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**What shall we do with
the drunken sailor?**
EC Competition Law and
Maritime Transport

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A. Introduction

Transport is of vital importance for the EC: free movement rights are not worth much if there are no adequate means of movement which includes transportation, be it of persons or of goods. In this context, shipping plays an important role. Around one third of the trade between the Member States and 90 % of trade with third countries is conducted by ship.¹ This shows the importance of a well-working maritime transport industry for the Common Market and for the European economy as a whole. The international shipping industry has a long tradition of „self-regulation“² which includes the conclusion of agreements. According to the carriers, this is necessary for reasons connected notably to the stability of the maritime transport sector.³ Obviously, such agreements may affect competition. This study examines the application of EC competition law in the special environment in which the shipping industry operates, with special emphasis on the two block exemptions of Art. 3 of Regulation 4056/86⁴ and Art. 3 of Regulation 823/2000.⁵ It will show that, like with a drunken sailor, something is seriously amiss with the way EC competition law is applied in this specific field. The first chapter provides some background information on the development of the shipping industry since the middle of the 19th century and an overview of the main legal developments in EC maritime competition policy. Chapter two, which constitutes the main part of this paper, contains an analysis of the two block exemptions mentioned. Chapter three addresses the question whether the current approach of EC competition law is adequate and compatible with the relevant Treaty provisions. This will lead to some concluding remarks on the question whether the current approach should be continued or whether it is advisable to modify it.

B. Historical and legal developments in maritime transport
I. Development of the shipping industry

The advent of the steamship from the 1850s onwards led to a number of changes in the shipping industry.⁶ Before, it had not been possible to offer a service based on a fixed schedule since the sailing times depended on the weather. Additionally, the volume of international trade and the transport capacity increased considerably. The reduced length of the Europe-Asia route resulting from the opening of the Suez canal in 1862 led to substantial excess capacity, and over-tonnage became one of the central problems. In order to combat the resulting cut throat competition, ship owners began to enter into agreements regarding prices and other conditions of transport, called conferences. The first such conference concerned the United Kingdom – Calcutta, India route and started operation in 1875⁷. The conference system soon spread throughout the world. At first, governments accepted its existence, based on arguments that are still prominent in current discussions.⁸ In England, the Royal Commission on Shipping Rings in 1909 referred to advantages such as rate stability and regularity of service⁹. In the United States, the so-called Alexander Committee investigated the effects of shipping conferences in the light of the Sherman Act of 1890 and concluded that the advantages of the conference system significantly out-weighed the disadvantages. This led to the adoption of the Shipping Act of 1916 which allowed for conferences under government control (but nevertheless prohibited some specific practices, such as the use of fighting ships¹⁰ and retaliatory measures against shippers using the services on non-conference carriers).¹¹

If the advent of the steamship caused a first revolution in maritime transport, a second revolution occurred with the invention of container shipping, starting in 1966 in the USA. Containerisation resulted¹² in an enlargement of transport capacity and a speeding up of travel, due to

the modern vessels used. It also created the possibility of door-to-door transport by way of intermodal or multimodal transport, that is a combination of sea and land transport offered by the same carrier. Further, the costs for stevedoring were reduced due to the possibility of mechanical loading and unloading. This was also faster, allowing the vessel to spend more time on sea generating profits. At the same time, containerisation made the purchase of new and expensive vessels necessary and carriers had to incur costs for the provision of containers.¹³ For the customer, the packaging costs were likely to be reduced; carriers regularly provided the containers free of charge. Goods transported in a container are also less susceptible to damage and pilferage. Containerisation led to structural changes in the maritime transport industry in the form of a new type of alliances, called consortia.¹⁴ Different from conferences, consortia do not focus primarily on price fixing. They are a form of co-operation with the aim of sharing the high costs involved in operating a modern container fleet (no longer affordable to the existing liner companies) while improving the quality of service.¹⁵ Consortia take such diverse forms as joint scheduling, slot and space exchanges, equipment pools, joint offices, joint terminal operations, cargo sharing, revenue sharing agreements and shared inland operations. Today, consortia are the most important form of cooperation in the field of maritime transport.¹⁶

More recently, yet another type of agreement emerged, called talking agreement.¹⁷ This started in the 1980s when agreements began to include both conference and non-conference lines operating in the same trades. Talking agreements provide a forum within which conference and rivaling non-conference lines can co-ordinate their actions by acting together on such issues as capacity management, rates and various other charges and fees. This new type of agreement emerged because traditional conferences were not able to attract participation of the new independent lines which offered a service of comparable quality to that

of liner conferences and which did not wish to give up their freedom. Talking agreements provided a broader and sufficiently flexible form of cooperation.

II. EC legislation in the field of maritime transport

It is well known that for a long time the Common Transport Policy envisioned in Arts. 3(1)(f) EC and Arts. 70 to 80 EC was largely characterised by inactivity on the side of the Community,¹⁸ particularly in the field of maritime transport.¹⁹ One possible reason²⁰ for this is the fact that, before the accession of the United Kingdom, Ireland and Denmark in 1973, the Member States were all connected by land. Before 1973, 90 % of the intra-Community transport was land-bound; thereafter, more than 90 % of the transport to the new Member States was maritime, with no alternative. More recently, 33 percent of intra-Community trade and 90 % of the trade between the Community and third countries is carried by ship. Another possible reason is that Art. 80(2) EC, the legal basis provision in the field of maritime transport, originally required unanimity in the Council.²¹

In *Commission v France*,²² the Court held that the general Treaty rules apply in the field of maritime transport (see also *Nouvelles Frontières*²³ and, specifically for competition law, *Ahmed Saeed*).²⁴ However, Regulation 141/62²⁵ excluded transport from the field of application of Regulation 17/62.²⁶ The exemption was unlimited in time for air and maritime transport, but for rail, road and inland waterway transport it was limited until the 30th of June 1968.²⁷ Regulation 1017/68²⁸ provided for special rules for the application of EC competition law in the field of transport by rail, road and inland waterway,²⁹ but again excluded air and maritime transport.³⁰ As a result, there were no provisions on the level of secondary law dealing with the application of the competition

rules to maritime transport.

The Community's first major step to regulate the field of maritime transport was the adoption of Regulation 954/79 (the „Brussels package“).³¹ It enabled the Member States to ratify or accede to the UN Convention on a Code of Conduct for Liner Conferences (the UNCTAD Code) as individual Member States of the Community. The main competition rule in the UNCTAD Code is the so-called „40:40:20 rule“. According to Art. 2 IV UNCTAD, national shipping lines of the countries in question are entitled to equal shares in the freight and volume of the trade between them and third country shipping lines are entitled to a significant part. In that latter context, Art. 2 IV gives the example of 20 percent. The provision has consequently been interpreted in such a way as to allocate trade in the 40:40:20 pattern. Further, the UNCTAD Code provides for a definition of liner conferences (later to be repeated in EC legislation)³² and provisions with regard to the freedom to provide services and the freedom of establishment.³³ The purpose of this code was to give the developing countries a chance to realise their ambitions of having an own fleet, which was seen as a sign and means of independence and as a means of saving foreign currency. Before the existence of the UNCTAD Code, 85-90 % of maritime transport was carried out by conference members which made it difficult for new competitors to enter into the business. Governments from developing countries therefore established cargo reservation schemes in favour of ships flying their flag. In the EC it was hoped that such practices, which were potentially harmful to EC carriers, could be avoided if the Member States could become parties to the Convention containing the UNCTAD code. This code, signed in Geneva in 1974, was to enter into force 6 months after at least 24 countries carrying 25 % of the world tonnage (per 1973) had become contracting parties to the code. The importance of Regulation 954/79 in this context is reflected by the fact that the UNCTAD code only entered into force in 1983 after it had been

ratified by Germany and the Netherlands.

