



EUROPEAN COMMISSION
DIRECTORATE-GENERAL IV – COMPETITION

Services
Transport and transport infrastructure

Stability v Competitiveness

Transasia 99 Conference, Hong Kong, 25-27 August 1999

Eric FitzGerald

Administrator, European Commission, DGIV/D2

Rue de la Loi 200, B-1049 Bruxelles/Wetstraat 200, B-1049 Brussel - Belgium - Office: C100 6/34.
Telephone: direct line (+32-2)296.75.49, exchange 299.11.11. Fax: 296.98.12.
Telex: COMEU B 21877. Telegraphic address: COMEUR Brussels.

Internet: Eric.Fitzgerald@dg4.cec.be

1. INTRODUCTION.....	2
2. REGULATORY DEVELOPMENTS	2
3. STABILITY <u>AND</u> COMPETITIVENESS: EC COMPETITION LAW IN THE MARITIME TRANSPORT SECTOR.....	3
4. “POST-TACA” DISCUSSIONS WITH CARRIERS	4
5. ILLUSTRATIVE EXAMPLE: THE REVISED TACA.....	5
6. CONVERGENCE OF US AND EC COMPETITION POLICY RE INTERNATIONAL MARITIME TRANSPORT.....	6
7. MAIN REMAINING DIFFERENCES US/EC	7
8. HOW DOES EC COMPETITION LAW AFFECT ASIAN SHIPOWNERS?.....	7
9. PENALTIES FOR NON-COMPLIANCE.....	8
10. CONCLUSION	9

Mr Chairman, Ladies and Gentlemen,

1. INTRODUCTION

Following the previous speakers' analysis of US deregulation in the maritime sector and its implications for shippers and carriers, I am grateful to have this opportunity to present a European perspective on the current state of play in the liner shipping industry. In so doing, I will briefly describe the similarities and differences between the US and EC approaches to competition in the maritime transport sector.

The title of this presentation is 'Stability v Competitiveness'. Stability, which has the effect of assuring the provision of reliable services to shippers, is mentioned in the recitals to Council Regulation 4056/86, the main regulation governing the application of EC competition rules to maritime transport, as being one of the benefits brought to transport users by liner conferences. This benefit provides one of the justifications for the EC's block exemption for liner conferences, which is described in my background paper for this conference.

Competitiveness is an objective of EC competition policy. The ability of EU companies to compete with each other and with non-EU undertakings is an essential prerequisite for harmonious and sustainable economic growth in the European Union taken as a whole. In general terms, the European Commission believes that competitiveness is best achieved by fostering free competition within an open market economy. It is the task of the Commission's competition department to ensure that such competition is not distorted by restrictive practices.

2. REGULATORY DEVELOPMENTS

The past year has seen important changes in the regulatory environment for international liner shipping. There is however a fundamental difference between Europe and the US with regard to the genesis of this change. While deregulation has come about in the US as the result of sweeping changes in shipping legislation, this is not the case in Europe, where the main maritime competition regulation has remained unamended since its adoption in 1986.

The marked shift in attitudes that nonetheless has occurred in Europe is instead the result of a number of leading Commission decisions in individual cases. These decisions, culminating in the 1998 TACA decision, have provided guidance to the liner shipping industry and to transport users on the Commission's interpretation of the competition rules in the maritime transport sector, and in particular on the scope of the block exemption for

liner conferences. Despite this difference between Europe and the US with regard to the origin of change, the main result should be substantially the same: i.e. to encourage a shift from carriage under a common conference tariff to carriage under individual and multicarrier (joint) service contracts.

3. STABILITY AND COMPETITIVENESS: EC COMPETITION LAW IN THE MARITIME TRANSPORT SECTOR

Detailed EC competition legislation in the maritime transport sector consists essentially of Regulations 4056/86 and 870/95, both of which are described further in my background paper for this conference. Both regulations contain block exemptions: the one for liner conferences; the other for consortia. Regulation 4056/86 also provides for the possibility of individual exemption for agreements between shipping lines that do not meet the conditions for, or otherwise fall outside the scope of, the respective block exemptions.

