



COMMISSION OF THE EUROPEAN COMMUNITIES

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2005/0264 (CNS)

Proposal for a

**COUNCIL REGULATION**

**repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services**

(presented by the Commission)  
{SEC(2005) 1641 }

## EXPLANATORY MEMORANDUM

### 1. GENERAL

Maritime transport services are key to the development of the EU economy. It is paramount that the rules applying to the sector reflect today's market conditions. In keeping with the Lisbon agenda, existing impediments for EU business to compete, innovate and grow should be removed. Legislation needs to be simplified and to be cost effective. In addition, the Commission is presently consulting widely on a new comprehensive maritime policy aimed at developing a thriving maritime economy. This proposal accompanies those goals.

#### 1.1 Council Regulation 4056/86

1. Regulation (EEC) No 4056/86 lays down detailed rules for the application of competition rules (Articles 81 and 82 of the Treaty) to maritime transport services.
2. Originally the Regulation had two functions. It contained procedural provisions for the enforcement of the EC competition rules in the maritime transport sector. This function has become redundant after 1 May 2004, when maritime transport became subject to the general competition enforcement rules of Council Regulation (EC) No 1/2003. Secondly, it lays down certain specific substantive competition provisions for the maritime sector and notably a block exemption for liner shipping conferences allowing them under certain conditions to fix prices and regulate capacity.
3. Scheduled services in container transport account for approximately 40% of the EU25 external trade by sea in value terms. This means that 18% of imports and 21% of EU25 exports are affected by carriers' ability to fix prices jointly under the liner conference block exemption.

#### 1.2 The review of Regulation 4056/86

4. The liner shipping market has changed considerably since Regulation 4056/86 was adopted. The continuing trend towards containerisation has led to an increase in the number and size of fully-cellular container vessels and to an emphasis on global route networks. This has contributed to the popularity of consortia and alliances as a means of sharing costs. The growth in importance of these operational arrangements has been accompanied by a decline in the significance of conferences. The latter trend has been particularly marked on the trades between the EU and the United States, largely as a consequence of pro-competitive Commission decisions applying Articles 81 and 82 EC and changes in US legislation, which have promoted individual service contracts at the expense of carriage under the conference tariff.
5. Transport users (shippers and freight forwarders) seek customer-focused relationships with carriers, reciprocal performance related compensation and integrated logistic solutions. They have systematically questioned the conference system which they consider does not deliver adequate, efficient and reliable services suited to their needs. They call for the abolition of conferences.

6. Other jurisdictions and international organisations have also questioned the benefits of maintaining the conference system. In April 2002 the OECD published a report<sup>1</sup> calling for member countries to remove antitrust exemption for common pricing and rate discussions but to retain the exemptions from other operational agreements between liner carriers. Australia has also been carrying a review of the sector and has recently reached similar conclusions<sup>2</sup>.
7. Against this background the Commission launched a review of Regulation 4056/86 to determine whether reliable scheduled maritime services could be achieved by less restrictive means than horizontal price fixing and capacity regulation. A Consultation Paper issued in March 2003 was followed by a public hearing in December 2003 and the adoption of a White Paper in October 2004. Numerous submissions were received from all stakeholders. The European Parliament<sup>3</sup>, the Economic and Social Committee<sup>4</sup> and the Committee of the Regions<sup>5</sup> issued opinions. Three meetings with Member State competition and transport experts were held. The Commission contracted three studies from independent consultants to look into the issues arising from a repeal of the conference block exemption. All documents are published in DG COMP website<sup>6</sup>.

### **1.3. Subject**

8. The proposed Regulation aims at repealing Regulation 4056/86 in its entirety and notably the liner conference block exemption, (Articles 3 to 8, 13 and 26). Certain provisions which are redundant are also repealed in line with the EC's overall policy to reduce and simplify Community legislation (Articles 2 and 9).
9. Finally, it amends Council Regulation 1/2003 to bring cabotage and tramp vessel services under the scope of the common competition implementing rules.

