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HIGH TIDES, LOW TIDES:
THE SCOPE OF THE CONFERENCE GROUP EXEMPTION

David Wood, Administrator, DGIV

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INTRODUCTION

By way of preparation for this conference, I looked out some of the papers given at EMLO in recent years.

I first attended this conference in October 1991 as a solicitor in private practice. I heard Helmut Kreis talk about the conference group exemption, the proposal for a consortia group exemption, agreements between conferences and outsiders and the need for guidance from the Community courts.

In 1992, Sir Leon Brittan, Commissioner responsible for competition policy at the time, specifically broached the issue of service contracts. He pointed out that "shippers demand individualised transport services tailored to their specific needs and prefer to deal direct with one or more shipping lines on an individual basis rather than dealing with liner conferences…". He promised that "where shipping lines go beyond what is permitted in the Regulation, the Commission will act firmly."

Also in 1992, John Temple Lang presented a paper dealing with many issues which later appeared in the TAA decision, and some which did not. I will refer further to John's 1992 paper in my presentation but suffice to say at this point that it was remarkable in its prescience and certainly bears re-reading.

The following year, Jonathan Faull focussed on the combination of price fixing and capacity management as well as the issue of inland price fixing. He stated that "there is not enough confidence between shipowners and the specialised lawyers who advise them and the Commission's competition officials". He added that "this leads to misunderstandings, personalisation of problems and unhelpful statements in the media". He gave his view that the TAA should have been handled differently.

Five years later, it is my turn. The title of my contributions today is "High tides, low tides: the scope of the conference group exemption". In a sense, this is a largely a legal debate: in what activities does Article 3 of Regulation 4056/86 permit conferences to engage? I do not propose to enter into the debate as to whether and, if so, what benefits are brought about by the conference system.

The reference to high and low tides is intended to suggest the difference of views which exist on this question. Shipowners have argued that its scope is wider and the Commission has argued its scope is narrower. It is also intended to suggest that there

[1] All views are personal

remain questions which have yet to be debated in full, such as the question of terminal handling charges. Where does the sea end and the land begin?

What is beyond dispute is that whatever the right interpretation, that interpretation has been right since the adoption of the Regulation. Interpretation is not a question of policy: the policy was established when the Regulation was adopted.

Policy does however come into play for those matters which fall outside the group exemption. In as far as the Commission is called upon to grant individual exemption, an assessment must be made as to whether the conditions of Article 85(3) are met. Here, the Commission has some discretion and exercises its discretion in accordance with the policy objectives laid down in the Treaty. The same is true where the Commission grants an exemption subject to conditions: there have been no such cases in the maritime sector.

My paper today will focus entirely on Article 85 issues: the scope of the conference group exemption and the exercise of the Commission's discretion in its assessment of whether the conditions of Article 85(3) are fulfilled in the context of an application for individual exemption.

The debate on the application of Article 86 to liner conferences will have to wait for the outcome of the CEWAL[2] and TACA[3] cases, although I do think that at some point a wider debate will have to take place on the circumstances in which conferences may or may not invite new members.

THE SCOPE OF THE CONFERENCE GROUP EXEMPTION AND THE REASONS FOR GRANTING INDIVIDUAL EXEMPTION

There are six aspects of the group exemption which I will address: inland price fixing, the meaning of 'uniform or common', capacity management, service contracts, freight forwarder compensation and the doctrine of severability.

Inland Price Fixing

It is nearly ten years since Sir Leon Brittan wrote, with the agreement of Karel Van Miert in his then capacity as Transport Commissioner, to the Far Eastern Freight Conference. He expressed the view that inland price fixing by conferences was not permitted under the terms of the group exemption for liner conferences contained in Article 3 of Regulation 4056/86.

In those ten years, interested parties have pored over the wording of Regulation 4056/86 coming up with arguments for and against reading the regulation in such a way that it does cover inland price fixing. This in itself shows, I suppose, that there is room for doubt. And where there is doubt, some would say that the parties claiming the benefit of the exemption should also be given the benefit of the doubt. Others

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2 Joined Cases C-395/96 P & 396/95 P, CMB v Commission

3 Case T-191/98, ACL v Commission

would say no: the general rule that all derogations must be interpreted strictly must apply.

Reams of paper have been filled with legal analysis of the question. In 1991, Philip Ruttley wrote in his article in the European Competition Law Review[4] that "the controversy over the application of Regulation 4056/86 in this respect continues": it does still today.

You will all be aware, I am sure, that this question occupies a central place in the TAA[5] and FEFC[6] cases which are currently before the Court of First Instance. The reason for which these cases have not yet reached a conclusion is that the Court of First Instance suspended its examination pending the outcome of a reference to the Court of Justice from the High Court in the SUNAG case[7] for a ruling on a point of interpretation. The first of the questions posed by the High Court was precisely whether the group exemption extended to multimodal tariffs.