The block exemption for liner conferences can be distinguished from that for consortia principally by virtue of the fact that the latter does not allow members of the consortium to agree a common maritime freight rate. However the members of a consortium may be, and often are, members of the same conference, and may therefore be applying a common conference tariff to some or all of the cargo carried on the consortium vessels.

As I mentioned earlier, the stability brought about by conferences provides one of the main justifications for granting a block exemption to this type of co-operation between liner shipping companies. The other principle justification consists in the contribution conferences make, in the words of Regulation 4056, “to providing adequate efficient scheduled maritime transport services”.

Consortia generally have a greater potential than conferences for producing real cost savings through the rationalisation of a common maritime transport service, to the benefit of transport users and ultimately of final consumers. Consortium agreements also encourage the necessary investments in more modern and efficient tonnage, and thus increase the competitiveness of the participating lines.

The Commission’s favourable view of consortia is evident from the fact that in the five years in which the consortium block exemption regulation has been in force, no consortium agreement has ever been prohibited.

If the application of the consortium regulation has given rise to little controversy, the opposite is true of the liner conference block exemption. As the description in my background paper shows, differing interpretations

of the scope of this exemption have lead to repeated conflict between the Commission and conference lines over the last decade. It is only recently that this conflict has abated, mainly as a result of discussions between the Commission and carrier representatives.

In view of recent suggestions from within the OECD that competition exemptions for liner conferences should be narrowed, I should perhaps stress that the Commission has no plans at present to repeal or amend the block exemption for liner conferences.

The consortium block exemption regulation, on the other hand, is due to expire in the year 2000. As the Commission's experience of applying the regulation has been generally positive, and as there has been very little adverse comment from transport users, it seems probable, at this stage, that the regulation will be renewed, subject, perhaps, to certain minor amendments being made.

No description, however summary, of the block exemptions for liner conferences and consortia would be complete without a firm reminder of the basic criterion for exemption: i.e. that competition shall not be eliminated on the trade or trades served by the conference or consortium. EC legislation thereby seeks to ensure that the benefits – such as stability – to transport users of co-operation between shipping lines are not outweighed by the negative effects of reduced competition.

It is illustrative of the Commission's approach in this respect that it has never accepted the need for 'stabilisation agreements' or 'capacity management programmes'. Agreements of this kind, under which participating lines agree not to use a proportion of their capacity, are inimical to the basic aims of the EC competition rules. Their sole purpose is to increase prices by limiting output. Such agreements have been condemned by the Commission in its TAA and EATA decisions. It should be emphasised that the fact that the guidelines adopted by the parties to the agreement are described as being purely 'voluntary' will not cause the Commission to view such guidelines in a more favourable light.

4. "POST-TACA" DISCUSSIONS WITH CARRIERS

As I mentioned briefly in passing, after years of conflict between the Commission and maritime transport users on the one hand and ocean shipping lines on the other, a constructive dialogue was finally joined in 1998.

Following discussions between the Commission and carrier representatives, and after consultation with shippers, tentative agreement was reached on a

set of guiding principles for conferences operating on Community trades. These principles provide, inter alia, that conferences shall no longer:

- place restrictions on the availability of confidential individual service contracts, or
- fix prices for inland transport within the European Union.

The principles do, however, provide for the possibility of individual exemption for certain conference arrangements falling outside the scope of the block exemption for liner conferences, such as port-to-port conference service contracts.

5. ILLUSTRATIVE EXAMPLE: THE REVISED TACA

As the only example, to date, of the practical application of these principles, I will briefly describe the Revised Transatlantic Conference Agreement. This agreement was notified to the Commission by the remaining TACA lines at the beginning of this year.

An essential feature of this revised agreement is the absence of any provision for a common inland conference tariff. The example of the Revised TACA in abandoning the inland tariff has been followed by other conferences operating on shipping routes to and from the Community.

