Recent developments in EU competition policy in the maritime sector

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1. INTRODUCTION

I am very grateful for the opportunity to address this knowledgeable audience on the subject of recent developments in EU competition policy in the maritime sector. As many of those present will no doubt be aware, this conference is particularly well-timed, coming as it does just months after three judgments of great significance for the liner shipping sector. It also happens to coincide with the publication of the OECD Secretariat's Final Report on Competition Policy in Liner Shipping and the launching of the European Commission's review of the main EU competition regulation in the maritime sector. I will return to these topics, but I would first like to put these developments into perspective by providing a brief history of EU maritime competition policy over the last decade.

2. A BRIEF HISTORY

2.1. General remarks

Detailed EU competition legislation in the maritime sector essentially consists of two regulations:

– Regulation 4056/86, containing a block exemption for liner conferences, and

– Regulation 823/2000, containing a block exemption for liner shipping consortia.

Regulation 823/2000 is largely uncontroversial and broadly accepted as producing benefits which outweigh the potential disadvantages of the restrictions of competition that are inherent in consortia agreements.

Regulation 4056/86, on the other hand, containing as it does an exemption for price-fixing, is exceedingly controversial.

In this context it should be recalled that European competition policy in this sector (as in other sectors) is shaped largely by the decisions that the Commission takes in individual cases. The development of maritime competition policy thus does not depend on the publication of reports, green and white papers,

notices, new legislation, etc., although all of these various instruments obviously have a major role to play.

Given the controversial nature of the EU liner conference block exemption it is not surprising that much of the Commission's efforts over the past decade have focused on the interpretation of that legislation.

2.2. Commission decisions

The interpretation of the exemption for ***price-fixing*** has been in issue in several cases. In its 1994 *TAA*[2] and *FEFC*[3] decisions, and again in the 1998 *TACA* decision,[4] the Commission objected, *inter alia*, to the collective fixing of tariffs for the inland leg of multimodal transport operations. Relying on the wording of Article 1(2) of Regulation 4056/86, which provides that the Regulation 'shall apply only to international maritime transport services from or to one or more Community ports' the Commission argued that the scope of the exemption contained in Article 3 could not be wider than the scope of the Regulation itself.[5]

Also in dispute in the *TAA* case was the interpretation of the Regulation's reference to 'uniform' rates. The TAA applied a two-tier tariff structure that differentiated between former conference members and independents. The Commission interpreted the reference to 'uniform' rates as meaning that for the transport of a given article a shipper must be offered the same freight rate by all members of a conference. For that and other reasons, the Commission did not consider the TAA to be

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2 Commission decision of 19 October 1994 in Case No IV/34.446 – *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994)

3 Commission decision of 21 December 1994 in Case No IV/33.218 – *Far Eastern Freight Conference* (OJ L 378, 31.12.1994)

4 Commission decision of 16 September 1998 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement* (OJ L 95, 9.4.1999)

5 The Commission's objection to inland price-fixing by conferences has on occasion been portrayed as a blanket prohibition against any form of inland co-operation between carriers. This is incorrect: co-operation that meets the requirements of Article 5 of Commission Regulation 1017/68 (inland transport) is permitted. If it could be demonstrated that an agreement on prices were essential in order to achieve the benefits mentioned in Article 5, and did not lead to the elimination of competition on a substantial part of the transport market concerned, it would presumably qualify for exemption.

a conference within the meaning of Article 1(3)(b) of Regulation 4056/86.

Finally, in the *TACA* case the Commission objected to attempts by the conference to restrict the availability to shippers of individual service contracts. In this respect, the Commission made clear that it considered that the exemption for conference rate-fixing covered tariff arrangements only – it could not be interpreted as encompassing the entirely different concept of contract carriage.

The above points of dispute relate to *price-fixing*. Equally important however is the interpretation of the reference in Article 3(d) of Regulation 4056/86 to 'the ***regulation of*** the carrying ***capacity*** offered by each member [of the conference]'. This issue has been addressed in two Commission decisions.