Naturally, such a reference was expected to result in a final ruling on the subject since the Court of Justice is the final court of appeal on questions of interpretation of community law. Moreover, since the Court of Justice concerns itself only with points of law, there was no question of muddying up its analysis with disputed questions of fact.

I have often heard that shipowners have greatly regretted the lack of legal certainty concerning the scope of the group exemption and the fixing of inland prices. They were therefore no doubt as disappointed as I that the SUNAG case was withdrawn by the parties. I understand that the Advocate General's opinion in the case was completed never to be delivered. However, thanks to that reference, the Council and two Member States formally supported the Commission's interpretation of the Regulation on this point.

It would be foolish to attempt to predict when the Court of First Instance will be in a position to rule in the TAA and FEFC cases and further appeal to the Court of Justice cannot be excluded.

As suggested by Nicholas Forwood last year, the possibility remains that neither the Commission nor the liner shipping industry is correct and that multimodal transport is sui generis, excluded from the scope of Regulation 17 but not falling within the scope of any of the transport regulations. This would put it into the category of cases dealt with under the Article 89 procedure.

I understand that some people consider that this would be a better outcome than a ruling by the Community Courts that inland price fixing falls within the scope of Regulation 1017/68. I do not agree. Anyone who has followed the Commission's examination of the British Airways/American Airlines alliance will know that the

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4 Ruttley: International Shipping and EEC Competition Law: [1991] 1 ECLR 5.

5 Case T-395/94, ACL v Commission

6 Case T-96/95, CMB v Commission

7 Case C-339/95 Compagnia di Navigazione Marittima v CMB

Article 89 procedure is so cumbersome that it disadvantages not only third parties, the Commission and Member States but also the undertakings concerned.

The debate over the scope of the group exemption does not only apply to price fixing for inland transport. One of the issues not yet fully addressed is where maritime transport services end and land transport services begin. In the FEFC decision the Commission expressly avoided taking a position on this question stating that *this Decision does not address the question whether price fixing agreements relating to port handling services fall within the scope of application of Article 3 of Regulation No 4056/86.*

However, the Commission has found that ground handling services at airports[8] fall within the scope of Regulation 17 and not one of the transport regulations. In the Frankfurt airport case, the Commission found that the following services, inter alia, fell within the scope of Regulation 17 where they took place on the ramp (or apron) of the airport.

- the provision and operation of equipment for the embarkation and disembarkation of passengers;
- the transport of passengers between the Terminal and the aircraft position and vice versa;
- the loading and unloading of baggage, cargo and mail;
- the transport, sorting and transfer of baggage;
- the transport of cargo and mail on the ramp;
- the push-back/towing of aircraft.

It is at least arguable that some of these activities are similar to activities carried out in ports for which conferences fix the prices their members charge to shippers. If those port activities fall within the scope of Regulation 17, it is difficult to see how they could nonetheless be granted exemption by a different regulation.

So far as individual exemption of inland price fixing is concerned, the Commission's position has been clear since the adoption of its Report to the Council in 1994: if conference members wish to fix inland prices they must engage in co-operation of a type which necessitates the fixing of inland prices. This position was endorsed by the Group of Wise Men set up under the chairmanship of Sir Bryan Carsberg.

It seems relatively clear that such forms of co-operation would be more readily engaged in by consortia rather than conferences since the essence of a consortium is co-operation for the purpose of providing a joint service. This does not exclude the possibility that all the members of a conference might participate but makes it considerably less likely. A second possibility would be the creation of an independent joint venture set up for the purpose of providing inland transport services to the parent liner shipping companies and, possibly, third parties.

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[8] *Olympic Airways*, decision of 23 January 1985. Commission Decision of 14 January 1998 relating to a proceeding under Article 86 of the EC Treaty -Flughafen Frankfurt/Main AG. 98/513/EC: Commission Decision of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty - Alpha Flight Services/Aéroports de Paris, OJ L 230 p10.

In either of these cases, the arguments for setting a common price are much stronger than those based on the need of a conference to insulate its maritime tariff from competition in relation to inland transport.

Uniform or Common

According to Regulation 4056/86, 'liner conference' means a group of two or more vessel-operating carriers … which has an agreement or arrangement…within the framework of which they operate under uniform or common freight rates …

The Commission has interpreted the expression 'uniform or common' as meaning that a conference price must be common or uniform not only as between the shipping lines but also with regard to all shippers of the same commodity. Not only does 'common or uniform' preclude a two- or multi-tier price structure as between carriers, it precludes the creation of different classes of shipper[9].

Once again, this is an interpretation of Regulation 4056 which is before the Court of First Instance.

However, a further question may arise in the future. Article 85(3) is concerned with effects not aims. Thus, a shipping line which entered into an agreement with other shipping lines to fix a uniform or common tariff but which did not operate under that tariff would not appear to fall within the definition of a liner conference and would not benefit from the group exemption. The inapplicability of the group exemption would be automatic and would not require a prior decision of the Commission to that effect.

