EC Competition Law on Multimodal Transport – Recent Development[1]

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1 Background[3]

One morning in early December, 1995 I was standing at the entrance to a building on Avenue de Cortenbergh in Brussels. That was at that time the location of Directorate General IV - Directorate C of the EC Commission. This Directorate deals with competition matters. A familiar figure was approaching from the other end of the block. It was Jan Ramberg. He also had a meeting at DG IV on the same day, at the same time and in the same building, but not with the same people. The locality of our coincidental convergence made the choice of the topic for my contribution easy.

EC law relating to transport, and, specifically to maritime transport, has widely been described in many sources.[4] The present main concern seems to be the

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1 Since the original publication of this article in 1996, essential development has taken place, not least by the Commission Decision of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 – Transatlantic Conference Agreement, OJ L 95/1,9.4.99. The EC Treaty has been amended by Treaty of Amsterdam, 1997. It has entered into force 1 May 1999. The original articles of the EC Treaty have new numbers, for example articles 81 (ex 85) on cartels and 82 (ex 86) on the misuse of a dominant position. The text in the following will *not* consider the new numbers.

2 I am indebted to Mr. Stefan Stenstrand, M.Pol.Sc., who has provided me with valuable material in order to write this contribution. Mr. Stenstrand is research assistant at the Institute of Maritime and Commercial Law in a project concerning EC shipping, financed by the Ministry of Trade and Industry, Finland.

3 The concept "multimodal" is generally used in this article rather than the concept "intermodal", even if the latter seems to be preferred by the EC, see, for example, Commission Communication "Towards a new maritime strategy" COM (96) 81, 34.

4 Vincent Power, *EC Shipping Law*, 1992, including also EC Shipping Law, First Supplement to the First Edition, 1994 is obviously the most comprehensive presentation. See also a general EC maritime competition law presentation in a comparative context, Hannu Honka, *European Union Shipping Policies*, included in United States Shipping Policies and the World Market, ed. William A. Lovett, 1996. Further background in Helmut W.R. Kreis,

continuing decline of EC-flagged shipping causing, for example, rising seafaring unemployment. The priority is to find measures to stop this negative trend.[5] If one wants to highlight the emphasis of EC law in the maritime sector, there are two areas.[6]

First, there are competition matters. This is quite natural, mainly due to the Treaty establishing the European Community (EC Treaty) art. 85 and 86 concerning prohibited cartels and suchlike arrangements and misuse of a dominant position respectively. The EC's and especially the Commission's workload has reached a level at which the use of national authorities and courts, if possible, is said to be the preferable way to correct an anticompetition status. Even the possibility of a third party claiming damages in a national court from undertakings involved in prohibited cartels or similar arrangements has been mentioned as a correction method.[7]

Second, the EC has gradually been taking an interest in maritime safety matters, not only covering traditional questions of ship safety but also questions concerning the marine environment. However, there seems, at least so far, to exist a division of functions between the EC and the International Maritime Organization, IMO. The latter maintains its traditional role in creating safety standards, partly by developing conventions such as the International Convention for the Safety of Life at Sea SOLAS,[8] partly by issuing different types of guidelines and recommendations which become soft law. EC activities do not so much consist of creating competitive safety standards to those of the IMO, but rather of finding methods on how to make the member states and third countries in fact apply international safety standards. However, the international debate which has arisen after the *Estonia* disaster in September 1994 shows signs of tension between traditional international solutions on the one hand, and territorially limited solutions on the other. The debate has remained within the sphere of IMO activities. The report after the Scandinavian Star accident in 1990 clearly

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European Community Competition Policy and International Shipping, ETL 1992, 155 et seq. Recent topical issues can be found in the European Maritime Law Organisation's (EMLO) *Fifth Annual Conference Documents*, London 6th-7th October 1995.

5 See following footnote. As a clarification, the global share of EC-owned shipping has not declined in the 1990's. Compared with the strong decline of the share related to EC-flagged ships this cannot mean anything else, but operators outflagging their ships for economic reasons. This is of course not a new conclusion.

6 Naturally, there is a much wider perspective to EC shipping policy than this. A clarifying document of the present policy is Commission Communication "Towards a new maritime strategy", COM (96) 81, adopted 14th March, 1996.

