



EUROPEAN COMMISSION  
COMPETITION DIRECTORATE-GENERAL

Services  
Transport and transport infrastructure

## "Liner shipping: Examining the development and impact of European legislation"

### Speech at Containerisation International 3<sup>rd</sup> Annual Conference "Global 2000"

London, 22 March 2000

Jürgen Mensching  
Head of Unit

## Outline

1.	THE REGULATORY FRAMEWORK.....	3
1.1.	Regulation 4056/86: procedural rules, and block exemption for liner conferences .....	3
1.2.	Regulation 870/95: block exemption for consortia.....	4
1.3.	Merger Regulation (4064/89) .....	4
2.	THE COMMISSION'S ENFORCEMENT OF THE COMPETITION RULES.....	5
2.1.	Conferences.....	5
2.1.1.	The Commission's approach .....	5
2.1.2.	Inland price-fixing.....	5
2.1.3.	Capacity management programmes .....	6
2.1.4.	Service contracts .....	7
2.1.5.	Abusive behaviour by members of a dominant conference .....	7
2.1.6.	Price cartels outside of a legal conference .....	8
2.2.	Consortia.....	9
3.	INTERNATIONAL ASPECTS .....	9
3.1.	Conflicts of laws .....	9
3.2.	OECD proposals .....	10
4.	MODERNISATION OF THE EC COMPETITION RULES.....	10

Chairman, Ladies and Gentleman,

As part of this afternoon's topic of "de-regulation", I have been asked to assess the development and impact of European legislation. I propose to cover this topic by first explaining the legislative framework under which the EC competition rules are applied to liner shipping. Secondly, I will outline how the Commission has applied those rules, including recent developments. Thirdly, I will touch upon how our European regulations fit into the international context. Finally, I will explain the Commission's proposals to modernise the way that the EC competition rules are applied.

## **1. THE REGULATORY FRAMEWORK**

### **1.1. Regulation 4056/86: procedural rules, and block exemption for liner conferences**

Following this structure, let me start with a short description of the regulatory framework. It was not until 1986 that the Commission received the powers to apply the EC competition rules to maritime transport services. Those powers are contained in Regulation 4056/86 which also, as is well known, grants liner shipping conferences an exemption from the cartel prohibition contained in Article 81(1) of the EC Treaty. This block exemption allows members of a conference to fix maritime transport rates provided that they fulfil certain conditions and meet certain obligations.

The block exemption is exceptional in the system of EC competition rules not only because it is granted for an indefinite period, but also because it allows price-fixing between competitors which is normally regarded as the most heinous of restrictive practices. The exemption was granted because it was assumed that conferences bring stability to the market - prices fluctuate less than they would if set by individual lines. This stability is considered to have the effect of assuring reliable liner services for shippers.

## **1.2. Regulation 870/95: block exemption for consortia**

The second piece of legislation to mention is Commission Regulation 870/95, which grants a group exemption to certain categories of consortium agreements. This block exemption recognises that consortia generally bring benefits to shippers, provided that consortia are subject to effective competition. This favourable position is explained by the advantages brought about by consortia. In general they help to improve the productivity and quality of liner shipping services by rationalising the activities of the member companies and by bringing about economies of scale. The block exemption for consortia allows shipping lines to cooperate in order to provide a joint service, provided they meet certain conditions. The block exemption for consortia does not, however, permit price-fixing within the framework of consortia; price-fixing is only permitted within the framework of an exempted conference agreement.

## **1.3. Merger Regulation (4064/89)**

Finally, I would like to mention in this context the EC Merger Regulation. Under this Regulation the Commission is required to examine mergers with a Community dimension and to assess whether they will create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it.

The P&O Nedlloyd case in 1996 was the first time that the Commission applied the EC merger control rules in the liner shipping sector. Since then the Commission has also examined and approved the Maersk/SCL and Maersk/Sealand mergers. In each case the Commission concluded that the merger would not create or strengthen a position of dominance, reaching this conclusion after examining the effect of the merger on the main trades to and from Europe on which both of the merging companies operated container liner shipping services. In examining the mergers the Commission also considered the effects of the liner conferences and consortia which operated on those routes, in particular whether the merger could strengthen the cohesion within existing conferences or consortia in such a way as to create dominance or reinforce an existing dominance.