The Commission, fearing that the UNCTAD Code was not in line with EC competition law, first presented three proposals aiming to prevent Member States from becoming parties. This was followed by a common position.³⁴ However, on the last day when the Convention containing the UNCTAD Code was open for signature, the governments of Belgium, France and Germany signed it, but stated that ratification could only take place if obligations arising from the Treaty of Rome were not violated. A new Commission proposal then suggested that Member States may become parties to the Convention provided that the principle of free trade would prevail within the Community and in relationship to all OECD countries. The measure passed by the Council to this effect in 1979 was Regulation 954/79. The Regulation provides for certain modifications of the rules under the UNCTAD code which the Member States have to respect (such as Art. 3 on intra-Community cargo allocation).³⁵ The Regulation is a compromise: on the one hand, the support of the UNCTAD code through Community legislation can be considered a concession to the developing countries, on the other hand the principles of EC competition law are protected.³⁶

The last recital of the Preamble to Regulation 954/79 refers to both the stabilising effect of liner conferences and to the possibility of a conflict with EC competition law. A first legislative proposal that has to be seen in this context was presented in 1981.³⁷ The Commission report „Progress Towards a Common Maritime Policy: Maritime Transport“,³⁸ published in 1985, constituted the first attempt to develop an EC shipping policy in a systematic way. It contained several specific proposals for Regulations. In 1986 four Regulations were adopted which are now at the centre of EC maritime policy.³⁹ Regulation 4055/86⁴⁰ provides for the application of the freedom of services in the maritime transport sector, be it transport between EC Member States or transport to third

countries. The only requirement for providing maritime transport services in the EC consists in the carrier being seated in a Member State or the relevant ships being registered under the flag of a Member State; rules giving preferential treatment to ships running under the national flag are no longer permissible. Existing agreements with third countries which contained freight allocation rules had to be eradicated, unless they were non-discriminatory, and the conclusion of new agreements of this type became illegal in principle. The regime of Regulation 4055/86 is complemented by Regulation 4058/86.⁴¹ Its objective is to ensure that EC carriers have the same access to trade on routes to third countries as foreign carriers have, by allowing the Member States to coordinate their efforts against third country measures aimed at protecting their fleet. Upon application of a Member State the Council may decide on measures such as import quotas, import charges or the requirement to obtain permission to load, unload and transport freight. A third measure, Regulation 4057/86,⁴² aims at levelling the playing field for European carriers in relation to third country carriers. The emphasis is placed on unfair pricing practices of third country carriers. The Community may impose a regressive duty on third country carriers if they have been found to cut rates due to state intervention and thus distort the market. The Community may only proceed in such a way if the distortion due to state intervention results in substantial damage on part of the Community carriers and interests of the Community. Finally, Regulation 4056/86⁴³ constitutes the centrepiece of EC competition legislation in relation to maritime transport. It provides rules in two main areas: first, procedural rules for the application of the Treaty provisions on competition in the field of maritime transport (though the Regulation does not apply to tramp services for which Art. 1 Regulation 141/62 remains applicable) and second, a block exemption for liner conferences (Art. 3), aiming at coordinating Community law with the UNCTAD code in order to prevent a conflict of the two types of law.⁴⁴ The block exemption for liner conferences is special in several

ways.⁴⁵ It is unlimited in time, whereas normally block exemptions have to be renewed after a certain time. Further, Art. 3 Regulation 4056/86 allows joint price fixing which is a concession not found in any other block exemption. Finally, it is passed in the form of a Council Regulation, and not in a Commission Regulation adopted based on an enabling Council Regulation.

As far as consortia are concerned, the Council asked the Commission already at the time of the adoption of Regulation 4056/86 whether there was a possibility for granting a group exemption.⁴⁶ In 1990 the Commission presented a report⁴⁷ in which it stated that consortia can help to increase productivity and capacity utilisation, produce economies of scale leading to reduced costs, increased reliability and improved quality. The report also contained a first draft for an enabling regulation.⁴⁸ Regulation 479/92⁴⁹ was adopted on the basis of Art. 87 of the Treaty (now Art. 83 EC) only, even though some Member States argued that Art. 84(2) (now Art. 80(2) EC) should have been relied on as well.⁵⁰ Based on this Regulation, the Commission presented a draft text for a block exemption in 1994⁵¹ which led to the adoption of Regulation 870/95,⁵² later replaced by Regulation 823/2000⁵³ which is valid until April 25, 2005. In both Regulations, the preamble states that the block exemption is granted because consortia typically conform to the requirements of Art. 81(3) EC. The exemption differs from other block exemptions in that it does not contain black and white lists. Instead, all cooperation between ship owners with the purpose of providing a joint liner service is exempted as long as the agreements in question conform to the obligations and conditions laid down in the Regulations.⁵⁴ Further, there are only very limited procedural provisions.

- C. The block exemptions for liner conferences and consortia
 - I. The block exemption for liner conferences
 - 1. General issues under Regulation 4056/86

Views regarding the relevance of Arts. 81 and 82 EC for the interpretation of Regulation 4056/86 differ. Some argue that the Treaty provisions form the standard for a correct interpretation and that it is therefore necessary to pay special attention to Art. 81(3) EC.⁵⁵ Others maintain that the regulation provides for a closed system of rules that must be interpreted primarily from within. Therefore, only general Treaty provisions such as Arts. 2 and 3 EC must be followed.⁵⁶ In this context, it is argued that Arts. 81 and 82 EC are mainly concerned with the functioning of the internal market. Since shipping is a world-wide activity, these provisions cannot be simply transferred to this sector. Further, without a broad interpretation the very objective of Regulation 4056/86, which is to co-ordinate EC law and the provisions of the UNCTAD code, cannot be achieved. However,⁵⁷ Regulation 4056/86 is also based on Art. 87 of the Treaty (now Art. 83 EC), expressly in order to give „effect to the principles set out in Articles 85 and 86“. Further, in the framework of the hierarchy of norms primary law always prevails over secondary law. Therefore, a regulation must conform to Treaty law as a whole. There can be no difference in quality. Finally, the argument that an interpretation in line with Arts. 81 and 82 EC does not pay sufficient tribute to the specialities of maritime transport is misguided: Regulation 4056/86 provides for a block exemption, unlimited in terms of time, for price fixing arrangements of liner conferences, something granted nowhere else. Therefore, Arts. 81 and 82 EC must remain the yardstick for the Regulation's interpretation, including a careful evaluation of its provisions in the light of Art. 81(3) EC.

Regulation 4056/86 is applicable to international maritime transport to and from one of the ports of the Community; transport between two

ports of the same Member State (cabotage) and transport between ports of third countries is not covered (Art. 1 of the Regulation). An interpretation similar to U.S. American law, which is applicable to all transport if there is a direct, substantial and reasonably foreseeable effect on the domestic commerce, has been suggested but is excluded in view of the Regulation's express wording.⁵⁸ In terms of material scope, Regulation 4056/86 applies to liner shipping only; tramp shipping is excluded by virtue of Art. 1(2) and (3)(a). Some have argued that tramp services remain covered as long as they do not fully correspond to the definition in Art. 1(3)(b) of the Regulation.⁵⁹ Relying on the regulation's preamble (where it is stated that „it appears preferable to exclude tramp vessel services from the scope of this Regulation“), others maintain that tramp services are always excluded, independent of that definition.⁶⁰ At the same time, these authors concede that there is no apparent reason for the general exclusion of tramp services from Regulation 4056/86. Indeed, it is stated in the Regulation's preamble that the underlying reason for an exclusion of tramp services seems to be that this sector of shipping typically operates in accordance with free-market principles. If this is not the case, as in the case of joint price fixing, there is no reason for the exemption. Further, it may be unhelpful to subject tramp services at large to the uncertainties of the cumbersome procedure laid down in Arts. 84 and 85 EC.⁶¹ The Commission is likely to follow a strict interpretation⁶² (which is not surprising given that then the Commission enjoys more competences in applying EC competition law to maritime transport).