‘Not-below-cost’

Instead, the Revised TACA contains a ‘not-below-cost rule’, to the effect that the conference members may agree not to charge below cost when they offer inland transport as part of a multimodal transport operation.

The Commission has given its approval to the not-below-cost rule, accepting the carriers’ argument that below-cost pricing could undermine the stability brought about by the common maritime conference tariff. It is important to note that the not-below-cost rule would apply only to goods carried under the conference tariff; it would thus not apply to cargo carried under service contracts.

It should also be noted that the ‘cost’ referred to is the direct out-of-pocket cost of each individual conference line. There is thus no question of the conference parties being allowed to re-introduce price-fixing on the inland leg in the form of an agreed notional minimum ‘cost’.

The Commission considers that a not-below-cost rule of the kind provided for in the Revised TACA is less restrictive than an inland tariff because it leaves scope for price competition between the conference parties.

Maritime aspects

The Commission's examination of the maritime aspects of the Revised TACA is still continuing. The Commission's investigation centres on whether the parties' arrangements for the exchange of information could harm competition between the parties when they negotiate and agree individual service contracts with shippers.

6. CONVERGENCE OF US AND EC COMPETITION POLICY RE INTERNATIONAL MARITIME TRANSPORT

I mentioned earlier that the US and EC maritime competition rules have converged significantly over the past year. This convergence has come about mainly through the changes in US shipping legislation introduced by the Ocean Shipping Reform Act (OSRA).

The most important of these changes, seen from a European perspective, is the shift from a system whereby the essential terms of individual service contracts, which must be filed with the Federal Maritime Commission, were a matter of public record, to a system whereby the filing requirement remains but confidentiality is ensured for key provisions such as rates, service commitments, intermodal origin and destination points.

As a result of this shift, EC law applicable to international maritime transport now shares a strong commonality of approach with its US equivalent.

The EC competition legislation applicable to maritime transport does not make specific reference to service contracts. However, to the extent that confidential individual service contracts are likely to lead to lower prices and better service through increased competition between conference lines and between these lines and independents, and therefore to benefit transport users (and ultimately consumers), the growth of carriage under such contracts is wholly in keeping with the fundamental objectives of the EC Treaty rules on competition.

In the TACA decision, the Commission stated that the liner conference block exemption did not cover an agreement by members of a conference not to offer individual service contracts or an agreement to restrict the terms on which the members of a conference could enter into service contracts. The decision also found that so-called 'voluntary guidelines' for the form and content of such contracts were equally illegal.

The guiding principles agreed with carrier representatives are consistent with the position taken by the Commission in its TACA decision. In

particular, the Commission's insistence on full confidentiality for individual service contracts should ensure that the terms of these contracts are not 'harmonised' through peer pressure.

7. MAIN REMAINING DIFFERENCES US/EC

Notwithstanding the significant convergence just described, US law still differs from EC law in a number of important respects, the foremost example of which is the difference in approach to inland price-fixing.

While US law allows carriers to agree a common inland rate, the Commission has stated in several decisions (TAA, FEFC, TACA) that inland price-fixing does not fall within the scope of the group exemption that permits liner conferences to set a common maritime tariff. The Commission's position is reflected in its determination to limit the scope of conference and multi-carrier service contracts to the maritime (i.e. port-to-port) leg of a multi-modal transport operation.

The Commission has also made clear on a number of occasions that while an individual exemption for inland price fixing is a possibility, such exemption could not be granted without firm evidence that it was indispensable for the type of co-operation sought by the conference members. Such co-operation would of course have to be of a nature to produce benefits for transport users.

Another division between US and EC law lies in the difference in the approach to the monitoring of the application of the conference tariff. In contrast to the FMC practice, the Commission neither requires conferences to file tariffs nor seeks to enforce the application of these tariffs.