## **2. THE COMMISSION'S ENFORCEMENT OF THE COMPETITION RULES**

### **2.1. Conferences**

#### *2.1.1. The Commission's approach*

Two principles underlie the Commission's approach to applying the competition rules to liner conference agreements.

First, external competition is an essential factor for the granting of the block exemption. It is a basic condition for an exemption that competition should not be eliminated on the trade or trades served by a conference. Restrictive agreements between conference lines and non-conference lines are therefore a particular cause for concern.

Secondly, the block exemption for conferences is an exception from the basic prohibition of cartel agreements contained in Article 81(1) and, like other exceptions from a general rule, it must be interpreted strictly. Thus the exemption in Regulation 4056/86 applies only to the maritime activities of liner conferences that fall within its terms. It cannot apply to other restrictive agreements between shipping companies.

The 1990s were a decade of conflict as to which conference activities were permitted under the EC competition rules, whether by the block exemption or by way of individual exemption.

Three principle areas of conflict can be identified.

#### *2.1.2. Inland price-fixing*

The first area concerns inland price-fixing.

The Commission takes the view that inland price-fixing (within the EU) is not covered by the block exemption. The Commission has taken three formal decisions to this effect: the TAA and FEFC Decisions in 1994, and the TACA Decision in 1998.

Following the TACA decision, the remaining members of the TACA notified a Revised TACA agreement which no longer contained an inland tariff. Instead the parties agreed that they could adopt a so-called “not-below-cost” rule. Under this rule each line would agree, where it provides maritime transport services pursuant to the conference tariff, not to charge a price less than the direct out-of-pocket cost incurred by it for inland

transport services supplied within the European Economic Area (EEA)<sup>1</sup> in combination with those maritime services. The Commission did not raise objections against the not-below-cost rule with the result that, under the applicable procedure, the rule is deemed exempt for three years.

The Commission's prohibition of inland price-fixing has been appealed by shipping lines to the EU's Court of First Instance in Luxembourg. Although the main conferences serving Europe have followed the TACA's lead and have now abandoned inland price-fixing in Europe, the appeals before the Court continue. At the same time, the Commission's acceptance of the not-below-cost rule has been appealed by the European Shippers' Council. The matter will thus fall to be resolved by the courts.

### 2.1.3. *Capacity management programmes*

The second area of conflict is in relation to capacity management programmes. The Commission takes the view that the group exemption in Regulation 4056/86 does not allow shipowners to agree not to use capacity. An individual exemption for a capacity non-utilisation agreement is not possible when it is a tool for maintaining excess capacity and artificially raising freight rates. Capacity regulation could only bring benefits if there was a real withdrawal of inefficient or outdated capacity so as to bring about a reduction of costs, leading to price reductions for shippers.

In the 1994 TAA Decision, the Commission prohibited the TAA's capacity management programme on the *westbound* transatlantic trade. In the 1999 EATA Decision, the Commission prohibited the European Asia Trades Agreement, a capacity management programme in place on the *eastbound* Europe/Far East trades between 1992 and 1997. The TAA and EATA agreements particularly penalised European exporters because it was on services *from* Europe but not services *to* Europe that they restricted capacity and raised prices without any concomitant benefit.

---

<sup>1</sup> The EEA consists of the EU together with Norway, Iceland and Liechtenstein.

#### *2.1.4. Service contracts*

A third area of disagreement is whether the block exemption allows conference agreements to ban or to limit individual service contracts. The Commission considers that conferences may not limit individual service contracts, and so it held in the 1998 TACA Decision. In that Decision, the Commission also found that the then TACA parties had abused their collectively dominant position by restricting the availability of individual service contracts.

Whilst the Commission approved the inland aspects of the Revised TACA, we are still continuing our investigation of the maritime aspects of the agreement. Our investigation centres on whether the parties' arrangements could harm competition between the parties when they negotiate and agree individual service contracts with shippers.