It would not be sufficient for a shipping line to claim that it was willing to provide services at the rate set out in the uniform or common tariff: Article 85(3) is concerned with effects. It would be necessary for the shipping line in question to be able to demonstrate that some part, possibly a substantial part but in any event more than a minimal part, of its services were actually being provided at the rates set out in the tariff.[10] Provided the tariff rates are set at competitive levels and provided the intention of the shipping line to adhere to the tariff is genuine, this should not prove a problem.

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9 Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty - Trans-Atlantic Conference Agreement, OJ L 376, 31.12.1994, p1, at paragraphs 322 & 323; Commission Decision of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty - Trans-Atlantic Conference Agreement, not yet published, at paragraph 456.

10 This line of reasoning is not new. In 1992 John Temple Lang argued in his EMLO paper that "if independent rate action were used by each and every member of a conference for each and every product of the tariff, the tariff would no longer provide for a single level of reference prices. If such a hypothetical situation arose, and continued, I would consider that the liner conference no longer existed in the sense this expression is used in Regulation 4056/86 since it would not provide "common or uniform rates".

If this were not the case, than it is at least arguable that not only is the individual shipping line not covered by the group exemption but that the agreement between the conference members and that shipping line also falls outside the scope of the group exemption.

Would such an agreement ever be individually exempted? In my view, the answer is no. The Commission has never challenged the assumptions of the Council that liner conferences bring about some benefits to shippers and has shown itself favourable to operational co-operation between liner shipping companies, particularly in the form of liner shipping consortia.

But, other in the air transport sector and that for historical reasons, it has never accepted that price discussions between competitors can fulfil the conditions for exemption. Such an agreement could hardly be said to be bringing about the benefits for which the group exemption has been granted and there would be no reason for it to benefit either from group or, probably, individual exemption.

There is no reason to believe that the Commission would take a more favourable view of discussions relating to issues other than price, such as supply and demand, where it was clear that the purpose of the discussions was to have an effect on price.

Capacity Management

A "capacity management programme" is an agreement under which the parties agree not to use a proportion of the space on their vessels for the carriage of goods in a particular trade. The proportion set aside is part of the forecast excess of supply over demand. Strangely, shipowners have, in the past, strongly objected to the Commission's description of such arrangements as capacity non-utilisation programmes.

Capacity management programmes have operated on the transpacific from 1989 to 1995 (the Transpacific Stabilization Agreement), on the transatlantic from 1992 to 1994 (the TAA) and on the North Europe/Far East trades during 1993 (the EATA).

Only the TAA has claimed to be a liner conference covered by the group exemption. The TAA parties argued that their capacity management programme was covered by the exemption since Article 3(d) expressly refers to "the regulation of the carrying capacity offered by each member".

The Commission considers that Article 3(d) enables the members of a conference collectively to adjust the number of sailings and vessels to seasonal and cyclical variations in demand for transport, to determine the type of vessel used, and thus to ensure that their provision of capacity is appropriate to market conditions.[11]

In the TAA decision, the Commission argued that the TAA capacity management programme was a control mechanism aimed at reinforcing price discipline among its

[11] TAA at para 365.

members. It did not regulate the supply of carrying capacity by conference members, but simply restricted the use of available capacity on the ships used by them. It did not adapt available capacity to market conditions, but sought to restrict the sale of that capacity in order to drive up prices.

The Commission concluded that such a freeze on the use of capacity was not a traditional liner conference practice and was not envisaged when the block exemption was granted.

In support of this conclusion the Commission referred to a statement of the Federal Maritime Commission November 1994 in its draft information form for the filing of tariffs. The FMC stated that that capacity management of the kind practised by TAA was a "relatively new technique for dealing with over-tonnaging and depressed rates" and that "such programmes have the potential to perpetuate economic inefficiencies and unnecessary costs for shippers, particularly if they remain in place beyond short term cargo declines or surges in capacity".

The Commission also argued in the TAA Decision that it must be questioned whether a block exemption covering capacity management in conjunction with price fixing would be lawful, since control over both prices and the volume of supply to potential customers would enable participating undertakings to eliminate competition, contrary to the fourth condition of Article 85(3)[12].

This is another of the outstanding issues before the Court of First Instance in the TAA case.

The Commission has reacted negatively to applications for individual exemption of capacity management programmes. The Commission refused to grant individual exemption in respect of the TAA capacity management programme in 1994 and is likely shortly to do the same in respect of the EATA. In the case of the EATA a meeting of the Advisory Committee of Member States was [due to be] held on 27 January 1999 and a draft decision will soon be proposed for adoption by the Commission.