### **1.4. Legal basis**

10. The legal basis for the proposed Regulation is Article 83 of the Treaty. The Commission's initial proposal for Regulation 4056/86 was also made on the basis of Article 87 [now Article 83] of the Treaty. The Council considered that Article 87 was the appropriate legal basis for the Regulation, but added Article 84(2) [now Article 80(2)] of the Treaty since Article 9 of the Regulation dealt with possible conflicts of law with third countries. The Commission formally reserved its position and stated that Article 87 of the Treaty constituted the appropriate legal basis for the Regulation in its entirety, including Article 9.
11. While it is normal practice to base a Community measure on the same legal basis as the original, there are good grounds to deviate from this practice where the legal basis of the original measure can be considered incorrect. In the light of the case law

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<sup>1</sup> DSTI/DOT (2002) 2, 16.4.2002

<sup>2</sup> Review of Part X of the Trade Practices Act 1974 : International Liner Cargo shipping, Productivity Commission Inquiry report released by the Government on 23 February 2005

<sup>3</sup> Own initiative report of the Committee for Transport and Tourism, xxxxx? 11 October 2005

<sup>4</sup> TEN/208 – CESE 1650/2004 – 16 December 2004

<sup>5</sup> CdR 485/2004, 13 April 2004

<sup>6</sup> <http://europa.eu.int/comm/competition/antitrust/legislation/maritime/>

of the Court, Article 84(2) of the Treaty is inoperative and redundant as a legal basis for Regulation 4056/86 because the aim and content of Regulation 4056/86 including Article 9 relate to competition law. The proposal for a regulation repealing Regulation 4056/86 should therefore be based on Article 83 of the Treaty only.

## **1.5. Cabotage and tramp services**

### *1.5.1. General remarks*

12. Cabotage and international tramp vessel services are currently the only remaining sectors that are excluded from the Community competition implementing rules.<sup>7</sup> The lack of effective enforcement powers for these sectors is an anomaly from a regulatory point of view.
13. The proposal to bring these services under the common competition implementing rules does not involve a substantive change for the industry as the substantive competition rules, set out in Articles 81 and 82 of the Treaty, already apply.

### *1.5.2. Cabotage*

14. Regulation 4056/86 does not explain why cabotage is excluded from its scope. The only indirect reference is to be found in recital 6 which states that the Regulation's objective is to avoid excessive regulation of the sector, implying that in a majority of cases cabotage services would not affect intra-Community trade. However, this does not justify why these services should from the outset be excluded from the scope of Regulation 1/2003.

### *1.5.3. Tramp*

15. Non-regular maritime transport services of bulk and break-bulk today cover a wide range of highly diversified services of significant economic importance of which most have a clear European dimension. The fourth recital of Regulation 4056/86 suggests that the exclusion is due to these services operating on a free and competitive market. This however is presumed to be the case for all de-regulated services, without it being deemed necessary to exclude such services from the implementing regulations.
16. Including these services within the scope of the implementing Regulation will increase legal certainty. Under Regulation 4056/86, industry as well as the competition authorities have to devote considerable resources into assessing whether a service fulfils all of the five criteria set out in Article 1(3)(a) of the Regulation<sup>8</sup> before determining what action could be taken and by whom.

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<sup>7</sup> Article 32 (a) and (b) of Regulation 1/2003.

<sup>8</sup> The transport of goods in bulk or in break-bulk in a vessel chartered (wholly or partly) to one or more shippers on the basis of a voyage or a time charter on any other form of contract for non-regularly scheduled or non-advertised sailings where freight rates are freely negotiated case by case in accordance with the conditions of supply and demand

#### 1.5.4. *Guidance to the tramp sector*

17. In the consultation process various submissions emphasised the need to provide guidance to the tramp sector on the application of the EC competition rules. The Commission stated in its White Paper that it would consider issuing some form of guidance in a manner that is to be determined. For that purpose the Commission is engaged in discussions with tramp operators so as to understand the issues at stake. The Commission is committed to making progress in these discussions so as to determine whether, and the extent to which, these agreements constitute a novel question to which the Court's jurisprudence and the Commission practice have yet to provide an answer.
18. The Commission intends to issue guidelines explaining how the competition rules apply to the maritime sector in general, and to tramp services in particular. Although such guidelines can be formally issued only after the Commission has been empowered by Regulation 1/2003, the Commission is currently exploring with industry whether it is necessary and appropriate to provide informal guidance before the changes to Regulation 1/2003 are made.