7 Cf. Katherine Holmes, *EC Competition Law: Recent Developments*; Richards Butler Scandinavian seminar papers, August 1995, para. 41 referring to the background situation of the so-called TAA-case, infra.

8 The IMO development of safety standards is partly connected with the important factor of procedure. SOLAS art. VIII enables amendments to be made in a different way than by the conditional and ordinary method of countries having to formally ratify the amendments. The SOLAS procedure is extremely interesting in requiring sates to group together and object should they wish to stop the implementation of certain types of amendments. There are other levels of safety regulations too as clarified in Frederic L. Kirgis Jr., *Shipping, United Nations Legal Order*, Volume 2, ed. Oscar Schachter and Cristopher C. Joyner 1995.

emphasized the need to discuss a territorially based split in safety standards.[9] The report was based not on split geographical rules created by the IMO, but on national solutions. The question for the future is rather how long will the EC be content with its role as an implementor rather than a creator of safety standards. It is not beyond reality to expect that the EC will take independent measures in certain more specific matters.[10] The EC's safety programme does not merely stand alone, but is connected with the protection of the competitive status of EC shipping in the global marketplace.[11]

The focus in this article will be on competition and on certain problems that have arisen due to EC competition legislation concerning transport.

The EC Treaty art. 85(1) clarifies what kind of anticompetitive arrangements are not allowed. Any contract or similar arrangement in contradiction to the stipulations in the article is automatically void, art. 85(2). The Commission is allowed to grant block or individual exemptions should the preconditions set out in the EC Treaty art. 85 (3) be fulfilled. The EC Treaty art. 86 disallows abuse by one or more undertakings of a dominant position.[12] The EC Treaty does not regulate sanctions or details concerning the substance in those articles and it was necessary to create separate EC legislation on this point.[13]

When the EC in 1986 legislated more comprehensively on maritime transport and competition, the package included four main regulations. The one of interest in this context is 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.[14] The other three deal with freedom of services,[15] unfair

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9 The author has discussed safety matters in further detail elsewhere. Hannu Honka, *Questions on Maritime Safety and Liability, Especially in View of the Estonia Disaster*, Essays in Honour of Hugo Tiberg, 1996, 351-382. See also the specific subject on classification society liability, Hannu Honka, *The Classification System and Its Problems with Special Reference to the Liability of Classification Societies*, (1994) 19 Tul.M.LJ. 1-36. Cf. the Scandinavian Star report NOU 1991: IA, especially 194 et seq.

10 Commission Communication COM (96)81 "Towards a new maritime strategy" states, 19: "In certain specific and justified cases (eg. for the protection of EC citizens and the environment), the EC could set its own intra-European safety and working standards for geographically limited operations, such as ferry services operating to or from a European port, whatever their flag, as a condition for providing such services". Indirect pressure is also put upon the IMO by it being stated that those independent standards "could be followed up whenever appropriate, for example if in spite of technical evidence, IMO failed to adopt safety measures to the high level appropriate or desirable for operation of these vessels from or to EC ports".

11 Honka 368 et seq. The same policy continues, Commission Communication "Towards a new maritime strategy" COM (96)81, 13 et seq.

12 Abuse of a dominant position is fairly liberally treated and has been widely applied. This is clearly shown in the analysis by Valentine Korah, *An Introductory Guide to EC Competition Law and Practice*, 5th ea., 1994, 67 et seq.

13 Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty, OJ L 13/ 204 21.2.62. Also, EEC: Regulation No 27 of the Commission: First Regulation implementing Council Regulation 17 of 6 February 1962,0J L35/1118 10.5.62.

14 OJ L 378/4 31.12.86.

15 Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between member states and third countries. OJ L 378/1 31.12.86. Now, of course, the WTO and the specific part concerning services, the

pricing practices[16] and free access to cargoes.[17] By 1986 there was also an EC standpoint, 1979, on the UNCTAD Code.[18] Finally, freedom of maritime cabotage was introduced in 1992 with transitional periods.[19]

Regulation 4056/86 was necessary not only to decide the scope of exclusion of ordinary EC competition rules on technical grounds and block exemptions for liner conferences[20] but also to clarify the Commission's competence in exercising control and implementing sanctions including the imposing of fines.[21]