The Commission's view has been that the direct effect of an artificial reduction in capacity utilisation (as opposed to a permanent reduction in capacity) is to share fixed operating costs amongst a smaller number of containers and to have no effect in reducing fixed operating costs. A reduction in capacity could benefit shippers if the cost of transport were reduced, i.e. if capacity was really withdrawn by the progressive withdrawal of certain vessels or certain operators currently present.

Secondly, there is no evidence that capacity management programmes help to ensure that in the long term the level of capacity is better adjusted to meet the level of demand and it is possible that they encourage the unnecessary premature introduction of excess capacity.

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12 TAA at para 367.

Thirdly, capacity management programmes have always been introduced into trades where there has been a functioning conference. The combination of price fixing and output limitation is probably the most potent form of anti-competitive behaviour which can exist. Moreover, they have appealed to non-conference members so that, in the case of the TSA and EATA, the pre-existing conferences have been able to extend their market power in the same way as with a tolerated outsider agreement.

The approach of the Federal Maritime Commission has also been negative but has been somewhat less well publicised. As mentioned above, the Transpacific Stabilization Agreement operated on the transpacific from 1989 to 1995. In 1996 the TSA parties filed for re-instatement of their CMP with the FMC. They wished to be allowed to set aside up to 18% of total capacity[13].

The Chairman of the FMC publicly expressed his "very serious concerns about adding capacity controls to TSA's already potent mix of rate authority and high market share"[14]. In the face of FMC and shipper opposition, the TSA withdrew its application in March 1997.

The common factor in the approach of the Commission and the FMC has been the concern at the combination of price fixing and output limitation. The Commission has also been concerned with the fact that such agreements have tended to extend the market power of a conference to independents operating within the same trade: the FMC has expressed the same concern in relation to high market shares.

The question therefore arises whether output limitation without price fixing and coupled with lower market shares (for argument's sake take those provided for in the Consortia Regulation) would qualify for individual exemption. This question has not been addressed by the Commission.

In my view, even in such circumstances, a capacity non-utilisation agreement could only be permitted if the alternative was either

- a withdrawal of capacity leading to a shortage of capacity (in one or both directions) in the reasonably foreseeable future or
- a significant deterioration in the level of service (frequency, type of vessel).

Such a programme could not be open-ended but would have to be in response to a concrete situation and provide for alternative remedies in the light of the continuation of that situation beyond a limited period.

In the light of the TAA and soon-to-be-adopted EATA decisions, I think it very likely that in the event of a notification of a similar capacity management programme, the Commission would give serious consideration to the launching of a procedure leading to the lifting of any immunity from fines following notification. Moreover, the parties involved might well find themselves to be in breach of the 'cease and desist' orders expressly provided for in the TAA and EATA decisions.

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13 Source: Journal of Commerce 21/10/96.

14 Source: Journal of Commerce 20/1/97

Service Contracts

One of the questions which arose in the TACA case was whether TACA joint service contracts fell within the scope of the group exemption.

The Commission's first argument was that the group exemption permits conferences to agree upon a 'uniform or common tariff'. Since TACA's joint service contracts neither appeared in the tariff nor were they based on the tariff, it could not be said that the group exemption covered the agreement of the TACA parties to enter into such contracts. This is a matter under dispute.

So far as the intention of the legislator was concerned, the Commission saw no reason to assume that the Council must have intended such an important form of arrangement to be exempted. In the Commission's view, there is a clear distinction to be drawn between tariff pricing and contractual arrangements. Carriage at tariff rates and arrangements relating to discounts off tariff rates (such as loyalty contracts and time-volume rates) fall within the former category and service contracts fall within the latter.

This distinction seems to have its origins in the notion of common carriage and in the TACA Decision the Commission stated that the distinction between common carriage and contract carriage predates liner shipping conferences. It referred to the UK Carriers Act 1830 (11° Geo. IV. & 1° Gul. IV.), an Act of Parliament limiting the liability of common carriers, which provides that *"Provided always, and be it further enacted, That nothing in this Act contained shall extend or be construed to annul or in anywise affect any special Contract between such Mail Contractor, Stage Coach Proprietor, or Common Carrier, and any other Parties, for the Conveyance of Goods and Merchandizes."* [15]

It appears that the introduction of the conference system hastened the transition of the contract system to the tariff system. In the Majority Report of the Royal Commission on Shipping Rings (at page 25), it is stated as follows:

Contracts. - We have spoken of the rebate system as superseding the system under which shipowners made separate bargains in the form of contracts with their clients. And so far as general merchandise is concerned this is practically true. To a certain limited extent, however, the contract system still survives, but in the great majority of cases the contracts are collective contracts made by the Conference as a whole and not contracts made by individual members of the Conference.

Thus, it can be seen that although the distinction between contractual arrangements and tariff arrangements is not new, the conference system was based on the latter and not the former. So far as service contracts are concerned, there is sufficient historical evidence to conclude that they were a new breed of arrangement only just coming into usage at the time of the preparations for the adoption of Regulation 4056/86.