Over the last 12 months individual and confidential service contracts have become widespread. In the USA, this has come about as a result of the deregulation brought about by the Ocean Shipping Reform Act (OSRA). In the European Union the changed practices are the result of Commission decisions enforcing the competition rules. Whatever the reason for this change, more efficient and responsive shipping services should result from carriers and shippers exploring the full possibilities of individual service contracting.

#### *2.1.5. Abusive behaviour by members of a dominant conference*

On 16 March 2000 the Court of Justice gave judgment in the CEWAL appeal. The case concerned the Commission's 1992 CEWAL Decision. In its Decision the Commission had found that the members of the CEWAL liner conference had, contrary to Article 82 of the EC Treaty, abused their collective dominant market position on the trade between northern Europe and Zaire. There were three abuses, each designed to eliminate competition from the conference members' chief competitor, G&C (a joint service between the Cobelfret and Grimaldi):

- (1) The CEWAL members participated in a co-operation agreement with the Zairean maritime authorities according to which all cargo on the routes in question would be carried by CEWAL members.
- (2) They used "fighting ships".

(3) They imposed 100% loyalty rebates.

The Commission imposed fines totalling ECU 10.1 million.

In 1996 the Court of First Instance rejected the substance of the parties' appeal, but reduced the amount of fines by 10%. On further appeal, the Court of Justice has now also upheld the substance of the Commission's original Decision. The Court did however quash the fines, on the grounds that during the procedure leading up to the Decision the Commission had addressed its formal statement of objections to the CEWAL and not to the individual lines that were subsequently fined.

Of particular interest in the CEWAL judgment is that the Court has upheld the Commission's finding that the members of CEWAL were collectively dominant on the market in question. The Court held that because of its very nature and objectives, a liner conference "can be characterised as a collective entity which presents itself as such on the market vis-à-vis both users and competitors". However, to constitute an infringement under Article 82 the further elements of dominance and abuse have to be present.

The Court also rejected the argument that the Commission should have gone through the procedure of withdrawing the benefit of the conference block exemption before it could impose fines for abusive behaviour of a collectively dominant position.

The judgments of the Court of First Instance and now the Court of Justice in the CEWAL case are to date the only judgments from those courts relating to the application of the competition rules in the shipping sector.

#### *2.1.6. Price cartels outside of a legal conference*

Let me close this chapter by a final comment.

It goes without saying that when it comes to restrictive price agreements outside the strict terms of the block exemption, the transport sector is treated like any other sector. The Commission has in the past been vigilant in seeking to bring to an end such agreements. It is the objective of the Commission's modernisation proposals, to which I will come, further to focus on and to devote more efforts to detecting and suppressing hard-core competition restrictions such as, in particular, secret pricing arrangements.



## **2.2. Consortia**

To pass on to the Consortia Regulation 870/95, you will be aware of its expiry next month. Therefore, the Commission's Competition Directorate-General last year reviewed the operation of the Regulation and concluded that the reasons for which the Regulation had been adopted were still valid and that it had worked well in practice.

The Commission therefore intends to adopt a new Regulation which will renew the block exemption. At the end of January a draft was published for third party comments. The Commission is proposing only limited changes from the existing Regulation. The main change that the Commission is proposing is to move from the current "trade share" test (which looked at a consortium's share of the trade between the actual ports it served) to the more normal "market share" test (which looks at the consortium's market share on the market or markets on which it operates).

The significance of identifying the market share of a consortium on the trade or trades on which it operates is to indicate the extent to which the consortium remains subject to external competition, and thus capable of being exempted. As in the current Regulation, the Commission is proposing a system with two thresholds. A consortium whose market share is below 30% (or 35% if operating outside of a conference) is automatically exempt if it fulfils the other conditions of the Regulation. If a consortium has a market share above 30% but below 50%, the consortium will benefit from the block exemption if the Commission does not oppose exemption within six months. A consortium with a market share above 50% may be notified to benefit, if appropriate, from an individual exemption.

## **3. INTERNATIONAL ASPECTS**

### **3.1. Conflicts of laws**

Let me now turn to some international aspects. It is sometimes argued that the Commission's enforcement of the EC competition rules leads to a conflict of laws with third countries, or at least could lead to such a conflict. Those who put forward such arguments appear to consider that the mere co-existence of different legal regimes constitutes a conflict of laws. However, that is not so. A "conflict" of laws would occur

only if the EC rules required shipowners to behave in a way that is prohibited under the laws of a third country, or vice-versa. Such a conflict has never occurred.