Other transport sectors than shipping concerning competition aspects have been specifically regulated. Land and inland waterway transport is regulated by Regulation (EEC) 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway.[22]

There is a vital difference between Regulation 4056/86 and Regulation 1017/68. The first-mentioned in art.3 *allows price fixing by liner conferences,* while the latter *does not* allow for this or similar type of co-operation for inland carriers and operators. Regulation 1017/68 art. 2 repeats the prohibited arrangements found in the EC Treaty art. 85. However, as in Regulation 4056/86 art. 2, some technical agreements are allowed in accordance with Regulation 1017/68 art.[23]

Relating to modern transport services in, to and from Europe there is a demand to find efficient and smooth transport routes for manufactured goods.

General Agreement on Trade in Services, GATS, has to be taken into consideration in the global marketplace. The most favoured nation, MFN, treatment is included in GATS, potentially opening up the market in a dramatic fashion. This results in the fact that the EC has no unlimited possibility to exercise discrimination against third countries, as GATS obligations have to be taken into consideration to the extent they apply. However, the fundamental restriction with GATS is that non-discrimination and access are based on the need to negotiate the obligations and rights. The shipping industry is subject to a problematic global situation due to this. For a short overview on the meaning of GATS in the shipping sector, see Philippa Watson, *Shipping and the General Agreement on Trade in Services* (GATS), ETL 1995, 841 et seq.

16 Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, OJ L 378/14 31.12.86.

17 Council Regulation (EEC) No 4058/86 of 22 December 1986 concerning co-ordinated action to safeguard free access to cargoes in ocean trades, OJ L 378/21 31.12.86.

18 Council Regulation of 15 May 1979 concerning the notification by Member States of, or their accession to, the United Nations Convention on a code of conduct for liner conferences (79/954/ EEC), OJ L 121/1 17.5.79.

19 Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364/7 12.12.92.

20 The block exemption stipulations also regulate some arrangements between transport users and between transport users and liner conferences.

21 Transport had been omitted from the scope of Regulation 17/62 by Regulation 141/62 of the Council exempting transport from the application of Council Regulation 17, OJ L 124/2751 28.11.62.

22 OJ L 175/1 23.7.68. Also, Council Regulation (EEC) 3975/87 of 14 December1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374/1 31.12.87.

23 Regulation 1017/68 art. 4 allows certain co-operation for groups of small and medium-sized undertakings.

Those routes are to a large extent created in the form of regular liner or similar services at sea. However, a customer, an exporter or importer, is not satisfied in receiving single mode services involving carriage by sea. In many cases, he would rather like to have the goods arranged on a door-to-door basis requiring a sensible combination of different modes of transport. These multimodal services save time, effort and costs. Such services have been traditionally delivered by forwarding agents. Also land carriers have been used to deliver them. The maritime business entered the door to door service sector later.

Multimodal operations involving sea carriers are commercially divisible into two categories: carrier haulage and merchant haulage. In the first-mentioned the sea carrier arranges the inland transport leg, in most practical cases by subcontracting capacity. In the latter the merchant, or on his behalf the forwarding agent, takes the goods to, and/or collects them from, the sea carrier's terminal by independent arrangements.[24]

A distinct feature in the EC regulation of the transport sector is that there is no specific emphasis on multimodal transport in spite of the fact that by the time the 1986 EC shipping legislation was implemented such form of services was well known.

The scope of Regulation 4056/86 has been under debate. As there are differences between sea and land carriage concerning mainly price fixing cooperation, also the legal status of multimodal operators, especially operators involved in sea transport, is unclear. The problems concerning the scope of the right to conclude anticompetitive arrangements by groups of shipping lines, including liner conferences, came to their head in two Commission cases. The first is Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 - Trans-Atlantic Agreement),[25] i.e.the *TAA-case*. The second is Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV.33.218 - Far Eastern Freight Conference),[26] i.e. the *FEFC-case*. The main elements in the cases are dealt with in the following.[27]

2 The TAA-case

2.1 The Nature of the TAA Agreement

In the TAA-case, the agreement, having become effective in 1992,[28] between 15 shipping lines included several restrictive practices. The geographical scope of the agreement covered eastbound and westbound shipping routes between a

24 For facts, see Commission Decision of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.218-Far Eastern Freight Conference), OJ L 378/17 31.12.94, especially recitals 8 and 16 et seq. Unscheduled or tramp services and specialized transport are of no great concern in this specific context.