In the *TAA* and *EATA* cases, the members of the TAA and EATA had agreed not to utilise a proportion of the capacity available on board their container vessels, with the obvious purpose of increasing freight rates by limiting supply. In its *TAA* and *EATA*[6] decisions the Commission objected to these capacity freezes on the grounds that they were not consonant with the aim of Article 3(d), which was the improvement of the scheduled transport service(s) provided by the members of the conference. A capacity freeze does not lead to an improvement in scheduling or to substantial cost savings; no tangible benefits of any significance therefore accrue to transport users.

2.3. Court cases

No description, however brief, of the background to current EU liner shipping competition policy would be complete without some mention of the *CEWAL* case. This case, the first concerning the application of Regulation 4056/86 to have been decided by the Community judicature, raised two fundamental points, the significance of which is not limited to the liner shipping sector. In its ruling,[7] the ECJ confirmed, first, that the same practice may simultaneously give rise to an infringement

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6 Commission decision of 30 April 1999 in Case No IV/34.250 – *Europe-Asia Trades Agreement* (OJ L 193, 26.7.1999)

7 Judgment of 16.3.2000 in Joined Cases C-395/96 P and 396/96 P, *Compagnie Maritime Belge Transport and Others v Commission* [2000] ECR I-1365.

both of Article 81(1) EC and Article 82 EC. Secondly, the Court found that a liner conference within the meaning of Regulation 4056/86, by its very nature and in the light of its objectives, could be described as a collective entity presenting itself as such on the market. A liner conference was therefore capable of holding a dominant position within the meaning of Article 82 EC. In the specific circumstances of the *CEWAL* case neither the Commission nor the CFI had erred in law by finding that the CEWAL conference held a dominant position on the relevant market and that it had abused that position by various practices such as insisting on strict compliance with the 'Ogefrem Agreement', using 'fighting ships' and imposing 100% loyalty rebates.

2.4. Carrier group discussions

In conjunction with and subsequent to the TACA decision, the Commission's services entered into discussions with carriers and shippers with a view to breaking out of the sterile cycle of litigation and establishing a consensus on the way forward. Out of these discussions came agreement between a group of carriers and Commission representatives on a number of guiding principles for future conference agreements. From the Commission's perspective, the most important of these principles was that conference members should be free to enter into confidential individual contracts with shippers. Other key principles included an undertaking on the part of carriers not to engage in inland price-fixing and the placing of strict limits on the type of information that could be exchanged by conference members.

3. RECENT DEVELOPMENTS

3.1. The current legal framework

3.1.1. The Revised TACA

The revised TACA agreement (Case COMP/37.396) is the first comprehensive attempt to put the above principles into practice. Notified to the Commission in May 1999, the agreement comprises both inland and maritime aspects. The inland aspects, including the controversial 'not-below-cost'

clause,[8] were cleared by the Commission in August 1999. The Commission did however raise serious doubts about other aspects of the agreement and in particular the arrangements concerning exchange of information.

In November 2001, the Commission announced its intention to grant clearance to all remaining aspects of the Revised TACA agreement. The Commission is now satisfied that the arrangements concerning exchange of information will not jeopardise the confidentiality of individual service contracts and thereby lead to a decrease in competition between the members of the conference.

The Commission also notes that the Revised TACA parties are subject to considerable external and internal competition, with the conference's market share currently standing at less than 50% and only approximately 10% of conference cargoes being carried under the conference tariff.

After having analysed certain comments and suggestions that it has received from shippers, the Commission will most probably take a formal exemption decision in the very near future.

3.1.2. Capacity management

The revised TACA case has also served to highlight the issue of capacity management. The conference agreement contains a general provision modelled on Article 3(d) of Council Regulation 4056/86, which allows a conference to regulate the capacity offered by each of its members. The revised TACA availed itself of this option over the Christmas and New Year low season of 2000/2001. The capacity programme, which covered a period of five weeks and was notified to the Commission, gave the latter the opportunity to clarify its view of the scope of Article 3(d). The Commission thus considered *inter alia* that a conference capacity management programme could not be used as an instrument to create an artificial peak season and that capacity withdrawal could not be combined

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8 The 'not-below-cost' clause allows the members of the revised TACA to agree (at some point in the future) that when the maritime transport leg of an intermodal operation is provided at the conference tariff, the inland transport leg of the operation shall not be provided at a price below the carrier's own individual cost of providing such inland transport. In its *TAA* and *FEFC* judgments (see below) the Court of First Instance gave its implicit endorsement to this clause.

with an increase in the conference tariff. The revised TACA parties undertook to comply with these guidelines.