2. Relevant provisions in the context of the block exemption

The block exemption for liner conferences (Art. 3 of Regulation 4056/86) allows for collusive conduct by fixing rates and conditions of carriage. Art. 3(a) to (e) list a number of further activities that are exempted, such as the coordination of timetables, the coordination and allocation of sailings and the regulation of capacity. The non-discrimination clause of Art. 4(1) embodies the principle expressed in Art. 81(1)(d) EC. Under this provision, it is prohibited to treat comparable situations differently and different situations in the same way unless there is economic justification (which must be based on objective principles).⁶³ The fact that Art. 4 does not provide for a set of criteria, criticised by some as leading to legal uncertainty,⁶⁴ has the advantage of allowing for a case-by-case analysis.⁶⁵ Discriminatory behaviour is automatically void *ex tunc* (Art. 4(2) or the Regulation *juncto* Art. 81(2) EC). Art. 4 has acquired special importance in view of the fact that since the invention of intermodal transport shippers have lost their traditional role in choosing the route by which goods are transported.⁶⁶ Finally, Art. 5 provides for a set of detailed obligations that have to be obeyed in connection with Art. 3. These concern consultations between transport users and conferences, loyalty arrangements, services not covered by freight charges, availability of tariffs to transport users and notification to the Commission of awards at arbitration and recommendations made by conciliators. The aim of Art. 5 is to ensure that the interests of transport users are duly taken into account and that the restrictions to competition connected with the liner conference system are kept to an absolute minimum.⁶⁷ Non-compliance with these obligations does not necessarily lead to the withdrawal of the block exemption, although this is possible in the sense of an *ultima ratio* (Art. 7(1)). Examples of less restrictive actions are recommendations and fines.

3. Specific problems

a) Multimodal transport

When liner shipping companies began to offer door-to-door transport they also started to fix prices for the land leg of their operations. In principle, such behaviour is contrary to Art. 81(1) EC. However, under Regulation 4056/86, the status of inter-modal transport is ambiguous.⁶⁸ In particular, the Commission's view that Art. 3 prohibits the fixing of prices for the land leg⁶⁹ has been opposed by carriers and in academic writing, based on a variety of arguments.⁷⁰ The FEFC points to Art. 5(3) which allows shippers to choose their own haulage contractor if the inland leg is not included in the freight rate. It argues that if the inland leg is included in a common freight rate, then the carrier must be allowed to select the haulage contractor. This only makes sense if the conference has the right to extend the common freight rate also to the land leg of a multimodal transport operation. According to the Commission, Art. 5(3) does not relate to a common conference tariff but to the conditions offered by the individual carrier. It states obligations that the individual carrier has to fulfil if he wants to benefit from a possible group exemption. Further, reference is made to the Council's statement in the minutes on the adoption of Regulation 4056/86 that „in practice, non-application of Art. 85 (1) will be the rule as regards the organisation and execution of successive or supplementary multimodal sea/land transport operations and the fixing or application of inclusive rates for such transport operations“. However, this was said in relation to Art. 2 of Regulation 4056/86 and Art. 3 of Regulation 1017/68 both of which cover technical agreements distinct from liner conference agreements. It is also argued that the block exemption must apply because otherwise conferences cannot properly play a stabilising role due to the fact that it would be possible for carriers to undercut the agreed maritime freight rate by offering cheap land transport. However, price fixing by conferences cannot stabilise prices in other transport sectors such as road or rail

transport. There is no certainty that price reductions negotiated by buyers of inland transport services on the basis of their market power, must be passed on to the shipper. Further, exemptions are not granted for the purpose of enforcing discipline among the members of a cartel. Therefore, the stabilising purpose of the liner conference block exemption does not necessitate an extension of this block exemption to price fixing for the inland leg of a multimodal transport operation.

By declining the applicability of the block exemption, the Commission relies on the wording of Art. 1(2) which speaks of „maritime transport“ only.⁷¹ It also points to the Regulation's preamble which states that „in the case of inland transport organised by the shippers, the latter continue to be subject to Regulation (EEC) 1017/68“. ⁷² This relates to Art. 5(4) which covers the availability of tariffs to conference users: they must not be able to inform themselves about conference rates because carriers might act as a cartel when they themselves buy land transport services. Therefore, the carriers' argument that the recital only means that conferences buying inland transport services from haulage companies do not fall under the group exemption in their function as buyers, cannot be correct. Art. 3 Regulation 4056/86 is unequivocal insofar as it relates to the price charged to the shipper, not to the price that carriers have to pay to inland haulage contractors. Further, during the process of adopting Regulation 4056/86, the European Parliament suggested an amendment with the aim of explicitly including multimodal transport into the scope of Art. 3 Regulation 4056/86.⁷³ This was rejected which strongly suggests that the legislator did not want to extend the block exemption to price fixing for the land leg of a multimodal transport operation. Indeed, an extension of the block exemption to the land-leg of multimodal transport would create an imbalance in relation to other modes of transport, where Art. 2 lit. a Regulation 1017/68 prohibits joint price fixing.⁷⁴ As for individual exemptions, the Commission has never granted one in this matter.⁷⁵

b) Capacity management programmes

A further question is in how far carriers are allowed to engage in capacity management programmes. Such programmes typically include an agreement that carriers use only a certain percentage of transport capacity on each ship.⁷⁶ Art. 3 lit. d of Regulation 4056/86 specifically permits „the regulation of the carrying capacity offered by each member“. The carriers argue that this covers all kinds of capacity management programmes. According to the Commission, such programmes are permissible only if they aim at ensuring the regularity, reliability and frequency of liner transport to all ports served by a conference or if they aim to balance seasonal or economical changes affecting demand. The programmes must either reduce the physical shipping capacity or the frequency of service⁷⁷. This has been interpreted as meaning that agreements to reduce capacity utilisation by a certain percentage are illegal, but agreements to reduce sailings on a certain route or to reduce the number of ships that operate a certain service is lawful.⁷⁸ It is criticised that in this way a comparatively mild form of capacity reduction is prohibited and a severer form allowed. However, ships that do not sail do reduce fixed operating costs per unit in comparison to ships sailing partially empty. Such a reduction in capacity therefore could prove beneficial to the shippers and should be allowed.⁷⁹

The Commission argues that the activities enumerated in Art. 3(a)-(c) are ancillary activities to the main conference activity, which is price fixing, and do not in themselves constitute a significant restriction to competition, different from capacity management programmes. However, such an interpretation is based on the presumption that the activities enumerated in Art. 3 are not of equal value.⁸⁰ There is no indication that lit.d. takes a special position in this context.⁸¹ The Commission's main argument is more convincing: to allow for unlimited capacity management programmes is not coherent with the aim of

realigning EC law with the UNCTAD code. The two bodies of law define the term „liner conference“ in the same way. From Art. 19(1) UNCTAD Code⁸² and its title („Adequacy of service“) the Commission concludes that the main purpose is to ensure a high quality standard of liner shipping, whilst capacity management programmes primarily aim at raising shipping rates.⁸³ Against this, it has been argued that there is no criterion for properly distinguishing the different programmes; all aim at raising the freight rates through a limitation of transport capacity.⁸⁴ However, to grant liner conferences far reaching powers to control shipping capacity would create an incentive for larger shipping capacities, thereby leading to self-made overcapacity which should not be further encouraged through a block exemption.⁸⁵ The Commission's view is further supported by the requirements of Art. 81(3) EC. The combination of price fixing and output limitation is probably the most effective way of restricting competition.⁸⁶ Against this background, it has even been argued that Art. 3 d cannot stand.⁸⁷

c) Restriction of the use of individual service contracts

In a service contract the shipper typically undertakes to transport a certain amount of cargo over a fixed period of time to one carrier or one conference. In consideration, the carrier or conference agrees on a certain rate and a defined level of service.⁸⁸ Contracts concluded with one specific carrier may be tailored to suit the shipper's needs for special transport services. They can also be concluded for a longer period of time, thereby creating financial stability for shipper and carrier.⁸⁹ In an individual contract, the negotiated price may be lower than the conference tariff. This is the reason why conferences are interested in restricting individual carriers' power to enter into such contracts. The importance of the availability of individual service contracts for the maritime transport

industry can be seen from the consequences of the adoption of the Ocean Shipping Reform Act (OSRA) in the United States (in force since the May 1, 1999) which allows the unrestricted use of individual service contracts and provides for the possibility to keep key information on these contracts confidential. First evaluations of the new statutory regime indicate a large number of such contracts and that the number of conferences operating in the trade to and from the United States is declining.⁹⁰