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[15] TACA at footnote 37.

For example, the United Kingdom Department of Transport published a study in 1986 entiled “Liner shipping services and freight rates. A United Kingdom - Northern Europe comparison”.

4.34 ***This phenomenon [the growth in the prevalence of service contracts] has been largely spurred on by the banning of conference loyalty contracts in the US Shipping Act of 1984, and that Act's specific endorsement of service contracts****. The move towards service contracts in the US was spearheaded by large shippers, who were not prepared to be kept within the restrictions of traditional loyalty contracts in their relations with shipping lines. But the US traditions of transparency and defence of the smaller customer in business legislation have been maintained by :*

(a) requiring that the essential terms of all contracts be made public, and available to all shippers similarly situated; and

(b) permitting shippers to group together in shippers' associations so as to control sufficient volumes of cargo to enable them to secure advantageous service contracts.

The whole Act was made subject to a 5 year monitoring and review procedure, so that the US authorities will be able to consider in 1989 how well this and other aspects of the Act have worked. Although increasing numbers of service contracts are being signed in US trades, there was some initial shipper reluctance to make use of these contracts, not least because in many US export trades, effective rates were falling. It is therefore too early to say how well they are operating.

4.35 ***Service contracts have also been introduced in some other trades recently. But they tend to be offered only to large shippers, often for 100% of their cargo, and to be denied to small shippers who must either ship under a loyalty contract or ad hoc at full tariff rates****.*

The novelty of service contracts is also apparent from the Report of the House of Lords Select Committee on the European Communities concerning European Maritime Transport Policy dated 18 March 1986.

33. The obligations spelled out at Article 5 also cause concern to those members of CENSA [Council of European and Japanese National Shipowners' Associations] whose countries have either become or intend to become contracting parties to the UN Liner Code. Those members would not support an EEC regulation which conflicts with or extends the Code's provisions. Apart from the consequential conflict of jurisdiction the proposal from the Commission extends the principle of government intervention into an area which the Code leaves to commercial negotiation between the parties concerned. In detail the concerns are :

Article 5.1 : extension of consultations to "transport users" (the Code limits consultations to shippers and shippers organisations);

Article 5.2 (a) : introduction for shippers of a 6 month notice period of release from a loyalty arrangement (the Code has no specific period);

Article 5.2 (b) : introduction of a limitation of 3 per cent spread between immediate and deferred rebates (the Code has no limitation);

Article 5.2 (c) : introduction of a user-right of choice of loading/discharge port (the Code has none but, more important, this obligation does not take account of the use of through-rates to and from points inside the country of origin/destination and the onward transport through whichever port the carrier deems necessary);

Article 5.2 (g) : a limitation on the penalties which may be imposed by a conference for breach of a loyalty agreement (the Code leaves this question for agreement between the parties).

It is also important, in this context, that the new type of shipper contracts (Service and Volume Incentive Programmes) are included in the exemption if there is any doubt that they are not covered already by Article 6.

95 *Shipowners and shippers have been in disagreement over certain parts of the revised draft, notably Article 5.2 concerning loyalty arrangements, but it is understood that these differences have recently been largely resolved, and that they have agreed to make submissions to the Commission and to Governments that the Article should be replaced by the wording on loyalty arrangements used in Article 7.1 of the UNCTAD Code. Shippers consider however that where this refers to commercial arrangements to be agreed between the parties, these should be based on four principles: a fair division of rights and obligations; no totality agreements; termination within a reasonable time; and freedom to enter into contracts with individual lines.*

96 ***Shipowners submitted that the Regulation should recognise the existence of various new systems such as time/volume and service arrangements and include them in its scope. Shippers also submitted that the Regulation should provide for service arrangements and stimulate their development. They argued that if the Regulation refers to loyalty contracts it should also refer to other forms of contract like service contracts, otherwise no forms of contract at all should be mentioned.***

99 ***On service contracts, the Committee have been informed by Government witnesses that following discussions in Brussels the Commission does not propose to add a reference to them in the draft Regulation,*** *but that does not stop the development of such contracts. Insofar as service contracts might conflict with the competition rules of the treaty however, and there can be different views on that, the Committee consider that it would be better to include them in the exemptions provided by [the draft Regulation].*

111 *You could exclude everything as a general principle. Loyalty agreements are included specifically - why not other forms of agreements?*

> *(Mr Sunderland)* ***I think it would be perfectly possible, if we had the time, to deal separately with the question of service contracts, which I believe are still in their infancy as far as the generality of shippers is concerned.*** *This is an area where I suspect the Commission's competition people, whose responsibility it is, after all, to draft these provisions and to secure their enforcement, would want to give a lot more time to deciding precisely how and in what terms one should deal with what is potentially quite a large question. It may be there is scope for some reference in a preambular paragraph to the regulation rather than in the hard core of the regulation. That is something we might be able to look at, if it would help.*

For these reasons the Commission came to the conclusion that nothing in Regulation 4056/86 concerns service contracts or methods of pricing other than tariff pricing.