25 OJ L 376/1 31.12.94.

26 OJ L 378/17 31.12.94.

27 See the footnote at the title of this article for references to new development.

28 Before the TAA, there were several conferences operating on the market, but the main difference was between lines organized in conferences and outsiders.

large contingency of European ports and US ports. In the TAA-case it was established that competitive restrictions concerning shipping comprised at least the following: 1) capacity sharing, 2) price fixing, and 3) capacity utilization. All these forms were found in the TAA-case.

Price fixing included both the maritime and inland sectors. Apparently, the only way to include former "conference outsiders" in the TAA was to give more freedom in respect of tariff rates and service contracts than was traditional for ordinary conference members. Thus, there was a division between structured members and unstructured members (former outsiders). An unstructured member could take independent action (IA), for example, in tariff rates both by underquoting structured members and by establishing rate differentials.[29] The Commission established that the TAA resulted in considerable increases in the general level of freight rates.

The agreement also consisted of a specific Capacity Management Programme CMP according to which the supply of transport on the market was to be limited without reducing the real available capacity of shipowners. Shipowners had agreed not to utilize a substantial part - up to 25 % - of their available capacity. The CMP was, in fact, a capacity non-utilization agreement, but applied only in the westbound sector. The CMP was explained from the operators' point of view by the fact that average utilization rates during the years 1990 - 1992, including westbound and eastbound, varied between 60,1 and 72,4%, the corresponding figures for westbound only being between 60,1 and 64,7%. However, the conference members maintained that there were still potential competition facilities in this specific market. The CMP, according to the Commission, meant that capacity could quickly be increased by the TAA members making it more difficult for others to enter the market on a more permanent basis. The Commission Decision described the CMP as (recital 254) "a toll intended to maintain unused capacities artificially and to raise artificially the level of freight rates in the westbound sector".

After the Commission had initiated examination of the TAA on the basis of a notification, there were several complaints from shippers and others against the TAA arrangements including references to the EC Treaty art.85 and 86 and Regulations 4056/86 and 1017/68. The Commission decided to take a standpoint on 1) price agreements on maritime transport, 2) the CMP, and 3) price agreements on inland transport.

2.2 Price Agreements Concerning Maritime Transport, The CMP and Price Agreements Concerning Inland Transport

As far as the price fixing was concerned, the Commission stated that liner shipping companies were undertakings within the EC Treaty art. 85 (1). The TAA agreement had, as the object or effect, the restriction of competition, in particular regarding tariffs, freight rates and general transport conditions. The Commission also mentioned that it was sufficient that agreements or restrictive trade practices

29 Independent action was possible with reference to service contracts.

potentially may affect intra-Community trade to a significant extent.[30] This was so in the TAA-case.

The CMP was considered to fall under the EC Treaty art. 85 (1). The arrangement allowed the limitation or control of production. This was possible mainly by restricting even substantially the competitive capacity of the TAA members. Also, the CMP enabled a general increase in freight rates.

The TAA agreement was considered to fall under Regulation 1017/68 for the inland leg. Art. 1 and 2 cover similar situations as the EC Treaty art. 85. Such rate fixing was a restriction of competition.

The result of such conclusions by the Commission was that the TAA members, in order to be able to continue with their restrictive practices, had to establish that the arrangements either fell under a block exemption or that they would be granted an individual exemption by the Commission.

2.3 The Question of Block or Individual Exemptions

Perhaps the most interesting part of the Commission Decision refers to the question of the TAA members' possibility to apply a block exemption. As Regulation 1017/86 does not give any real possibilities in this respect, the remaining possibility would be Regulation 4056/86.

This would presuppose two things. First, the TAA agreement would have to fall under the definition of a liner conference in Regulation 4056/86. Second, the established above-mentioned competitive restrictions would have to be included in the block exemption as defined in Regulation 4056/86.

According to Regulation 4056/86 art. 1 (3)(b), one of the characteristic features of a liner conference is that the basic agreement makes the members operate on uniform or common freight rates.[31] This same reference is found in the UNCTAD Code of Conduct for Liner Conferences (UNCTAD Code). The Commission found that such definitions did not cover the setting of minimum, maximum or differentiated tariffs. On the contrary, the definitions showed that all members of a conference must (recital 321) “quote the same freight rates for the maritime transport of the same product on a regular service”. Thus, freight rates according to the exact wording must be common, not only established in common. In addition to the exact wording the Commission referred to both literature defining a liner conference and to the preparatory reports of the UNCTAD Code.