The regulation of service contracts is not mentioned in Art. 3 Regulation 4056/86. That it should be exempted explicitly (an argument made by TACA members in relation to joint service contracts)⁹¹ is doubtful for a number of reasons. First, there is traditionally a difference between contractual transport arrangements and transport carried out under a common tariff.⁹² This distinction is at the basis of a British law from 1830⁹³ and also of the majority report of the Royal Commission on Shipping Rings.⁹⁴ The conference system is based on a rate structure governed by a common tariff; consequently, the regulation of contractual transport arrangements does not constitute a typical conference activity within the meaning of Art. 1(2)(b) of Regulation 4056/86 and the UNCTAD code. Further, such contracts were introduced only after U.S. American legislation banned loyalty contracts in 1984.⁹⁵ The definition of the term „liner conference“ in the UNCTAD code precedes this date. It could also be argued that individual service contracts constitute a form of non-conference competition. Although such contracts are carried out by conference members, this is done outside the conference tariff framework. According to the case law of the Court of Justice,⁹⁶ an exemption from the prohibition in Art. 81(1) EC may only be granted if sufficient or workable competition continues to exist. The supply of transport services on the basis of individual service contracts outside the conference tariff system could be seen as a way to ensure competition in the maritime transport sector. Further, it must be repeated

that it is not the function of Art. 3 to ensure discipline among conference members. The Commission was therefore right in deciding that „the group exemption for liner conferences contained in Regulation (EEC) No 4056/86 does not authorise [...] a prohibition on individual service contracts or restrictions, whether binding or non binding, on the contents of such contracts“.⁹⁷ It should also be noted that individual service contracts are not subject to Art. 81 EC as such because they lack a collusive element, but that a conflict may nevertheless arise if the issue is regulated in a conference agreement.⁹⁸

4. Conclusion

The three issues discussed above illustrate that the Commission in its administration of Art. 3 of Regulation 4056/86 adopts a restrictive approach. In rejecting the attempts of liner conferences to extend their right to engage in collusive practices, the Commission ensures that the interests of the shippers are taken into consideration as well and that the aims of EC competition policy are respected in the field of maritime transport. The principal idea behind EC competition law is that a market economy ensures efficiency, increased innovation, lower prices and, as a consequence, the best possible allocation of resources.⁹⁹ To date there is no case law of the Court in which it addresses any of the above specific issues. In the only decision relating to problems connected to the conference system, CEWAL, the Court held that the block exemption for liner conferences is an exceptional rule in the light of EC competition policy.¹⁰⁰ In view of the general rule that exceptions are to be interpreted narrowly, it is very likely that the Court will agree with the Commissions' view once such a matter is brought before it.

II. The consortia block exemption

1. General aspects

The regulation of consortia has proven much less problematic than that of liner conferences. There is as yet no Commission decision stating that a given consortium does not conform to the requirements of the block exemption.¹⁰¹ One reason for this may be that the consortia block exemption does not allow for price fixing (see Art. 2 of Regulation 823/2000 and the preamble to Regulation 823/2000). Consortia normally do not set uniform or common freight rates, though they may contain certain rules on joint price fixing.¹⁰² They aim at increasing the income of companies by reducing the costs of liner shipping through rationalisation. Therefore, they primarily affect the expenses incurred by carriers.¹⁰³

As was already stated, only services to and from one or more ports of the Community are covered. As for the personal scope, Art. 1 provides that the Regulation is applicable to consortia offering liner shipping services only, as defined in Art. 2(2). According to Art. 2(1), the term „consortium“ refers to „an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, in relation to one or more trades, and the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing“. This definition is deliberately broad.¹⁰⁴ It covers all types of consortia ranging from forms that are highly integrated to types where the degree of joint activity is much less advanced.¹⁰⁵ It should be added that consortia cannot be considered technical agreements in the sense of Art. 2 of Regulation

4056/86 because such agreements aim exclusively at the technical improvement of liner shipping services.¹⁰⁶ Consortia do not aim at a technical improvement of shipping only but are also based on profit-making motives.¹⁰⁷ Consortia do not constitute mergers either because they do not create permanently fused new entities that are legally separate from the undertakings which created them. They normally include a clause on a possible termination of the agreement.¹⁰⁸

2. Relevant provisions in the context of the block exemption

Art. 3 of Regulation 823/2000 provides for the consortia block exemption, with Art. 3(2) listing in an exhaustive manner activities to which Art. 81(1) EC is not applicable.¹⁰⁹ The wording is misleading insofar as it is not the activity as such that creates a conflict with Art. 81(1) EC but rather the collusive engaging in it.¹¹⁰ Art. 5 states alternative conditions that must be satisfied in order for the group exemption to be applicable in order to maintain sufficient competition in the market. Art. 6 states that the market share of a consortium may not exceed 30 % if it operates within a conference and 35 % if it operates outside a conference. Consortia whose share is higher but still lower than 50 % may be eligible for the exemption according to Art. 7 (notification of the Commission which then must decide on the exemption). Art. 8 provides for cumulative conditions relating to the availability of individual service contracts, the right to withdraw from the consortium and the right to engage in independent marketing if the consortium operates a joint marketing structure. Art. 8(d) corresponds to Art. 4(1) of Regulation 4056/86 (non-discrimination clause).

3. Specific aspects

a) Land activities

The consortia block exemption can only cover maritime activities (Art. 1(1) of Regulation 479/92). This excludes the common provision of land services such as for example the provision of land transport as part of a multimodal transport operation.¹¹¹ According to the initial proposal for the enabling Regulation,¹¹² consortia offering multimodal transport were included, but the European Parliament demanded that they should be excluded and that multimodal transport should be addressed outside specific maritime transport legislation.¹¹³ The only inland activities that may be carried out by a consortium are those that are either covered by Art. 3(2)(a)(ii) of the Regulation (pooling of port installations) or by Art. 3(2)(c) (joint operation of port terminals and related services). Joint installation of port facilities is not covered.¹¹⁴ As a result, inland transport services are subject to Regulation 1017/68 and inland activities that do not constitute transport services fall under Regulation 17/62. Consortia agreements that cover such matters can only seek for an individual exemption under Art. 81(3) EC.¹¹⁵

b) Consortia and capacity management programmes

The position on capacity management programmes is much clearer under Regulation 823/2000 than under Regulation 4056/86: Arts. 3(2)(b) and 4 specifically allow for temporary capacity adjustments. However, such programmes may not have the effect of keeping empty a certain percentage of the available container slots. Rather, they must reduce the number of sailings or the size of the vessels used on a certain route. This ensures consistency with the regime for liner conferences and avoids that carriers operating within a conference circumvent the

TAA Decision by transferring rules on capacity management to a consortium agreement existing within the conference concerned.¹¹⁶

4. Conclusion

The conclusion from the above is that the application of Regulation 823/2000 has not lead to major legal problems. In particular, the cases of inland transport and capacity management are regulated in a clearer manner than in the context of liner conferences, possibly because of the problems the Commission had experienced in other contexts.¹¹⁷ It is therefore not surprising that the Commission was prepared to extend the original exemption with only minor amendments.¹¹⁸

III. The relationship between Regulation 4056/86 and Regulation 823/2000

Regulation 4056/86 contains detailed rules for the application of EC competition law to the field of maritime transport. With the exception of tramp shipping, this covers all types of restrictions that are within the scope of Arts. 81 and 82 EC, including consortia. The *lex specialis* of Regulation 823/2000 was adopted „without prejudice to the application of Regulation (EEC) No 4056/86“ (see Art. 1(1) of the enabling Regulation 479/92). Given that Regulation 823/2000 contains rudimentary procedural rules only, the interplay between the two Regulations is particularly important in that context. Where Regulation 823/2000 lacks the necessary specific provisions, the more general rules of Regulation 4056/86 apply.¹¹⁹

As far as substantive law is concerned, liner conferences and consortia are two distinct types of agreements subject to different Regulations.