#### **1.6. Technical agreements**

19. Article 2 of Regulation (EEC) No 4056/86 states that the prohibition laid down in Article 81(1) of the Treaty does not apply to agreements whose sole object and effect is to achieve technical improvements and co-operation, on the grounds that they do not restrict competition.
20. If an agreement restricts competition in the way provided by Article 81 (1), Article 2 will not apply. An evaluation of each single technical agreement even if listed in Article 2 is therefore necessary. Looking back on the application of this Article, this process has not been straightforward and has come at a cost to the industry. Carriers have often interpreted Article 2 broadly whilst the Commission and the Court of First instance consider that agreements that are not purely technical but also involve some form of commercial co-operation will fall within the scope of Article 81 (1)<sup>9</sup> and thus fall outside the scope of Article 2. Litigation has ensued.
21. The argument has been put forward that, in spite of its declaratory nature, Article 2 should be maintained because it might provide guidance notably in the context of modernisation, when undertakings have to assess for themselves whether their agreements are caught by Article 81(1) of the Treaty. The case law of the Commission and the Court is clear on the very limited scope of the provision which merely intends to confirm that agreements which are not restrictive of competition in the first place do not fall under Article 81(1) of the Treaty and as such are not

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<sup>9</sup> Commission decisions in FEFC (OJ L 378, 31.12.1994, p. 17 par 66) and FETTCSA (OJ L 268, 20.10.2000, p. 1 par 146-147) with regard to provision for technical agreements in Article 3 of Regulation (EEC) No 1017/68 and Article 2(1) of Regulation (EEC) No 4056/86 respectively. For the Court of First instance see Case T-229/94 Deutsche Bahn AG v Commission [1997] ECR II-1689, paragraph 37 in relation to the similar exception for technical agreements provided for in Article 3 of Regulation (EEC) No 1017/68.

prohibited<sup>10</sup>. Article 2 therefore does not add legal security. It should also be recalled that, for similar reasons, the Council in 2004 repealed a similar provision on technical agreements in the air transport sector.<sup>11</sup>

### 1.7. The liner conference block exemption

22. The block exemption is both highly generous and unique. It is generous because it permits liner conferences to engage in activities that would normally constitute a hard core restriction of competition (collective price fixing and capacity regulation) and which are unlikely to fulfil the conditions of Article 81 (3)<sup>12</sup>. It is unique because it is contained in a Council Regulation<sup>13</sup> which was adopted even though the Commission had not gained any experience in granting individual exemptions in the sector. Furthermore, it contains no market share thresholds and is unlimited in time.
23. The adoption of this exceptionally generous block exemption regulation can only be explained in its historical and political context. It was the result of the discussions that sought to reconcile the contradictory requirements of the UNCTAD Code of Conduct for Liner Conferences<sup>14</sup>, to which some Member States had acceded, and the EEC Treaty.
24. The industry has sought to apply the provisions of the block exemption broadly and extensively so as to cover all activities the carriers deemed useful or necessary to adapt to changing market conditions. This has led to a series of Commission decisions and subsequently litigation whereby the Court confirmed that the block exemption – despite its exceptional nature – cannot derogate from the Treaty competition provisions and must be given strict interpretation<sup>15</sup>.
25. The justification for the liner conference block exemption in essence assumes that conferences bring stability, assuring exporters of reliable services which can not be achieved by less restrictive means.
26. After a thorough review process the Commission has concluded that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition.
27. In present day market circumstances, the four cumulative conditions of Article 81(3) of the Treaty needed to justify an exemption for liner conference price fixing and capacity regulation are not fulfilled.

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<sup>10</sup> See in this regard also the Commission Notice on horizontal guidelines (OJ C 3 of 06.01.2001 p. 2), para 24.

<sup>11</sup> See Council Regulation No 411/2004 of 26.02.2004 (OJ L 68 of 06.03.2004, p. 1).

<sup>12</sup> See Commission notice on Guidelines on the application of Article 81 (3) of the Treaty, OJ C 101, 27.4.2004, p.27, paragraph 46

<sup>13</sup> The Council usually empowers the Commission to adopt Block Exemption Regulations. Of the fifteen block exemptions currently in force only one besides Regulation 4056/86 is adopted by the Council (Regulation 1017/68). These are the only two block exemption Regulations that do not have an expiry date or review clause.