The scope of Article 3(d) was also at issue in a case involving the Far Eastern Freight Conference (the FEFC). In October 2001, the FEFC parties decided to implement a six-month co-ordinated vessel withdrawal scheme. The scheme was intended to deal with the combined effects of a drastic fall in demand on the Europe – Far East trades and the introduction of significant amounts of new capacity. In a warning letter to the parties, the Commission indicated that it considered that the FEFC programme was not covered by Article 3(d), as interpreted by the Commission in its *TAA* and *EATA* decisions. In particular, the programme did not, in the Commission's view, have the permissible objective of addressing a short-term fluctuation in demand. Nor would the programme qualify for individual exemption, as any possible benefit to transport users would be more than outweighed by the negative impact of the programme on shippers' transport costs. In response to the warning letter, the members of the FEFC immediately terminated their co-ordinated withdrawal scheme.

3.1.3. CFI judgments

As I mentioned in my introduction, the European Court of First Instance (CFI) has recently delivered three judgments of great importance for carriers and shippers.

The first judgment concerns an appeal by the ***Far Eastern Freight Conference (FEFC)*** against a Commission decision imposing fines for inland price-fixing.[9] The Court established that the EU liner conference block exemption does not give conferences the right to set a common price for inland transport, even if the inland transport forms part of an intermodal (land and sea) transport operation. This does not mean that shipping lines, including conference lines, are prohibited from any form of co-operation with regard to inland transport – it simply means that the co-operation must fulfil a number of strict conditions in order to qualify for exemption. The inland co-operation between the members of the FEFC did not fulfil these conditions.

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9 Judgment of the Court of First Instance of 28.2.2002 in Case T-86/95 *Compagnie Générale Maritime and others* v *Commission* [2002] ECR II-0000.

In its second judgment, the CFI upheld a Commission decision prohibiting the members of the ***Trans-Atlantic Agreement (TAA)*** from engaging in maritime and inland price-fixing and limiting the amount of available maritime transport capacity in order to put upward pressure on maritime freight rates.[10]

The CFI's judgment may be usefully summarised thus as far as the application of the EU liner conference **block** exemption is concerned:

- The TAA was not a liner conference because it did not operate under uniform or common freight rates (Article 1(3)(b) of Regulation 4056/86);
- Not being a liner conference it could not benefit from the EC liner conference block exemption (provided for by Article 3 of the Regulation);
- That being the case, it was unnecessary for the CFI to examine whether the capacity management programme and inland price-fixing arrangements implemented by the TAA would have fallen within the scope of the liner conference block exemption had the TAA been a conference.

On the issue of **individual** exemption, the CFI found:

- That the maritime price-fixing and capacity management aspects of the TAA would lead to the elimination of competition and could for that reason not qualify for exemption;
- That it had not been shown that the inland price-fixing arrangements were apt to lead to any improvement in production. They were therefore ineligible for exemption.

Finally, in the ***TACA Immunity*** case[11] the CFI found that as inland price-fixing fell within the scope of the inland transport regulation,[12] Regulation 1017/68, and as the latter did not

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10 Judgment 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-0000.

11 Judgment of the Court of First Instance of 28.2.2002 in Case T-18/97 *Atlantic Container Line and others* v *Commission* [2002] ECR II-0000.

12 The CFI referred to the FEFC judgment.

contain any provision granting immunity from fines, the Commission's decision[13] purportedly withdrawing immunity from fines did not alter the TAA parties' legal position. The parties' appeal was therefore inadmissible.

In reaching the above conclusion, the CFI rejected the argument that even if Regulation 1017/68 does not expressly provide for immunity from fines, it must be regarded as a general principle of Community competition law that formal notification has that consequence.