Difficulties may arise in relation to agreements containing rules on joint price fixing. The Preamble of Regulation 823/2000 excludes joint price fixing. An agreement inside a conference engaging in price fixing does not constitute a consortium within the meaning of the Regulation. Consequently, the entire agreement cannot be exempted. An exemption under Regulation 4056/86 is also doubtful, in particular because consortia typically do not offer a uniform or common freight tariff. In such situations, the only possibility is to apply for an individual exemption based on Art. 81(3) EC.¹²⁰ The same is true with regard to agreements operating outside a conference that do not constitute a conference themselves. Finally, consortia requiring their members to participate in a certain conference cannot be exempted under Regulation 823/2000 since this would amount to a circumvention of the prohibition of price fixing.¹²¹

D. Conformity of the two block exemptions with the EC Treaty

I. Art. 3 of Regulation 4056/86 (liner conferences)

It has been stated on several occasions that, in spite of its cautious attitude towards the liner conference block exemption, the Commission does not consider it necessary to change or abolish the current regime.¹²² It simply insists that, in order to ensure compliance with the EC Treaty, Art. 3 of Regulation 4056/86 must be interpreted narrowly.¹²³ This is, however, debatable for the reasons discussed below.

1. Arguments relating to Art. 81 EC

In the economic literature on liner conferences, it is stated that their market share is often above 50 %, that they often cooperate with non-conference carriers, that they engage in price discrimination based on

the value of the goods that are being transported and that they typically charge higher prices than independent carriers. This begs the question whether, from an economic viewpoint, liner conferences act as monopolies.¹²⁴ Whatever the answer to that question, in both cases there are legal arguments putting the compatibility of the exemption regime with Regulation 4056/86 in question.

a) If conferences do not act as an effective monopoly

If it is assumed that conferences do not act as a monopoly, the question arises whether they constitute a restriction to competition within the meaning of Art. 81(1) EC. It has been argued that those who oppose a block exemption must justify their view and therefore carry the burden of proof for the existence of such a restriction.¹²⁵ This has to be seen against the background of the Court's case law indicating a „rule of reason“ approach.¹²⁶ In *Pronuptia*,¹²⁷ the Court found that restrictions to competition that are objectively necessary for the successful operation of a franchise system do not constitute a restriction to competition within the meaning of Art. 81(1) EC. This can be interpreted as meaning that the Court is willing to balance the advantages and the disadvantages of an agreement in relation to competition. If the former prevail, there will be no prohibited restriction of competition.¹²⁸ Should this apply to liner conferences that do not effectively act as a monopoly, then arguments would have to be brought forward to justify that there is nevertheless a restriction to competition.

Others maintain that those who seek an exemption must show that it is possible on grounds of public interest as defined in Art. 81(3) EC.¹²⁹ In this context, it can be argued that the rule of reason can in any case not apply to price fixing arrangements. The price is the main instrument

of competition and agreements to fix prices are expressly prohibited by Art. 81(1)(a) EC. The reason for this is that such agreements effectively exclude competition with regard to a crucial aspect of any market. Consequently, any agreement to fix prices would constitute by its very nature a restriction to competition.¹³⁰ Further, there may be more general doubts as to whether a rule of reason approach is correct in the context of Art. 81 EC since section 3 EC expressly recognises that some restrictive practises are beneficial and therefore allowed.¹³¹ Further, the Court has ruled that some practises *per se* constitute a restriction to competition, regardless of any positive impact they may have on competition.¹³² In such contexts, there is no room for the application of the rule of reason,¹³³ meaning that it must be shown that an exemption complies with the requirements of Art. 81(3) EC.

As for the statements in the preamble of Regulation 4056/86 that a block exemption for liner conferences fulfils the criteria of Art. 81(3) EC, they do not indicate that there has been a thorough analysis of Art. 3 Regulation 4056/86 in the light of the conditions laid down in Art. 81(3) EC.¹³⁴ In fact, the arguments that liner conferences ensure stability of rates, that they provide a higher standard of service and that it is only in such a framework that efficient liner shipping can be provided, have been contested successfully. In spring 2001 the OECD invited comments from interested parties on the subject of regulatory reform in the maritime industry. Associations of shippers from the U.S.A., Canada and Europe conducted a survey among their members from which it resulted that under the present system rates are more volatile.¹³⁵ This is supported by figures provided by players that are in favour of allowing joint price fixing. Further, since the advent of container shipping the maritime transport industry has witnessed the emergence of new independent operators that provide liner service, including multi-modal transport, of a quality that is comparable to that of conference carriers.¹³⁶ Finally, many measures that enhance efficiency are taken

outside the framework of conference agreements (the typical agreement aiming at reducing costs and at increasing service is the consortium where price fixing is not allowed). It should also be noted that in the road and rail sectors, transport agreements similar to consortia increased efficiency without having the power to fix prices.¹³⁷ Therefore, the arguments of rate stability, higher standard of service and increased efficiency are not convincing. The conclusion must be that even under the assumption that conferences do not function as an effective monopoly the existence of a block exemption for price fixing arrangements in maritime transport cannot be justified under Art. 81(3) EC.

b) If conferences do act as a successful monopoly

If it is assumed that conferences are able to act as a monopoly by raising the price for maritime transport above the level that would prevail in a competitive market, the arguments that have been presented above are equally true. In addition, protection and cartel-like behaviour can lead to inefficiency and reduced profitability. In such a situation there is an incentive for holding overcapacities and there is not sufficient pressure to increase internal efficiency. Another aspect is the relationship between high transport prices and liberalisation of world trade: in some cases the costs for maritime transport services are much higher than the payable customs duties. In a situation where trade liberalisation collides with a monopolistic liner shipping industry, it is not only the consumer in the importing country and the exporters in the exporting country who benefit from the liberalisation of trade but also the carriers who capture some of the resulting benefits for themselves. Therefore, trade liberalisation will not result in the desired benefits unless the shipping industry is deregulated.¹³⁸

2. Arguments connected to legal basis provisions

Art. 87 of the Treaty (now Art. 83 EC) which is one of the legal basis provisions of Regulation 4056/86 aims at giving effect to the principles set out in Articles 81 and 82 EC. The liner conference block exemption differs from other block exemptions in so far as it does not affect ancillary aspects of competition in the relevant market only but rather restricts competition at its very centre by allowing joint price fixing. This contradicts the basic principle of ensuring a process of effective competition in order to achieve an efficient allocation of resources.¹³⁹ In that sense, Art. 3 of Regulation 4056/86 contradicts Art. 83 EC.¹⁴⁰ Another legal basis provision for Regulation 4056/86, Art. 84(2) of the Treaty (now Art. 80(2) EC), does not restrict the application of competition law to the field of maritime transport. Therefore, a measure may be based on this provision only if it complements general EC competition law in the field of maritime transport based on the specialties of this sector. Secondary legislation that constitutes a fundamental restriction to, or the exclusion of, the application of basic principles of EC competition law cannot be based on Art. 80(2) EC.¹⁴¹ An exemption for price fixing activities of liner conferences does constitute such a fundamental restriction. Finally, Art. 73 EC contains special rules with regard to state aids in the transport sector. By contrast, there is no similar provision which would allow for a derogation from Arts. 81 and 82 EC EC. It must therefore be concluded that a derogation in the form of price fixing is not envisioned by the Treaty.¹⁴²

