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“Current and future competition policy issues in the maritime sector”

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INTRODUCTION

I am grateful for the opportunity to make a few remarks on current and future competition issues in the maritime sector. This seminar is particularly well timed because the European Commission has just completed a first step in a review process of the current legislative set-up and this is the first time that we have had an opportunity to present it to those closely involved in shipping.

My remarks will focus therefore on the ongoing review of Regulation 4056/86 - but I shall also be referring to the current enforcement action and finally I shall be saying a few words about the modernisation of antitrust rules and how that affects maritime transport.

➤ **The Review of Council Regulation 4056/86**

Last Thursday, 27 March the Commission issued a Consultation Paper on the review of Regulation 4056/86.

Regulation 4056/86 as you all know has two main components. First, it lays down detailed rules for the application of Articles 81 and 82 EC to international maritime transport services, empowering the European Commission to investigate alleged infringements. Secondly, it provides for a block exemption for liner conferences and for agreements between transport users and the latter concerning the use of the conference services.

The Consultation Paper briefly examines the provisions that are currently applicable and records points of interpretation that have arisen in the course of applying the Regulation. In particular it focuses on the block exemption for liner conferences, examining the reasons that led the Council to grant a block exemption.

It may be useful to recall that in exempting price fixing and supply regulation between competing shipping lines, the legislator has assumed that

a) Price fixing and supply regulation within a conference leads to stability of rates, and

b) Stability assures shippers of reliable scheduled services

The Commission has recognised that stability of rates for scheduled services may be beneficial because it allows shippers to know in advance the cost of transporting their goods and enables shipowners to forecast their income and better organise regular reliable and efficient services¹.

The Consultation Paper therefore does not cast doubt on the objectives in themselves, but does ask whether an exemption for, among other things, horizontal price-fixing is a necessary and proportionate way of achieving those objectives, and whether the assumed benefits still outweigh the obvious disadvantages.

In particular the main questions the Commission seeks to address are:

- The extent to which conferences contribute to the stability of prices
- The extent to which price fixing is necessary to ensure that scheduled services are maintained over time
- Whether the present arrangements result in efficient, adequate maritime transport services and finally
- Whether there are other less restrictive ways to achieve the above mentioned objectives.

The decision to undertake a review of the main maritime regulation was prompted by different, concurring factors. First there is the fact that the block exemption for liner conferences is in many ways exceptional, not only because it grants exemption for a hardcore restriction of competition but also because unlike almost all other block exemptions it is not time-limited and has never been reviewed. This in itself would be sufficient justification to undertake a review because it is standard Commission practice to ensure that legislation is regularly updated to take account of changes in market conditions.

Another incentive for the review process was the publication in April 2002 of a report on competition policy in liner shipping by the Secretariat of the OECD. The report casts doubt on the validity of the assumption that collective rate setting by members of a liner conference is an indispensable pre-requisite for reliable liner shipping services and invites Member countries to review antitrust exemptions for price fixing. But it also recognises that carriers have legitimate operational needs that may require co-operation with other competing carriers. As long as these and other operational arrangements do not result in excessive market power, the OECD recommends that they be eligible for exemption.

In response to the work carried out by the OECD, the Commission's services, in agreement with the Member States, decided to revisit the way in which the EU's own competition rules are applied to the maritime sector. Importantly, the current review process does not cover the consortium block exemption – Regulation 823/200 – which, subject to certain conditions, allows shipping lines to jointly operate liner services and thus achieve through a rationalisation of the services potentially important economies of scales.

We envisage a three-step approach to the review. The Consultation Paper establishes a broad framework for the debate and invites responses from governments, industry and all interested parties to a set of specific questions, while requesting them to provide detailed and reasoned evidence in support of their submissions. The deadline to provide responses is 3 June 2003.