<sup>14</sup> <http://www.admiraltylawguide.com/conven/liner1974.html>

<sup>15</sup> 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-875, paragraph 146

28. To fulfil the first condition of Article 81(3) of the Treaty, it must be established that concrete economic benefits flow from the price fixing and capacity regulation by conferences. A direct causal link between the alleged stability and the provision of reliable shipping services must be established.
29. Carriers consider the reliability of service as the main benefit that derives from conferences. However, in today's market, conferences are not able to enforce the conference tariff and do not manage the capacity that is made available on the market. The majority of cargo is carried under confidential individual agreements between carriers and transport users rather than under the conference tariff. The proportion of contract cargo is very high ranging from 90% and above in the Transatlantic trade to 75% in the Europe to Australian trade. The same occurs in the Europe to Far East trades. Thus, under the current market circumstances, price stability and the reliability of services are brought about by individual service contracts.
30. The second condition of Article 81(3) of the Treaty requires that, if liner conferences were to achieve economic benefits, a fair share of these benefits should be passed on to consumers. Yet transport users (shippers and freight forwarders) fail to see any benefits of price fixing by conferences and call for their abolition. Although the conference tariff is no longer enforced it may in some instances act as a benchmark for the setting of individual contracts. Moreover conferences are still setting surcharges and surcharges and the same level of charges or adjustment factors are often applied by non-conference members. These charges and surcharges account for on average 30% of the price of transport.
31. Under the third condition of Article 81(3) of the Treaty, the test is basically whether there are less restrictive alternatives than conference price fixing which would assure reliable liner services to the benefit of consumers.
32. Today, scheduled liner services are provided in several ways. Independent carriers operate outside conferences on all main trades to and from Europe. Co-operation arrangements between liner shipping lines not involving price fixing, such as consortia and alliances<sup>16</sup>, have increased and have important shares of the market in all major trades. Under certain conditions, consortia are block exempted from the prohibition set out in Article 81 of the Treaty by Commission Regulation (EC) No 823/200 of 19 April 2000<sup>17</sup> on account of the rationalisation they bring to the activities of member companies and the economies of scale they allow in the operation of vessels and port facilities. Moreover, confidential individual service contracts between individual carriers and individual shippers account for the majority of cargo transported. The restrictions permitted under Regulation 4056/86 (price fixing and capacity regulation) are therefore not indispensable for the provision of reliable shipping services.

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<sup>16</sup> Council Regulation (EEC) No 479/92, based on Article 87 [now 83] of the Treaty empowered the Commission to apply Article 81(3) of the Treaty to liner shipping companies grouped in consortia and providing a joint service (OJ L 55, 22.9.1992, p.3)

<sup>17</sup> OJ L 100, 20.4.2000, p.24 as amended by Commission Regulation (EC) No 463/2004 of 12 March 2004, OJ L 77, 13.3.2004 and by Commission Regulation 611/2005, OJ L 101, 21.4.2005, p. 10

33. Finally, the fourth condition of Article 81(3) of the Treaty requires that competition should not be eliminated on a substantial part of the market. Conferences operate alongside consortia, alliances and independent operators. It would appear therefore that the fourth condition of Article 81(3) of the Treaty may be fulfilled. However, since the four conditions of Article 81(3) of the Treaty are cumulative and the first three conditions are not fulfilled for the reasons explained above, the question whether or not the fourth condition is fulfilled could be left open.
34. This said, carriers are likely to be members of a conference on a trade and outsiders in another. They may also be members of conferences and of consortia or alliances on the same market thus cumulating the benefits of the two block exemptions. In all cases, they exchange commercially sensitive information with their competitors that may allow them to adapt their conduct on the market. In addition for charges and surcharges representing on average 30% of the price of transport, there is clearly no competition on this part of the price. Given the increasing number of links between carriers, determining the extent to which a particular conference is subject to effective competition is a case by case assessment.