3. Conclusion

Resulting from what is stated above, it becomes clear that the liner conference block exemption does not conform to Arts. 80(2), 81 and 83 EC. However, the Commission can only interpret secondary

legislation but not abolish it, and Regulation 4056/86 is a measure of unlimited validity. Therefore, a reassessment at the time of renewal is excluded.¹⁴³

II. Art. 3 of Regulation 823/2000 (consortia)

Consortia limit competition and consequently, constitute agreements that restrict competition within the meaning of Art. 81(1) EC. This means that a justification of the consortia block exemption must be assessed in the light of the requirements of Art. 81(3) EC. Under the regime of Regulation 823/2000, agreements on price fixing are prohibited. Therefore, the gravest impediment of the liner conference block exemption, as far as coherence with Art. 81 EC is concerned, does not exist in this context. Secondly, the block exemption for consortia is sufficiently beneficial for the public interest. Consortia rationalize liner shipping through such activities as vessel sharing etc., rendering the industry more efficient. Shippers profit in the form of a better quality of shipping services and of reduced costs. Here, the forces of competition will ensure that a reduction in costs will be passed on to the shippers.¹⁴⁴ This justifies the conclusion that the consortia block exemption conforms to Art. 81(3) EC. Perhaps the fact that the shippers themselves judge the consortia block exemption positively¹⁴⁵ is the best proof that the exemption is sufficiently beneficial not only for the carriers..

E. Conclusion

This paper has examined the two block exemptions existing in the field of maritime transport, one for joint price fixing activities of liner conferences and one for consortia. The liner conference block exemption was found to be so problematic that it must be considered

contradictory to Art. 81(3) EC. By contrast, the consortia block exemption does not give rise to such problems. From a legal perspective at least, EC maritime competition policy must draw its conclusions from these findings. First, it is justified to grant a block exemption to consortia agreements as first done through Regulation 870/95, and to continue such a regime done through the adoption of Regulation 823/2000. Given that the main reason for the agreements among carriers is that the liner shipping industry is faced with a number of structural difficulties peculiar to the sector, the consortium, a form of structural cooperation, is the best answer to solve or at least reduce the impact of such problems. Thus, the uneven distribution of cargo on the inbound and outbound leg of a journey can, at least in parts, be overcome by offering round-the-world services. The consortium is the forum to coordinate the complicated logistics of such an activity. The problems arising out of seasonal changes in the cargo volume can be battled by shipping more refrigerated products. The investment in warehouses and containers with refrigeration capacities can again be borne by an alliance such as the consortium.

The situation is different for the liner conference block exemption. This exemption is not only a breach of Art. 81(3) EC, conferences are also not essential to ensure a stable liner shipping industry. This is indicated by the first reactions of the shipping industry to regulatory reform in the U.S.A.¹⁴⁶ Since the Ocean Shipping Reform Act came in force in 1999, transport to and from the U.S.A. is conducted in large parts under individual service contracts outside the conference tariff system. From 1997 to June 2000, the number of conferences operating in trade to and from the U.S.A. dropped from 32 to 22. Yet, in 1999 and 2000 the profitability of liner shipping companies increased. This indicates that a reduced power of conferences to fix prices does not lead to a breakdown of the liner shipping market due to cut-throat competition. Therefore, liner conferences are not essential for ensuring stability in

the market for maritime transport services. It should also be noted that, although Art. 3 of Regulation 4056/86, as interpreted by the Commission, already constitutes a unique and generous treatment of liner shipping, the carriers have tried to engage in even worse restrictions to competition such as price fixing for the inland leg of multimodal transport, capacity reduction arrangements that prescribe to leave a certain percentage of slots on each vessel empty, restriction of the capacity of the carriers to enter into individual service contracts, and the use of fighting ships. All of these were considered breaches of Art. 3 of Regulation 4056/86 by the Commission and, in the last case, the Court. Therefore, from a legal perspective, the Council should decide to abolish the block exemption under Regulation 4056/86, without any form of replacement. As long as a measure to this effect is not taken, the sailor will not sober up and the liner shipping industry will continue to stagger along like a drunkard.

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G. Abbreviations

| | |
|---------|---|
| Art. | Article |
| Arts. | Articles |
| CPI | Contemporary Policy Issues |
| CFI | Court of First Instance |
| CSC | Canadian Shippers' Council |
| EATA | Europe Asia Trade Agreement |
| EC | European Community |
| ECJ | European Court of Justice |
| ECOSOC | Economic and Social Committee |
| ECR | European Court Reports |
| EEC | European Economic Community |
| ESC | European Shippers' Council |
| ETL | European Transport Law |
| FEFC | Far Eastern Freight Conference |
| EuR | Europa-Recht |
| FMC | Federal Maritime Commission |
| FS | Festschrift |
| GNP | Gross National Product |
| i.e. | ipso est |
| lit. | litera |
| NITL | National Industrial Transportation League |
| NJW | Neue Juristische Wochenschrift |
| No | Number |
| OECD | Organisation for Economic Cooperation and Development |
| OJ | Official Journal of the European Communities |
| OSRA | Ocean Shipping Reform Act (1998) |
| p. | page |
| RabelsZ | Zeitschrift für ausländisches und internationales Privatrecht, begründet von Ernst Rabel |
| rec. | recital |

| | |
|--------|--|
| Reg. | Regulation |
| RIW | Recht der Internationalen Wirtschaft |
| RMC | Revue du marché commun et de l'Union européenne |
| SEA | Single European Act |
| TAA | Trans-Atlantic Agreement |
| TACA | Trans-Atlantic Conference Agreement |
| TR | Transportrecht |
| TSA | Transpacific Stabilization Agreement |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| WSC | World Shipping Council |
| WuW | Wirtschaft und Wettbewerb |