After analysing the response to the Consultation Paper, the Commission's services will be reporting to the Member States. The most likely outcome of those discussions is a Green or a White Paper, which will examine various policy options for reviewing Regulation 4056/86. This Paper will again be made available for consultation. The likely impact of the various options will be assessed carefully and we will also seek to ensure that the options are in conformity with competition rules as they are applied in other sectors. There will most likely be an in-depth study of the relevant data – the study will be made available for public scrutiny. Finally, if appropriate, the conclusions of the Green or White Paper will be translated into concrete legislative proposals. We are aiming to achieve the first two steps (i.e. Consultative Paper and the Green/White Paper) by 2004 and the conclusive step in 2005. We believe this three-step process will allow for ample consultation of all interested parties and for a fully transparent review process.

The Commission's services embark on this review process without any pre-conceived idea of what the end product should be. The Consultation Paper does not make any policy choice but rather it seeks to involve both sides of the industry in a review of the rules in the light of current market conditions so as to determine whether the serious restrictions on competition authorised more than fifteen years ago – when the block exemption entered into force – continue to be justified and continue to deliver the intended results. In addition, we are very aware that shipping is a global industry that has to operate efficiently under overlapping jurisdictions and therefore throughout this process therefore we shall be keeping our main trading partners updated of developments and we look forward to a fruitful exchange on the review process.

➤ The enforcement of existing rules

Let me turn now to the enforcement of existing rules. Although the Commission has embarked on a review process, the main thrust of the Commission's action in the maritime sector is and continues to be the enforcement of Regulation 4056/86.

I shall not be going into the long list of Commission decisions that have shaped the way in which the liner block exemption is applied. Suffice to say that it is constant Commission practice – and unlikely to change - to apply the provisions of the block exemption restrictively. And, this approach has been confirmed by the Court of First Instance when it found that “the block exemption provided for by Article 3 of Regulation 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deemed useful or even necessary in order to adapt to market conditions”ⁱⁱ.

Notwithstanding this background, it may also be useful to recall the efforts the Commission's services have entered into, since the late nineties in order to engage discussions with carriers so as to establish a common understanding on how the block exemption should be applied. Out of these discussions emerged a series of principles – amongst which for instance an agreement not to restrict the availability of confidential individual contracts.

Turning now to the latest Commission decisions, on 14 November 2002, the Commission granted an individual exemption to those aspects of the Trans-Atlantic Conference Agreement (TACA), falling outside the scope of the liner conference block exemption. The exemption was granted for a period of 6 years (expires 6 May 2005).

The **Revised TACA** was the first opportunity for the Commission to apply some of the principles that emerged during the discussions with carriers. And it was able to do so because the TACA members agreed to make substantial concessions and take account of the interests of both shipping lines and transport users. The Commission's concern was that the exchange of information between the conference members would not jeopardise the confidentiality of ISC. Free and widespread use of such contracts is in the Commission's view crucial to the maintenance of effective competition. The fact that the market had become much more competitive also contributed to the decision to grant exemption.

The Commission's services consider that certain features of the Revised TACA are unequivocally pro-competitive and, as complemented by the guidance provided by the European Court of First Instance, should be immediately emulated by all conferences operating on EU liner shipping

trades. As indicated at the time of the adoption of the Revised TACA decision, conferences are expected in particular:

- (1) to refrain from inland price-fixing,
- (2) to place no restrictions on members wishing to enter into confidential individual contracts with transport users, and
- (3) To regulate capacity only where it is necessary in order to adapt to a short-term fluctuation of demand without combining it with a price increase.

Presently the Commission's services are considering how to ensure that the most important principles of the Revised TACA decision are effectively applied by all conferences operating on EU liner shipping trades.

FEFC car carrier case

As you may have read in the press on Friday, the Commission has welcomed the announcement by the Far Eastern Freight Conference (FEFC) that it would terminate with immediate effect its price fixing regarding the specialised transport of cars by sea.

To give you the background to this case: In November 2002, the Commission cleared the joint acquisition by Wallenius Lines and Wilhelmsen of the deep-sea car carrier business of Korean company Hyundai Merchant Marine (HMM), subject to a commitment to withdraw from a co-operation agreement with one of its main competitors.

During its investigations, the Commission became aware of the practices concerning deep-sea car carriage. This is a highly concentrated sector with few major players world- wide. The four largest specialised car carriers are all members of the Far Eastern Freight Conference (FEFC), the main activity of which is containerised liner shipping. Those four lines jointly fix prices for the carriage of cars on board their specialised vessels on the Far East to Europe shipping routes.