Incidentally, the Commission has been criticised on the grounds that its objections to the TACA's rules on service contracts came out of the blue. Such criticism is unfair as is apparent from John Temple Lang's 1992 EMLO paper in which he stated

"There is nothing in Regulation 4056 which purports to exempt bans on individual service contracts. It is therefore at best very doubtful if such bans, or efforts to impose them, are or indeed could be exempted by Regulation 4056, even if the members of the conference were not in a collective dominant position."

Freight Forwarder Commission

In the TACA Decision, the Commission addressed for the first time the practice of conferences to agree the level of reward which conference members pay to freight forwarders[16].

Article 3 of Regulation (EEC) No 4056/86 concerns the fixing of rates and conditions of carriage, that is to say, the terms on which maritime transport services are sold to shippers. It does not expressly cover an agreement to fix the terms on which freight forwarders or other intermediaries are rewarded for providing intermediary services to the members of a conference although it has been argued that such a restriction is ancillary to the restrictions of competition permitted under the group exemption.

The TACA parties argued that conferences operating on the Northern Europe/US trades have fixed "westbound levels of commissions agreed to be paid to European [other than UK and Irish] forwarders" since the early 1970s. They have also argued that other conferences have fixed such prices since the beginning of the twentieth century.

The Commission considered that the practice of fixing freight forwarder compensation was intended to restrict competition between the parties to the TACA thereby adversely affecting competition as regards the demand for services supplied by freight forwarders to the TACA parties. This might deprive customers of the benefits which would result from competition between the TACA parties.

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16 TACA at paras 505 et seq.

It might also inhibit competition between freight forwarders and be a disincentive to improvements in the quality of services provided by freight forwarders, who may be encouraged to concentrate on the volume as opposed to the quality of business. Thus, competition may also be adversely affected on the supply side.

The Commission did not consider that the removal of maximum levels of freight forwarder commissions (together with the other restrictions described above) would lead to higher prices overall and so justify this restriction of competition. In any event, this is an argument which could be made for every price-fixing agreement on the demand side. In order to achieve optimal allocation, prices should reflect the real economic value of products and services as determined by individual buyers.

If the cost of using freight forwarder services rose too sharply for shippers they would be likely to switch very quickly to dealing direct with the carrier. If, however, the freight forwarder is perceived as being capable of contributing material added value, there is no reason why this should not be reflected in higher prices. In this respect freight forwarders are in the same position as very many other intermediaries: if the cost of going through the intermediary becomes too high, the consumer will seek other distribution channels such as direct purchase from the supplier.

Accordingly, the Commission did not consider that the agreement to fix the levels of remuneration paid to freight forwarders could qualify for individual exemption. This approach is very much in line with the approach that the Commission has adopted both with other forms of intermediary, such as insurance brokers, and with professional bodies[17].

We have been asked whether the TACA decision applies to freight forwarder compensation eastbound, that is to say shipments despatched from the US by a person in the US. For Article 85(1) to apply, it is sufficient that an agreement restricts competition within the common market[18]. An effect on competition within the EU

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17 The role of intermediaries, such as brokers and agents, may in some circumstances give rise to competition concerns. The Commission has taken no formal decisions in this field, although it did in 1987 publish an Article 19(3) notice proposing to exempt an agreement notified by the Irish Insurance Federation fixing maximum rates of commission that insurers would pay to intermediaries. The insurers wished to avoid commission rates rising (which ultimately had to be paid by consumers), and claimed that consumers would also benefit because intermediaries would be more likely to give best advice uninfluenced by the commission they were receiving. No decision was subsequently taken, and it seems unlikely that the Commission would now be persuaded to exempt this type of horizontal agreement between insurers fixing the rates of commissions to intermediaries (See for example UIC - Distribution of railway tickets by travel agents [1992] OJ L366/47 (infringement decision with fines for inter alia a standard rate of commission to travel agents; decision annulled because adopted on the basis of Regulation 17 rather than Regulation 1017/68: T-14/93 UIC v. Commission [1995] ECR II-1503; C-245/95 P Commission v. UIC [1997] ECR I-1287).

18 Joined Cases 89/85 etc *Ahlström v. Commission* [1988] ECR 5193.

could result from fixing freight forwarder commission on eastbound shipments in one or both of the following ways:

- an indirect restrictive effect on the markets for the goods being shipped: assuming the effect is to make US exports more expensive, there will be fewer/more expensive US exports to the EU, thus reducing competition on the EU markets for those goods; and/or, EU goods relying on US parts or raw materials will be more expensive;

- an indirect restrictive effect on the EU market for maritime services: by agreeing what is in effect a purchasing cartel for freight forwarder compensation, the TACA parties will gain additional profits which could then affect their competition in selling to customers in the EU. However, that affect could be beneficial for EU customers if the parties use their additional profits to subsidise price competition to EU customers.