Footnotes

- ¹ Sir Leon Brittain 1993, p. 337.
- ² Pons 1998, p. 4.
- ³ For an overview, see WSC submission to the OECD 2001, p. iii.
- ⁴ OJ 1986 L 378/4.
- ⁵ OJ 2000 L 100/24.
- ⁶ See Herman 1983, p. 7 subs.; Erdmenger 1995, p. 391; Report by the Australian Productivity Commission on Liner Shipping 1999, p. 41.
- ⁷ Sir Leon Brittain 1993, p. 337, p. 338; Herman 1983, p. 8.
- ⁸ E.g., ESC submission to the OECD 2001, p. 8-11.
- ⁹ Herman 1983, p. 11.
- ¹⁰ This is a practice by which a conference accords its sailings to the sailing times of non-conferences competitors. The conference ship offers a cheaper service, thereby undercutting the others' rate. This practise is continued until the non-conference competitor leaves the trade. Any losses that might be incurred by conference ships due to the very low rates are split between the members of the conference; compare Joint Cases C-395/96 and C-396/96, *Compagnie maritime belge transports SA and others* [(2000) ECR I-1365].
- ¹¹ Zerby 1984, p. 8.
- ¹² For this and the following, see Hummels 1999, p. 8 subs.; Kumar 1999, p. 4; Herman 1983, p. 136 subs.
- ¹³ Erdmenger 1995, FS Raisch, p. 397. It has been stated that the costs for the containers during the total live-span of a ship may be as high as the price for the vessel itself.
- ¹⁴ Braakman 1996, p. 270; Green 1993, p. 477; Ruttlely 1993, p. 488.
- ¹⁵ Green 1993, p. 477; Faull/Nikpay 1999, p. 901.
- ¹⁶ Commission working document on Regulation 870/95, rec. 140.
- ¹⁷ For this and the following, see Francois/Wooton 2000, p. 3; FMC Interim Report 2000, p. 10 subs.; Kumar 1999, p. 8.
- ¹⁸ Clough and Randolph 1991, p. 41.
- ¹⁹ Prieß 1989, p. 369.
- ²⁰ For this and the following see Erdmenger 1983, p. 81; Clough and Randolph 1991, p. 48; Basedow 1994, p. 85; Schwarze 2000, Art. 80, rec. 4; Lenz 1999, Art. 80, rec. 1; Kreis 1988, p. 562, p. 563; Kreis 1992, p. 155, p. 156-7; Power 1992, p. 136; Sir Leon Brittain 1993, p. 337, p. 338; Erdmenger 1988, p. 543, p. 543.
- ²¹ Basedow 1994, p. 85, p. 85; Erdmenger 1988, p. 543, p. 546. It is only since the SEA that the Council can pass measures based on this provision by a qualified majority; Schwarze 2000, Art. 80, rec. 1; Prieß 1989, p. 369.
- ²² Case 167/73 *Commission v France* [1974] ECR 359.
- ²³ Joint Cases 209 - 213/84, *Nouvelles Frontières* [1986] ECR 1425.
- ²⁴ Case 66/86 *Ahmed Saeed* [1989] ECR 803; see Pernice 1993, p. 135, p. 136, and Immenga/Mestmäcker 1997, p. 1469-70, rec. 2.
- ²⁵ OJ 1962, 124/2751.
- ²⁶ OJ 1962, p. 202; OJ Special Edition, 1959-62, p. 57.
- ²⁷ Art. 3, Reg. 141/62.
- ²⁸ OJ 1968, L 175/1.
- ²⁹ Erdmenger 1995, p. 390.
- ³⁰ Art. 1 Reg. 1017/68.
- ³¹ OJ 1979 L 121/1. For this and the following, see Clough/Randolph 1991, p. 16; Vermote 1988, p. 573.; Erdmenger 1995, p. 387 subs.; Heldring 1988, p. 601.
- ³² Compare Art. 1(3)(b) of Regulation 4056/86 and UNCTAD-code, chapter one, definition one.
- ³³ For details see: Vermote 1988, p. 576 subs.
- ³⁴ For the following, see Vermote 1986, p. 7; Erdmenger 1983, p. 88 subs.
- ³⁵ Clough/Randolph 1991, p. 20.
- ³⁶ Erdmenger 1983, p. 89-90; Vermote 1988, p. 586.
- ³⁷ OJ 1981 C 282/4.
- ³⁸ COM(85) 90 final.
- ³⁹ Erdmenger 1988, p. 548.
- ⁴⁰ OJ 1986, L 378/1. For the following, see Calliess/Ruffert 1999, Art. 80, rec. 11; Erdmenger 1988, p. 549; Prieß 1989, p. 374.
- ⁴¹ OJ 1986 L 378/21. For the following, see Grabitz/Hilf 2000, Art. 80, rec. 49; G/T/E 1997, Art. 84, rec. 55; Calliess/Ruffert 1999, Art. 80, rec. 12.
- ⁴² OJ 1986 L 378/14. For the following, see Grabitz/Hilf 2000, Art. 80, rec. 48; Calliess/Ruffert 1999 Art. 80, rec. 15.
- ⁴³ OJ, 1986 L 378/4.
- ⁴⁴ See G/T/E I 1997, Art. 84, rec. 49; Calliess/Ruffert 1999, Art. 80, rec. 13; Clough/Randolph 1991, p. 17.

- ⁴⁵ Ginderachter/Durande 1996, p. 241, p. 245.
- ⁴⁶ Ginderachter/Durande 1996, p. 242; Faull/Nikpay 1999, p. 900.
- ⁴⁷ COM90 (260) final.
- ⁴⁸ OJ 1990 C 167/9. There was some dispute on the question of who should adopt the Regulation, the Council directly through a detailed regulation, or rather the Commission based on an enabling regulation by the Council; see Green 1993, p. 482 subs.; Ruttley 1993, p. 492.
- ⁴⁹ OJ 1992 L 95/3. Ginderachter/Durande 1996, p. 243.
- ⁵⁰ Green 1993, p. 484, ECOSOC statement as cited in: Ruttley 1993, p. 492.
- ⁵¹ OJ 1994 C 63/8; for a good summary of the contents of this draft see: Commission working document on Regulation 870/95, 1999, rec. 32–42.
- ⁵² OJ 1995 L 95/7.
- ⁵³ OJ 2000 L 100/24.
- ⁵⁴ Commission working document on Regulation 870/95, 1999, rec. 31.
- ⁵⁵ Temple Lang 1993, p. 406.
- ⁵⁶ For this and the following, see Kröger 1993, p. 426 subs.
- ⁵⁷ For the following, see Oppermann 1999, p. 182; Temple Lang 1993, p. 406; Faull 1995, p. 5.
- ⁵⁸ Rycken 1987, p. 488; Clough/Randolph 1991, p. 170 subs., where the example is given of a possible boycott of Community carriers on a route between third countries with the aim of hindering EC feeder transport. In the context of the Treaty provisions, the ECJ interprets the principle of territoriality as meaning that EC competition law applies to all agreements that take effect on EC territory, Joined Cases 89/85, 104/85, 114/85, 116/85, 125-29/85, A. Ahlström Osakeyhtiö v Commission [1988] ECR 5193.
- ⁵⁹ Kreis 1988, p. 573; G/T/E 1997, Art. 87 2nd part, rec. 32.
- ⁶⁰ Pernice 1993, p. 151.
- ⁶¹ Wood 1999, p. 5; Clough/Randolph 1991, p. 183.
- ⁶² Clough/Randolph 1991, p. 181.
- ⁶³ G/T/E 1997, Art. 87 2nd part, rec. 36; Immenga/Mestmäcker 1997, p. 2052, rec. 34; Clough/Randolph 1991, p. 220; Werner 1987, p. 797 subs. Compare, however, Rabe/Schütte 1988, p. 701 subs.
- ⁶⁴ Power 1992, p. 308; for examples where doubts about the legality of price differences may arise see Green 1988, p. 612 subs.
- ⁶⁵ Munari 1990, p. 642.
- ⁶⁶ Kumar 1999, p. 4.
- ⁶⁷ G/T/E 1997, Art. 87 2nd part, rec. 38; Rabe/Schütte 1988, p. 702; Werner 1987, p. 801.
- ⁶⁸ Confavreux 1996, p. 373.
- ⁶⁹ FEFC, OJ 1994 L 378/17; see also the Commission Decisions TAA, OJ 1994, L 376/1 and TACA, OJ 1999 L 95/1.
- ⁷⁰ For the following, see FEFC, rec. 86 subs.; Clough/Randolph 1991, p. 214; Kröger 1993, p. 429; Pernice 1993, p. 155; Rabe/Schütte 1988, p. 703; Kreis 1992, p. 167 subs.; Braakman 1996, p. 273; Temple Lang 1993, p. 407 and 421.
- ⁷¹ FEFC, rec. 75 subs.; Kreis 1992, p. 166.
- ⁷² From the German version it becomes clear that the word shipper here means „carrier“, and not „transport user“.
- ⁷³ OJ 1986 C 255/182.
- ⁷⁴ Temple Lang 1993, p. 421.
- ⁷⁵ See TAA, rec. 462-491; FEFC, rec. 92-141; TACA, rec. 409-424.
- ⁷⁶ EATA, rec. 11; TAA, rec. 19; Erdmenger 1995, p. 403. The physical existence of ships and slots is not involved.
- ⁷⁷ TAA, rec. 178 and 366; TAA, rec. 365.
- ⁷⁸ Immenga/Mestmäcker 1997, p. 2053, rec. 35.
- ⁷⁹ Faull/Nikpay 1999, p. 897; Wood 1999, p. 8.
- ⁸⁰ Temple Lang 1993, p. 416.
- ⁸¹ TAA, rec. 370.
- ⁸² Art. 19(1) provides: „Conferences should take necessary and appropriate measures to ensure that their member lines provide regular, adequate and efficient service of the required frequency on the routes they serve and shall arrange such services so as to avoid as far as possible bunching and gapping of sailings. Conferences should also take into consideration any special measures necessary in arranging services to handle seasonal variations in cargo volume“.
- ⁸³ TAA, rec. 362.
- ⁸⁴ Immenga/Mestmäcker 1997, p. 2053, rec. 35.
- ⁸⁵ Braakmann 1996, p. 269; Temple Lang 1993, p. 419. The latter author explains how conferences avoid that free market principles work: „In a competitive market the more efficient shipowners would lower their freight rates, expand their market

shares and provide extra services only at such prices which shippers were willing to pay for them. In such a market, the less efficient shipowners would either become more efficient or leave the market, helping to solve the overcapacity problem.“

⁸⁶ Faull 1995, p. 5; Wood 1999, p. 9.