In its merger clearance decision, the Commission concluded that specialised car carriage is not liner shipping. It is therefore not covered by the EU liner conference exemption. As a consequence, the Commission launched an investigation into the specialised car carriage activities of the FEFC - the investigation into the past activities of the FEFC car carriers is still ongoing.

➤ **Modernisation of Antitrust procedures**

On 16 December 2002, the Council adopted a new Regulation on the implementation of Articles 81 and 82 – Regulation 1/2003. This Regulation will replace Regulation 17 as from 1 May 2004.

The central element of the new enforcement system is *the abolition of the Commission's exemption monopoly and the introduction of a legal exception system*. The direct application of Article 81(3) means that a restrictive agreement which fulfils the conditions for exception contained in the Treaty (Article 81(3)) is legal from the beginning and can be enforced before a national court. And the opposite: a restrictive agreement which does not fulfil the conditions of the exception rule will be void and unenforceable from the beginning.

The new system will enhance effective enforcement of the EC competition rules in several ways:

- it will reduce the bureaucracy for companies who do no longer have to notify agreements to the Commission;
- it will allow the Commission to focus its enforcement activities on the most serious infringements like cartels instead of working through a pile of notifications;
- it will allow the national competition authorities like the Office of Fair Trading etc. to fully participate in the application of EU competition law as the Commission has no 1 monopoly in applying the exception rule;
- it will allow national courts to fully adjudicate a competition matter where up till now they were blocked in their action by the exemption monopoly of the Commission.

The reform will enhance the level playing field for companies as regards agreements which affect trade between Member States because national competition authorities and national courts will be obliged to apply EU competition law to all such cases. This will be a formidable factor of integration, as the EC antitrust rules become truly 'the law of the land' for the internal market.

The reform also contains a number of safeguards ensuring consistent application of the rules throughout the Community both as regards the national courts and the national competition authorities. There is no risk of re-nationalisation of competition law.

In view of the entry into force of Regulation 1/2003, the Commission will be issuing a series of executive acts that will be submitted to the Member States, the European Parliament and the public in the course of 2003 for consultations. This “package” will include a Commission Regulation implementing Regulation 1/2003 and at least 6 Notices on

- The methodology for the application of Article 81(3)
- Co-operation within the network of competition authorities
- Opinions
- Co-operation between the Commission and national courts
- Complaints
- The affectation of trade criterion

The Commission is also in the process of creating a network of competition authorities, called the European Competition Network, where the competition authorities of all Member States and the Commission will closely co-operate for the enforcement of the European antitrust rules. As the guardian of the Treaty the Commission will have a special responsibility in that network. It stays in the game as autonomous enforcer and keeps the power to intervene if a serious divergence from established principles were to occur.

The impact on maritime transport

Regulation 1/2003 does not change the substantive rules applying Articles 81 and 82 to transport. In particular it does not change the scope of Regulation 4056/86 nor does it affect the block exemption for liner shipping. But it does do away with Articles 10-25 of Regulation 4056/86 replacing them with a single set of procedural rules applicable to all cases, – whether transport related or not, falling under Articles 81 and 82 of the Treaty.

This in itself should do away with some of the difficulties experienced in past cases triggered by the specificity of the procedural rules applicable to the transport cases (for example the right to be heard by a special Committee).

As for the transitional period, all notifications made under Regulation 4056/86 shall lapse on 1 May 2004. Individual exemptions granted prior to that date will continue to be valid until their date of expiry. All procedural steps taken under that Regulation shall continue to have effects for the purposes of applying Regulation 1/2003.

Considering the changes in the market in the last fifteen years, the work carried out by other jurisdictions and international organisations, it seems appropriate to re-consider whether the substantive rules governing maritime transport should not be revisited to ensure that they are appropriate to current market conditions. We hope to do so in close co-operation with industry and Governments.

ⁱ TAA decision recital 389

ⁱⁱ Judgement of the Court of First Instance of 28.2.2002 in case T-395/94 *Atlantic Container Line and others v Commission* [2002] ECR II 875, paragraph 146