The services of the Commission have taken the preliminary view that both of these two potential effects within the EU are indirect and speculative. The second effect is not necessarily of harm to EU customers. It can therefore be doubted that the fixing freight forwarder commission on eastbound shipments gives rise to any restriction of competition within the common market.

Severability

The doctrine of severability states that commercial agreements may be preserved in part by striking down only those parts of an agreement which are illegal or against public policy. The principle is well known in at least some national legal systems, has been accepted by the ECJ in Consten & Grundig[19] and is expressly mentioned in Regulation 4056/86.

The doctrine presupposes that the underlying aim of the agreement is not itself objectionable. Clearly, those provisions falling outside the scope of Article 85(1) should be saved if appropriate by applying the doctrine of severance. As the Court has repeatedly pointed out, the doctrine of severance concerns provisions *"which do not involve the application of the Treaty"*[20] and is therefore to be applied by national courts.

Thus, it would be common to sever exclusivity or non-competition clauses from distribution agreements and the principle laid down in Consten & Grundig is fully applicable.

However, where the main or primary purpose or effect of the agreement is illegal or against public policy there is no reason to seek to preserve those parts of the agreement, if any, which are not for one reason or another when viewed in isolation from the severed parts themselves objectionable. There is no sense in holding that the agreement by the members of an illegal price fixing cartel to meet once every three months should be upheld.

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19 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community. Joined cases 56 and 58-64. ECR 1966 page 429

20 Technique Minière [1996] ECR 235

There is a third category of agreements: agreements which include provisions falling within the scope of a group exemption as well as provisions falling outside. This presupposes that the agreement contains provisions some of which fall within Article 85(1) and some of which do not and that some of the provisions falling within Article 85(1) cannot be assumed to fall within Article 85(3) without individual examination.

In certain cases the answer is clear. The inclusion of certain clauses expressly causes the benefit of the group exemption to fall away (eg Article 8(1) of Regulation 1984/83). In other cases, the operation of an opposition procedure is intended to provide a procedural mechanism for resolving the issue. Regulation 4056/86 is ambiguous.

Where the clause in question is either not a 'black' clause or the group exemption Regulation is silent as to whether the group exemption continues to apply if further restrictions of competition are included, the situation is more complicated. Clearly, those provisions falling outside the scope of Article 85(1) should be saved if possible by applying the doctrine of severance. The aim, as indicated above, being to save a commercial agreement.

However, the question remains whether all the provisions falling within the scope of Article 85(1) need to examined together to see whether the agreement in question as a whole fulfils the conditions for exemption. Or whether it is possible to continue to assume that the group exemption continues to apply to part of the agreement and only individually examine the provisions falling outside the scope of the group exemption.

In other words, should the benefit of the group exemption fall away entirely from the whole agreement if that agreement includes restrictions

(a) which are additional to those covered by the group exemption (other than ancillary restrictions), and
(b) which increase the anti-competitive effect of the group-exempted restrictions.

The principle reason for an affirmative answer to this question is that the Commission cannot safeguard the interests of third parties if its only power in respect of the restrictions falling 'in general' within the scope of the group exemption is to adopt a decision withdrawing the benefit of the group exemption.

Such a decision could not normally have retrospective effect and where a third party had suffered harm as a result of the overall agreement, he would have to show to a national court that his harm was caused by the restrictions falling outside the group exemption (although the purpose of those restrictions may have been to reinforce the anti-competitive effect of the group-exempted restrictions). If his harm has been caused by the 'reinforced group-exempted restrictions', which might well not have qualified for individual exemption had they been individually assessed, he has no remedy in damages.

Support for this view may be found in VAG[21]

[21] VAG France SA v Établissements Magne SA. Reference for a preliminary ruling: Tribunal de grande instance de Paris - France. Case 10/86.ECR 1986 p 4071

13 Where an agreement does not satisfy all the conditions laid down by Regulation No 123/85 the parties may either request the Commission to adopt an individual decision declaring Article 85(1) inapplicable or contend that the conditions laid down in another regulation providing exemption in respect of other categories of agreements are satisfied, or even establish that ***the agreement in question*** *is on some other ground not incompatible with the prohibition contained in Article 85(1).*

This passage seems to assume that where an agreement does not fall within the scope of the group exemption, it is necessary to notify the entire agreement for individual exemption or follow one of the other courses described. Delimitis[22] also lends support for this conclusion by stating that *"It is only those aspects of the agreement which are prohibited by Article 85(1) that are void."*

Such a view is also consistent with the 'cumulative effect' approach taken in Delimitis. Where additional restrictions of competition are included in an agreement to reinforce the anti-competitive effect of restrictions of competition permitted under a group exemption, public policy suggests that the whole arrangement should be scrutinised. The analysis that certain restrictions are in general thought to fulfil the conditions of Article 85(3) is no longer valid where the anti-competitive effect of those restrictions is reinforced by other restrictions. This is particularly the case given that the parties can apply at any time for individual exemption for their arrangements[23].