3.2. Legislative reform

3.2.1. OECD

On 16 April 2002 the OECD Secretariat published its final Report on Competition Policy in Liner Shipping. The Report concludes that there is no evidence that anti-trust exemptions for price-fixing and rate discussions provide benefits which outweigh their disadvantages for transport users. It recommends that Member countries should consider removing anti-trust exemptions for price-fixing and rate discussions. As a second-best option it recommends that governments should review their existing legislation in such a way as to create conditions favourable to confidential individual contracts.

3.2.2. Review of Regulation 4056/86

A draft version of the OECD Report was published in November 2001 and was debated at a Workshop in December that year. With the agreement of the EU Member States, the Commission stated that it intended to follow up on the OECD Report by carrying out its own, more narrowly focused, examination of the matter.

After reflecting at length on how best to proceed, the Commission decided that only one body of legislation called for review; i.e. Regulation 4056/86, containing the EU liner conference block exemption. While the block exemption for consortia was reviewed quite recently, was found to be working well, and was therefore renewed for a further five

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[13] The decision was taken as a precautionary measure only, to take account of the possibility that the CFI or ECJ might consider that the inland part of an intermodal transport operation fell within the scope of Regulation 4056/86, which does provide for immunity from fines if an agreement is formally notified.

years, the liner conference block exemption has never been reviewed in the fifteen years that is has been in force.

We are therefore now launching a three-stage process to review Regulation 4056/86 and the justification for the EU liner conference block exemption.

The first stage will consist of a technical working paper outlining the key issues and establishing a list of questions to be addressed.

The justification for the EC liner conference block exemption is the assumption that the rate-setting and other activities of liner conferences lead to stable freight rates, which in turn assure shippers of reliable scheduled maritime transport services.[14] Against that background, and in the light of the findings of the OECD Report, it would seem appropriate for the technical paper to examine, *inter alia* :

– Whether there is clear evidence that the price-fixing activities of conferences have led to stable maritime freight rates on the trades to and from the Community and the EEA, and, if so;

– Whether that has assured shippers and other transport users of reliable scheduled maritime transport services, and, if so;

– Whether that result could not have been achieved by other, less restrictive, means such as operational agreements (vessel-sharing agreements, consortia, slot-charter arrangements), which do not involve price-fixing.

The technical paper would be published and governments and industry would be invited to comment and to provide reasoned replies, with supporting data, to the listed questions.

The second stage will consist of an in-depth study of the relevant data, including the replies to the technical paper. That study would most probably require the assistance of specialist consultants.[15] The results of this study and any preliminary policy conclusions that could be drawn from it would be

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14 See the 8th recital of the preamble to Regulation 4056/86.

15 E.g. Drewry Shipping Consultants, Ocean Shipping Consultants.

published in the form of a Green or White Paper. Again, governments and industry would be invited to comment on the findings and conclusions.

If, after having received comments on the Green or White Paper, the Commission were to conclude that some changes appeared to be called for, **the third stage** might consist of a proposal for an amendment of the existing EC liner shipping legislation. The proposal would obviously be published for comment by interested third parties. It is still far too early to predict what that proposal will contain.

The above approach will allow the Commission to examine the issue of antitrust immunity and exemption in three phases: a first phase involving a preliminary identification of the main issues, followed by a second phase in the course of which the issues thus identified are studied in greater depth and finally a third phase where preliminary conclusions are translated into a concrete proposal for new legislation.

We believe that this three-phase examination – providing as it does ample opportunity for comments and suggestions – is the approach best suited to ensure that the views of governments and industry are adequately heard and that any conclusions that the Commission may draw are soundly based in fact and law.

4. CONCLUSION

EU maritime competition policy now stands at a crossroads. The industry has been provided with a high degree of legal certainty through the judgments of the Court of First Instance – and further legal certainty will be provided by the Commission's decision in the Revised TACA case.

This however concerns the application of the existing legislation, while the question now before us is whether that existing legislation is appropriate for current market conditions. We hope to be able to answer that question – with the help of governments and industry – in the not too distant future.