October 2005, imposed a fine of 49.4 million euros for breach of Article 81 EC on the motor vehicle manufacturer Automobiles Peugeot SA (‘Peugeot’), and its subsidiary Peugeot Nederland NV, which is tasked with importing vehicles of the Peugeot brand into the Netherlands from other Member States, in particular France.

The decision is directed at an infringement implemented in the context of selective and exclusive distribution agreements regulating the relations between Peugeot and its Dutch dealers. The addressees of the decision have committed one infringement composed of two measures, which had for object and effect to restrict competition. The first measure, applied from 1997 to 2003, consisted in a system of bonuses paid to dealers and discriminating against export sales; this system of bonuses, viewed from the angle of its objective modus operandi, went beyond what was necessary to induce Dutch dealers to devote their best sales efforts to their contract territory.

In respect to both measures, it has been possible to show the existence of an agreement, of a restriction by object — but also a concrete effect on the market.

The discriminatory bonus

As concerns the first measure, it is worth recalling that in the Netherlands, dealer remuneration was made up of a fixed portion (the margin on invoices (1)) and a portion linked to the dealer’s results (the bonus (2)), which the dealer needed in order to earn a profit from his business. This bonus could be obtained by the Dutch dealer only if the cars sold by him were registered in the Netherlands. The system put in place by Peugeot had two distinct phases regulating the mechanism for granting a bonus: the right to the bonus was established on the basis of a progressive scale of annual sales targets established at the start of the exercise: these targets related to sales to be made in the dealer’s territory. Later, when the volumes corresponding to the sales targets were reached, bonus payments were also calculated on the basis of the number of vehicles sold in the territory. In other words, registration in the Netherlands was required by Peugeot for the purpose of (1) achieving any sales target leading to the acquisition of entitlement to the bonus and the determination of the level of discount per car, and (2) identifying each vehicle sold by Peugeot eligible for such remuneration (the payment of the bonus).

The annual circulars sent to all dealers from 1 January 1997 until 30 September 2003 concerning implementation of the new bonus scheme provided that only private cars registered in the Dutch market would count for the payment of the bonus. In its reply to the statement of objections, Peugeot argued that its network remuneration policy was pro-competitive and had the ‘sole, manifest objective’ of motivating dealers by offering them the necessary economic incentives, in the form of bonuses, to concentrate their best sales efforts on their own area and thereby enable Peugeot to increase its market share in the Netherlands.

In the light of this agreement, the Commission decision does not call into question the possibility for the manufacturer to tailor its commercial policy according to the requirements of different

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(1) The dealer’s margin is the difference between the net recommended list price of a given model and the price at which the dealer buys the car from his supplier. This amount serves to cover the dealer’s distribution costs and overheads as well as the discounts which he has to grant most of the time to final consumers.

(2) The bonus consists of a flat-rate payment made to the dealer by his supplier at regular intervals for each vehicle sold in accordance with the terms applicable. Payment of the bonus is subject to the dealer’s meeting certain quality and quantity targets.