This view is not inconsistent with either the principle laid down by the Court in Consten & Grundig nor the words concerning severability in Recital 14 and Article 4 of Regulation 4056/86 if the words "covered by the prohibition of Article 85(1)" are taken to mean "falling within the scope of Article 85(1)".

This view is also consistent with the fact that the doctrine of severance is to be applied by national courts in line with the notice on co-operation[24].

ISSUES OF GENERAL INTEREST

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22 Stergios Delimitis v Henninger Bräu AG. Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany. Case C-234/89. ECR 1991 page I-0935 at para 40

23 Delimitis at paras 40-41

24 Where an agreement contains restrictions of competition not falling within the scope of a group exemption - *The national court must first examine whether the procedural conditions necessary for securing* [individual] *exemption are fulfilled, notably whether the agreement, decision or concerted practice has been notified in accordance with Article 4(1) of Regulation N° 17. Where no such notification has been made, and subject to Article 4(2) of Regulation N° 17, exemption under Article 85(3) is ruled out, so that the national court may decide, pursuant to Article 85(2), that the agreement, decision or concerted practice is void* [subject to applying the doctrine of severability].

As a matter of general interest, I should include the usual and oft-repeated assurance that no proposals are in the pipeline to change the conference group exemption in any way - although it is no secret that the Commission is currently examining how it might improve its procedures for applying Articles 85 and 86.

On 1 February 1999, two Regulations will come into force which modernise, simplify and make more user-friendlier its competition procedures. Between them the two new Regulations replace five existing Commission Regulations.[25]

The first Regulation sets out how the Commission will ensure the right to be heard of the different parties involved in competition cases. The second Regulation covers all transport sectors (ie inland transport, maritime transport and air transport) and sets out how to lodge applications and notifications in competition cases relating to the transport sector. This Regulation introduces similar modern rules for companies in the transport sector to those introduced in all other sectors in 1994.

Some concern has been expressed that three transport regulations each dealing with different sectors have been replaced by a single regulation. This concern is misplaced and confuses form with substance. First, the procedural regulations do not alter the substantive regulations one iota. Second, a competent draughtsman could consolidate the three substantive transport regulations into a single regulation in a matter of a couple of hours, again without altering their effect.

Turning to substance, the consortia group exemption will expire relatively soon and therefore a decision will have to be taken whether to renew it, amend or abandon it. The procedure to be followed following the adoption of a formal proposal by the Commission involves:

1. consultation of the Member States,
2. publication of proposed draft text in the Official Journal inviting third party comment,
3. a second consultation of the Member States, and
4. a second publication in the Official Journal again inviting third party comment.

However, even before we get to the stage of going to the Commission with a draft formal proposal, it is our intention to circulate a working document analysing the background to the adoption of Regulation 870/95 including the policy options taken at that time as well as the lessons which have been learnt in applying the Regulation since it came into effect. The working document then assesses the various policy options available to the Commission when the Regulation expires.

The revised procedural regulations are currently available on the DGIV website and the working document on the revision of the consortia regulation will be placed on the website in the near future.

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[25] Commission Regulations (EEC) No 99/63, (EEC) No 1629/69, (EEC) No 1630/69, (EEC) No 4260/88 and (EEC) No 4261/88 will be repealed.

CONCLUSION

I referred to previous Commission speakers in my introduction not merely because each of them has made a significant contribution to the debate over the application of the competition rules to maritime transport. I referred to them because their public statements reveal how consistent has been the position of the Commission.

Now I know that "a foolish consistency is the hobgoblin of little minds". I also know that it is certainly too early for anyone to seek to claim that the approach followed by the Commission has been vindicated. The Commission is as interested as anyone, perhaps more so, in seeing its decisions tested before the Community Courts.

In a sense the Commission almost never loses. Either its decision is upheld or it obtains a useful clarification of a difficult issue. Regulation 4056/86 has clearly led to the raising of difficult issues in the past and if shipowners wish to continue to test the limits of the group exemption, it will do so again.

Finally, I would suggest that the debate about the application of Community competition law in the maritime transport sector must not be restricted to shippers and shipowners. The Community is based on "the principle of an open market economy with free competition favouring an efficient allocation of resources" (Article 102a EC). The competition rules are the principle means enforcing this principle.

The debate about the application of Community competition law in the maritime transport sector is part of the wider debate about the application of Community competition law generally. This debate cannot take place at the level of special interests or even in fora dedicated to specific sectors.

Having said that, there are questions of interpretation of Regulation 4056/86 which remain very much alive and which deserve scrutiny and debate. Unless and until these questions arrive in the Community Courts, EMLO is well-placed to be the pre-eminent forum for such a debate.

26 January 1999