8. HOW DOES EC COMPETITION LAW AFFECT ASIAN SHIPOWNERS?

To the extent that it operates on trades to and from the European Union, an Asian carrier will be affected by EC competition law in exactly the same way as any other carrier operating on those trades. EC competition law is in other words 'flag-blind'; it applies equally and impartially to all undertakings whose activities fall within the scope of the relevant competition rules.

For maritime transport, as well as for other economic sectors, the main criterion for deciding whether a particular activity falls within the scope of application of the EC competition rules is whether the activity in question is liable to affect trade within the European Union (and European Economic

Area). In its *CEWAL* judgment, described further in my background paper for this conference, the European Court of First Instance upheld the Commission's finding that various practices of the CEWAL parties which were intended to foreclose competition from independent lines on trades between Europe and West Africa were liable to have an effect on trade within the European Community. Trade flows were liable to be distorted *inter alia* by the fact that these practices would lead the 'CEWAL ports' to be favoured over the ports called at by the outsiders.

As to administrative practice, the flag-state of the vessel or the country of residence of the carrier is a matter of complete indifference to the Commission in its handling of individual cases. This is true regardless of whether the case arises from a notification of a restrictive agreement, a complaint brought by a transport user, or an investigation undertaken on the Commission's own initiative.

As this presentation will, I hope, have made clear, there are a number of points that carriers operating on Community trades should bear in mind. In particular, carriers should be aware that the Commission will not accept any attempt by a liner conference to:

- a) restrict the right of conference members to enter into confidential individual contracts with transport users;
- b) agree 'voluntary guidelines' for the form and content of such contracts;
- c) fix prices on the inland leg of a multi-modal transport operation;
- d) adopt capacity management programmes.

9. PENALTIES FOR NON-COMPLIANCE

Failure to comply with these rules may lead to severe penalties being imposed on the individual members of the conference. As most conference lines now belong to a group of companies, these carriers should be aware of the fact that the Commission has the power to impose fines on individual group undertakings in an amount equal to 10% of group turnover.

Moreover, whatever reason the Commission may have had in the past to exercise restraint when setting the level of the fines – e.g. the novelty of the applicable legislation, possible doubt as to the scope of the liner conference block exemption – no such reason exists today, now that the Commission's position on the activities of liner conferences has been made abundantly clear by successive leading decisions.

The TACA decision, in which conference members were fined a record total of ECU 273 million, demonstrates the Commission's determination to make full use of its powers in order to deter the undertakings in question from repeating their offending behaviour and others from following their example.

A further option available to the Commission lies in the power the latter has to withdraw the benefit of the block exemption from the infringing conference. As this would in practice lead to the conference having to cease its activities – subject, of course, to the (unlikely) possibility of its being granted an individual exemption – this penalty has been viewed as a 'nuclear option', to be used only as a final resort. The Commission has, so far, never availed itself of this alternative, which is, of course, not to say that it will not do so in the future.

I should mention at this juncture that any penalty imposed by the Commission can be appealed to the European Courts in Luxembourg.

10. CONCLUSION

To conclude, I would like to return to the two concepts that form the central theme of this presentation: i.e. stability and competitiveness.

I have heard carrier representatives express fears that a regulatory environment that encourages industry participants to enter into individual service contracts will undermine stability by promoting destructive competition between already hard-pressed ocean shipping lines.

Although some observers might consider that such a course of events would merely mark the beginning of an inevitable and long-overdue restructuring of the industry, I feel that there is reason to believe that the carriers' fears may be exaggerated.

It could well be argued that individual service contracts will, on the contrary, contribute to increased stability by promoting closer and more enduring relationships between carriers and their customers. Such relationships could provide a sounder basis for commercial decisions with long-term implications, such as whether to make major investments in vessels or terminals.

An additional benefit of a trend towards carriage under service contracts should be to gradually increase the competitiveness of the liner shipping industry as a whole, by forcing individual lines to look for ways in which they can cut costs while offering a service that is attractive to transport users.

The end result will hopefully be to improve the quality of the supply chain from manufacturer to ultimate consumer, with evident benefits for all parties.