#### **1.8. Conflict of laws**

35. Liner conferences have traditionally been tolerated worldwide. No jurisdiction has so far entirely removed their anti-trust immunity or exemption. If the EU would be the first to repeal the liner conference block exemption, this raises the question whether there is a risk of a conflict of international laws.
36. The Commission does not believe that a repeal of the liner conference block exemption would create such a risk. A conflict of laws would arise only when one jurisdiction *requires* something that another jurisdiction *prohibits*. The Commission is not aware of any jurisdiction that imposes such an obligation on liner shipping operators.
37. If the liner conference block exemption is repealed all carriers (both EU and non EU) that are presently part of conferences would no longer be allowed to fix prices and regulate capacity on those trades. Given the definition of a conference this implies that conferences would no longer operate on trade lanes to and from the Community. Nothing would impede these carriers to continue being part of conferences on other (non EU) trades.
38. Article 9 of Regulation 4056/86 provides for a procedure to be followed if the application of the Regulation results in a conflict with the laws and regulations of a third country. It is superfluous because the procedure foreseen therein is standard. If a conflict relating to competition law arises the Commission enters into consultation with the third country in question to lessen the impact of the divergence of approach and then takes all additional steps that may be necessary.
39. Competition law is not applied in the same way in all jurisdictions. Divergences exist and the increasing importance of international cooperation between competition law enforcement authorities is widely recognised. For these reasons, the Commission pursues a dual policy of, on the one hand, developing enhanced bilateral cooperation with the European Community's main trading partners and, on the other, of examining ways to expand multilateral co-operation in the field of competition.



Therefore, also in light of the EU's overall policy to reduce and simplify Community legislation, Article 9 should be repealed.

## **1.9. Need for an alternative to the conference system**

40. Industry is divided on whether an alternative to the conference system is necessary, in the event of a repeal of the conference block exemption. Transport users consider that existing alternatives, such as the Consortia Block Exemption are sufficient. Carriers on the other hand have argued that there is a need for new block exemption.
41. The European Liner Affairs Association (ELAA), a carrier organisation representing about 80% of world capacity has proposed that the conference block exemption should be replaced with an exchange of information system. This system would potentially cover the whole liner shipping market and thus be broader in scope than the present conference block exemption.
42. For such a system to be acceptable it must respect the Court case law and the Commission practice on exchanges of information between competitors. Some elements of the ELAA proposal appear to be in line with these requirements. However, others are problematic notably because they do not differ in effect from what conferences do today. Accepting the proposal as such would remove all the pro-competitive effects of the abolition of the conference system.
43. The Commission is committed to continuing the dialogue with industry to seek clear indications and substantiated facts about what it needs in order to function effectively. Given that competition rules have never applied fully to the liner sector, the Commission will issue appropriate guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime. The guidelines, which should be promulgated by end 2007, would treat issues such as, the independent data warehouse, the creation of a trade association and of trade fora, the publication of a price index and common formulae for charges and surcharges. The purpose of these guidelines is to explain, inter alia, how the competition rules apply to the liner sector in general, including timely and regular exchange and publication of information on capacity and utilisation. As an interim step in the preparation of guidelines, DG COMP will publish an "issues paper" on liner shipping in September 2006.

## **1.10. Impact of the repeal of Regulation 4056/86**

### *1.10.1. Economic assessment*

As it is shown in the annexed impact assessment, the repeal of the conference block exemption and that of Articles 2 and 9 is the best available option to lower transport costs whilst maintaining reliability of services on all trades; enhancing the competitiveness of European industry, in particular transport users without endangering that of European carriers and meeting the objectives of the Lisbon agenda for the simplest and most cost effective legislative option.

### 1.10.2. *International implications*

44. Fourteen Member States have made use of the option set out in Council Regulation 954/79 and have ratified the UNCTAD Code of Conduct for Liner conferences. The Code is not applied in practice and there have been no new accessions since the early 1990s.
45. If the liner conference block exemption is abolished the application of the Code becomes incompatible with the EC competition rules. This implies that the Member States that have ratified the Code of Conduct would have to denounce it.<sup>18</sup> It also implies that, for the sake of coherency, the Community legislator should repeal Regulation 954/79. The Commission will be tabling a proposal to that end.
46. Furthermore, national laws, regulations or administrative provisions implementing Regulation 954/79 will have to be adjusted. Two Member States may also have to revisit their international agreements with third countries that refer to the Code of Conduct or Regulation 4056/86.
47. As a consequence, the date of application of those provisions of Regulation (EC) No 4056/86 relating to the liner conference block exemption should be postponed for a period of two years. This concerns Articles 1(3) points (b) and (c), Articles 3 to 8 and 26.
48. The repeal of the liner conference block exemption would not have any implications for the international agreements entered into by the EU which contain a reference to Regulation 4056/86 and/or to the Code of Conduct. There are currently fourteen such agreements.<sup>19</sup> Considering the way the provisions are phrased, the Commission holds the view that there is no need to modify these agreements if the Council decides to repeal Regulation 4056/86 because the texts do not impact on the ability of carriers to either party to the agreement to operate outside conferences.