Article 9 of Regulation 4056/86 provides that if the application of the EC competition rules would conflict with a third country's regulation, then there should be consultations between the Commission and the third country in question. Since the adoption of Regulation 4056/86, the Article 9 procedure has never been used. Moreover, the OECD's maritime transport committee examined at great length the issue of compatibility between different competition regimes and was unable to identify a single example of a Commission decision or action that had led to a conflict of laws.

### **3.2. OECD proposals**

More recently the OECD's maritime transport committee has turned its attention to possible changes to the way liner conferences are regulated. The OECD has prepared a discussion document suggesting that competition exemptions for liner conferences should be narrowed. In the light of this suggestion, I should state that the Commission is not at present considering any proposal to modify or abolish the block exemption under the EC competition rules.

The Commission is, however, interested to hear the views of other competition and transport authorities on the competition exemption for liner conferences, and the Commission's Competition and Transport Directorate-Generals will therefore be represented at the OECD's May workshop on this issue to follow very closely this discussion.

## **4. MODERNISATION OF THE EC COMPETITION RULES**

Finally, I would like to take this opportunity to explain the Commission's efforts to modernise the way that the EC competition rules are applied, and how these efforts might affect the shipping sector.

The rules granting the Commission powers to enforce the competition rules in the transport sector are currently contained in three sectoral regulations, one of which is Regulation 4056/86, that sit apart from the general rules contained in Regulation 17 of 1962. This procedural complexity has arisen for historical reasons, and the Commission is intending that its procedural reforms of the competition rules, which I will shortly be

describing, should be the occasion to simplify our procedures by as far as possible having a single set of competition procedures for all sectors. In other words, as far as procedural rules are concerned, there should not in the future be any specific rules for the transport sector.

The Commission has in recent years started its efforts to simplify and make more user-friendly its competition procedures. In the transport sector, two new Commission procedural regulations came into force, just over a year ago, on 1 February 1999. Regulation 2842/98 sets out how the Commission will ensure the right to be heard of the different parties involved in competition cases, including in the transport sector. Regulation 2843/98 covers all the transport sectors (ie inland transport and air transport as well as maritime transport) and sets out how to make applications and notifications to the Commission. This latter Regulation introduces for companies in the transport sector similar modern rules to those already introduced in other sectors in 1994.

In April last year the Commission published a White Paper proposing much more far-reaching reforms in order to modernise the way the EC competition rules are enforced. The main thrust of the Commission's proposals is to give up its monopoly on clearing restrictive practices caught by Article 81(1) of the EC Treaty. In other terms, national authorities and courts would no longer be excluded from applying the competition rules effectively.

The other fundamental point is the Commission's proposal to end the current system of notifying agreements for individual exemption. A positive approval to individual agreements will be given only in exceptional circumstances. There will continue to be block exemptions.

The objective of these changes is to enable enforcement activity to become more focused on cases which raise serious competition issues. Furthermore, enforcement activity will be decentralised and national competition authorities will no longer be restricted from fully applying the EC competition rules. The Commission and the national authorities will together form an enforcement network.

We also wish to see more private enforcement of the competition rules by way of private actions before national courts throughout the EU.

One consequence of the proposed approach will be that complaints will become all the more important in informing the Commission about restrictive practices. In the liner shipping sector this will be nothing new: every negative decision adopted by the Commission has been based at least in part on complaints submitted to it either by shippers or by competing shipowners.

The publication of the White Paper has generated much discussion about the future direction of competition law enforcement in the EU. During the public consultation period that ended last September, the Commission received many reactions from industry, lawyers and other interested parties. In January of this year, the European Parliament voted in favour of the proposals. The Commission intends to come forward with formal proposals for new legislation in autumn of this year.

In conclusion, the proposed changes to the way the EC competition rules are applied implies that the Commission will further increase its efforts to detect and eliminate serious restrictions of competition. At the same time, proposed mergers will continue to be closely scrutinised to ensure that they do not result in the creation or strengthening of a dominant position.