⁸⁷ Temple Lang 1993, p. 416.

⁸⁸ FMC Interim Report 2001, p. 17.

⁸⁹ TACA, rec. 472 and 473.

⁹⁰ FMC Interim Report 2000, p. ii and 20.

⁹¹ TACA, rec. 451.

⁹² TACA, rec. 107.

⁹³ 11° Geo. IV & Gul. IV, which contains the following provision: „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 merchadizes.“, cited from: Wood 1999, p. 10.

⁹⁴ This report contained the following paragraph: „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 merchadise is concerned this is practically true. To a certain limited extend, 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.“, cited from: Wood 1999, p. 10.

⁹⁵ TACA, rec. 111; Wood 1999, p. 10-13. A loyalty contract is an agreement by which a shipper commits all, or a fixed percentage, of his freight to a certain carrier or conference. The shipper benefits from lower rates in exchange.

⁹⁶ Case 26/76, *Metro v Commission* (No 1) [1977] ECR 1875, p. 1905, rec. 20.

⁹⁷ TACA, OJ 1999 L 95/1, rec. 449.

⁹⁸ TACA, rec. 447.

⁹⁹ Bellamy & Child 1993, p. 35, 1-075.

¹⁰⁰ Joint cases C-395/96 and C-396/96, *Compagnie maritime belge transports SA and others v Commission* [2000] ECR I-1365, p. 1476, rec. 115.

¹⁰¹ For a list of Commission action in this matter see: Commission working document on Regulation 870/95, annex 2.

¹⁰² Ruttley 1993, p. 487, p. 489.

¹⁰³ Confavreux 1996, p. 377-378; Immenga/Mestmäcker 1997, p. 2080, rec. 1.

¹⁰⁴ Commission working document on Regulation 870/95, 1999, rec. 77.

¹⁰⁵ Ginderachter/Durande 1996, p. 247.

¹⁰⁶ Immenga/Mestmäcker II 1997, p. 2046, rec. 21; Munari 1990, p. 641.

¹⁰⁷ Ruttley 1993, p. 489.

¹⁰⁸ Commission working document on Regulation 870/95, 1999, rec. 15; Kreis 1992, p. 164; Ruttley 1993, p. 489.

¹⁰⁹ Ginderachter/Durande 1996, p. 252.

¹¹⁰ Immenga/Mestmäcker 1997, p. 2085, rec. 14.

¹¹¹ Ginderachter/Durande 1996, p. 250; Immenga/Mestmäcker 1997, p. 2084, rec. 12; Ruttley 1993, p. 493.

¹¹² OJ 1990 C 167/9.

¹¹³ OJ 1991 C 305/35.

¹¹⁴ Immenga/Mestmäcker 1997, p. 2086, rec. 19.

¹¹⁵ Immenga/Mestmäcker 1997, p. 2084, rec. 12.

¹¹⁶ Ginderachter/Durande 1996, p. 254; Commission working document on Regulation 870/95, rec. 57.

¹¹⁷ Proceedings in the FEFC affair began in 1989 and in the TAA affair in 1992.

¹¹⁸ Commission working document on Regulation 870/95, 1999, rec. 144 and 145.

¹¹⁹ Immenga/Mestmäcker 1997, p. 2083, rec. 9.

¹²⁰ Ginderachter/Durande 1996, p. 251; Immenga/Mestmäcker 1997, p. 2084, rec. 11.

¹²¹ Commission working document on Regulation 870/95, 1999, rec. 116 subs.

¹²² Fitzgerald 1999, p. 5; Pons2000, p. 15; Wood 1999, p. 18.

¹²³ Temple Lang 1993, p. 405, p. 406.

¹²⁴ On the issue of market power, see Butz 1993, p. 69; Fink/Mattoo/Neagu 2001; Francois/Wooton 2000; Clyde/Reitzes 1995. For a description of the functioning of a monopoly see Beaumol/Blinde 1997, p. 255-274; Eaton/Eaton/Allen 1999, p. 458-484; Faull/Nikpay 1999, p. 4-60; Jones/Sufrin 2001, p. 10-15; Mankiw 2001, p. 315-347.

¹²⁵ WSC submission to the OECD, 2001, p. iii.

- ¹²⁶ The term „rule of reason“ originates from United States antitrust law and means that antitrust provisions do not prohibit all agreements that restrain competition but only those that restrict competition unreasonably; see Bellamy & Child 1993, p. 79, rec. 2-080.
- ¹²⁷ Case 161/84 Pronuptia [1986] ECR 353. See also Case 26/76 Metro v Commission (No 1) [1977] ECR 1875 and Case 75/85 Metro v Commission (No 2) [1986] ECR 3021.
- ¹²⁸ Bellamy & Child 1993, p. 68 - 69 2-063.
- ¹²⁹ ESC submission to the OECD, 2001, p. 3-4.
- ¹³⁰ Joint Cases T-68, 77 & 78/89 Societa Italiana Vetro v Commission [1992] ECR II-1403, p. 1539, rec. 350.
- ¹³¹ Immenga/Mestmäcker 1997, p. 190, rec. 259. In U.S.American antitrust legislation there is no comparable provision which means that there is a greater need for a rule of reason; Jones/Sufrin 2001, p. 143.
- ¹³² Case T-141/89 Montepide SpA v Commission [1992] ECR II-1155, p. 1246, rec. 265; Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, p. 1108, rec. 109.
- ¹³³ Immenga/Mestmäcker 1997, p. 190. Rec. 259.
- ¹³⁴ Dolfen 1991, p. 280.
- ¹³⁵ CSC submission to the OECD 2001, p. 5-6; ESC submission to the OECD, 2001, p. 8; NITL submission to the OECD, 2001, p. 7. See also TSA submission to the OECD, 2001, exhibit 2 and 3; WSC submission to the OECD, 2001, p. 13 and 14; these groups have submitted data on rates to prove that the overall rate level dropped.
- ¹³⁶ Fink/Mattoo/Neagu 2001, p. 9.
- ¹³⁷ Reitzes 1993, p. 82.
- ¹³⁸ Francois/Wooton 2000, p. 12 subs.; Fink/Mattoo/Neagu 2001, p. 4 and 19 subs.
- ¹³⁹ Jones/Sufrin 2001, p. 4.
- ¹⁴⁰ Immenga/Mestmäcker 1997, p. 2049, rec. 26.
- ¹⁴¹ Idem, p. 2050, rec. 27.
- ¹⁴² Idem, p. 2050, rec. 27.
- ¹⁴³ ESC submission to the OECD 2001, p. 3.
- ¹⁴⁴ Kreis 1992, p. 165; Immenga/Mestmäcker 1997, p. 2080, rec. 1.
- ¹⁴⁵ ESC submission to the OECD 2001, p. 5.

- ¹⁴⁶ Submission of the WSC to the OECD, 2001, p. 7 and 13; FMC Interim Report, 2000, p. iv.

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