## 2. CONCLUSIONS

49. The Commission accordingly proposes that the Council adopts the proposed Regulation, repealing Regulation 4056/86 and amending Regulation 1/2003.
50. The proposed Regulation will:
  - repeal all remaining provisions of Regulation (EEC) No 4056/86;
  - delete Article 32 of Regulation (EC) 1/2003, which excludes from its scope tramp services and cabotage.
51. The proposed Regulation presented by the Commission with this memorandum falls within the field covered by the European Economic Area and is accordingly of relevance to it.

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<sup>18</sup> Article 50 of the Code provides for denunciation to be notified in writing and to take effect at least one year later.

<sup>19</sup> See *attachment 1*.

Proposal for a

**COUNCIL REGULATION**

**repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services**

**(Text with EEA relevance)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the European Parliament<sup>2</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>3</sup>,

Having regard to the opinion of the Committee of the Regions<sup>4</sup>,

Whereas:

- (1) Since 1986, the application of the rules on competition in the maritime transport sector has been subject to the provisions of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport<sup>5</sup>. Regulation (EEC) No 4056/86 originally had two functions. Firstly, it contained procedural provisions for the enforcement of the Community competition rules in the maritime transport sector. Secondly, it laid down certain specific substantive competition provisions for the maritime sector and notably a block exemption for liner shipping conferences, allowing them to fix prices and regulate capacity under certain conditions, the exclusion of purely technical agreements from the application of Article 81(1) of the Treaty and a procedure for dealing with conflicts of international law. It did not apply to maritime transport services between ports in one and the same Member State (cabotage) and international tramp vessel services.

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<sup>1</sup> OJ C, , p. .

<sup>2</sup> OJ C, , p. .

<sup>3</sup> OJ C, , p. .

<sup>4</sup> OJ C, , p. .

<sup>5</sup> OJ L 378, 31.12.1986, p. 4. Regulation as last amended by the 2003 Act of Accession.

- (2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>6</sup> amended Regulation (EEC) No 4056/86 to bring maritime transport under the common competition enforcement rules applicable to all sectors with effect from 1 May 2004, with the exception of cabotage and international tramp vessel services. However, the specific substantive competition provisions relating to the maritime sector continue to fall within the scope of Regulation (EEC) No 4056/86.
- (3) The liner shipping conference block exemption provided for in Regulation (EEC) No 4056/86 exempts from the prohibition of Article 81(1) of the Treaty agreements, decisions and concerted practices of all or part of the members of one or more liner conferences which fulfil certain conditions. The justification for the block exemption in essence assumes that conferences bring stability, assuring exporters of reliable services which cannot be achieved by less restrictive means. However, a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition.
- (4) The first condition for exemption under Article 81(3) requires that the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. As regards the efficiencies generated by conferences, liner conferences are no longer able to enforce the conference tariff although they still manage to set charges and surcharges which are a part of the price of transport. There is also no evidence that the conference system leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. Conference members increasingly offer their services via individual service agreements entered into with individual exporters. In addition conferences do not manage the carrying capacity that is available as this is an individual decision taken by each carrier. Under the current market circumstances price stability and reliability of services are brought about by individual service agreements. The alleged causal link between the restrictions (price fixing and supply regulation) and the claimed efficiencies (reliable services) therefore appears too tenuous to meet the first condition of Article 81(3).
- (5) The second condition for exemption is that consumers must be compensated for the negative effects resulting from the restrictions of competition. In the case of hard core restrictions such as horizontal price fixing which occur when the conference tariff is set and charges and surcharges are jointly fixed, the negative effects are very serious. However no clearly positive effects have been identified. Transport users consider that conferences operate for the benefit of the least efficient members and call for their abolishment. Conferences today do not fulfil the second condition of Article 81 (3).
- (6) The third condition for exemption is that the conduct must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of its objectives. Consortia are co-operative agreements between liner shipping lines that do not involve price fixing and are therefore less restrictive than conferences. Transport users consider them to provide adequate, reliable and efficient scheduled

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<sup>6</sup> OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p.1.

maritime services. In addition the use of individual service agreements has increased significantly in recent years. By definition, such individual service agreements are not restrictive of competition and provide benefits to exporters as they make it possible to tailor special services. Furthermore, because the price is established in advance and does not fluctuate for a predetermined period (usually up to one year), service contracts can contribute to price stability. It has therefore not been established that the restrictions of competition permitted under Regulation (EEC) No 4056/86 (price fixing and capacity regulation) are indispensable for the provision of reliable shipping services to transport users as these can be achieved by less restrictive means. The third condition of Article 81(3) is therefore not satisfied

- (7) Finally, the fourth condition of Article 81(3) requires that the conference should remain subject to effective competitive constraints. In current market circumstances conferences are present in nearly all major trade lanes and they compete with carriers grouped in consortia and with independent lines. Whilst there may be price competition on the ocean freight rate due to the weakening of the conference system there is hardly any price competition with respect to the surcharges and ancillary charges. These are set by the conference and the same level of charges is often applied by non-conference carriers. In addition, carriers participate in conferences and consortia on the same trade, exchanging commercially sensitive information and cumulating the benefits of the conference (price fixing and capacity regulation) and of the consortia (operational co-operation for the provision of a joint service) block exemptions. Given the increasing number of links between carriers in the same trade, determining the extent to which conferences are subject to effective internal and external competition is a very complex exercise and one that can only be done on a case by case basis.
- (8) Liner shipping conferences therefore no longer fulfil the four cumulative conditions for exemption under Article 81 (3) of the Treaty and the block exemption in respect of such conferences should therefore be abolished.
- (9) The exclusion from the prohibition of Article 81(1) of the Treaty of purely technical agreements and the procedure for dealing with conflicts of law which may arise are also redundant. Those provisions should therefore also be deleted.
- (10) In the light of the above, Regulation (EEC) No 4056/86 should be repealed in its entirety.
- (11) Liner conferences are tolerated in several jurisdictions. In this, as in other sectors, competition law is not applied in the same way worldwide. In light of the global nature of the liner shipping industry, the Commission will take all relevant initiatives to advance the removal of the price fixing exemption for liner conferences that exist elsewhere whilst maintaining the exemption for operational co-operation between shipping lines grouped in consortia and alliances, in line with the recommendations of the OECD Secretariat in 2002.

Cabotage and international tramp vessel services have been excluded from the rules implementing Articles 81 and 82 of the Treaty originally laid down in Regulation (EEC) No 4056/86 and subsequently in Regulation (EC) No 1/2003. They are currently the only remaining sectors to be excluded from the Community competition

implementing rules. The lack of effective enforcement powers for those sectors is an anomaly from a regulatory point of view.

- (12) The exclusion of tramp vessel services from Regulation (EC) No 1/2003 was based on the fact that rates for these services are freely negotiated on a case by case basis in accordance with supply and demand conditions. However, such market conditions are present in other sectors and the substantive provisions of Articles 81 and 82 already apply to these services. No convincing reason has been brought forward to maintain the current exclusion of these services from the rules implementing Articles 81 and 82 of the Treaty. Similarly although cabotage services often have no effect on intra-Community trade, this does not mean that they should be excluded from the scope of Regulation (EC) No 1/2003 from the outset.
- (13) As the mechanisms enshrined in Regulation (EC) No 1/2003 are appropriate for applying the competition rules to all sectors, the scope of that Regulation should be amended so as to include cabotage and tramp vessel services.
- (14) Regulation (EC) No 1/2003 should therefore be amended accordingly.
- (15) Since Member States may need to adjust their international commitments in the light of the abolition of the conference system, the provisions of Regulation (EEC) No 4056/86 relating to the liner conference block exemption should continue to apply to conferences satisfying the requirements of Regulation (EEC) No 4056/86 on the date of entry into force of this Regulation for a transitional period,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Regulation (EEC) No 4056/86 is repealed.

However, Article 1 (3) (b) and (c), Articles 3 to 7, Article 8(2) and Article 26 of Regulation (EEC) No 4056/86 shall continue to apply in respect of liner shipping conferences satisfying the requirements of Regulation (EEC) No 4056/86 on the date of entry into force of this Regulation for a transitional period of two years from that date.

#### *Article 2*

Article 32 of Regulation (EC) No 1/2003 is deleted.

#### *Article 3*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [DATE]

*For the Council  
The President*