The true status of the TAA agreement was, according to the Commission, that it sought to disguise as a conference what in fact was an effort to bring outsiders into some kind of line with traditional conference members. The nature of the TAA agreement was an agreement between a conference and outsiders.

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30 Cf. Höfner and Elser v. Macrotron [1991] ECR I 1979, paragraphs 32 and 33.

31 The wording in Regulation 4056/86 art. 1 (3)(b) is: “'[L]iner conference' means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services”. Cf UNCTAD Code Ch. I “Liner conference or conference”.

Even if certain independent action (IA) was allowed within conferences, such as departures from the common tariff for loyalty arrangements, the TAA differentiation of rates was, according to the Commission, not open to all the members of the agreement.

Consequently, the Commission found that the TAA was not a liner conference within the definition of Regulation 4056/86, as the agreement established at least two rate levels.

In deciding the status of the CMP, the Commission again, as in the previous part of the Decision, used material on the UNCTAD Code and UNCTAD reports. The Commission found that the main restrictive activity to be exempted was price fixing, and capacity questions were referred to seasonal fluctuations, sailings allocations and similar circumstances which must be incidental to price fixing. The CMP's main purpose was increased freight rates. Even if Regulation 4056/86 art. 3 (d) allowed for "the regulation of the carrying capacity offered by each member" the history of the Regulation in question showed that the legislative intention had been to require the above-mentioned underlying needs, not the objective of substantial increase in freight rates. Finally, the interpretation of that stipulation was, if possible, to be in accordance with the EC Treaty art. 85 (3). The Commission stated that it would have been difficult to find compatibility in including the CMP under Regulation 4056/86 art. 3 (d) as no preconditions mentioned in the EC Treaty art. 85 (3) were found.

Thus, even if the TAA would have been a liner conference, the CMP would not, according to the Commission, fall within the substantive block exemption stipulations in Regulation 4056/86 art. 3. As found in recital 366 of the Commission Decision, the CMP was different from "temporary adjustments in the amount of physical capacity available". For example, the withdrawal of a vessel would fall under the block exemption. The motivations used by the Commission show that a very detailed analysis of facts in order to make a proper differentiation is required.

The Commission Decision shows that the whole "list" (a-d) in art. 3 should be interpreted as ancillary to price fixing.

It is particularly interesting, whatever one might feel about the conclusions drawn by the Commission, to note how the Commission pursued with the interpretation of the relevant EC legislation. The Commission clearly used (1) wide background material as the basis for its decision. Interpretation of a Regulation was put in a global setting by reference to literature and the underlying aims of the UNCTAD Code. The (2) real nature of the agreement was analysed and the formal framework was not given weight. Also, a (3) specific *ratio legis* analysis was applied not directly referable to the recitals of the Regulation, but found in the history of that EC legislation. Finally, the (4) EC Treaty was given its ordinary weight in the interpretation process.

The Commission found that the block exemption in Regulation 4056/86 art. 3 could not reach further than the scope of the Regulation itself. Door-to-door services were not covered, only port-to-port services.

The course adopted by the Commission concerning this specific problem was largely based on (5) textual interpretation of the Regulation. However, there is an interesting observation as far as interpretative material is concerned. When Regulation 4056/86 was dealt with by the European Parliament it (6) proposed

an amendment according to which the block exemption would have covered also "intermodal transport". This amendment was not accepted by the Council. The rejection was interpreted by the Commission to reflect the contention that inland price fixing was not covered by Regulation 4056/86, not even in its multimodal context. Regulation 1017/68 allows for deviations concerning technical agreements but this was not the case in the TAA agreement.

The Commission seems to have reacted strongly to the TAA agreement.[32] It held that any other interpretation of the TAA agreement taking it under the block exemption would have made the Commission consider the application of Regulation 4056/86 art. 7. This would have allowed the Commission to withdraw the block exemption on the basis of elimination of competition.

With such strict motivations related to interpretation of relevant EC legislation it is perhaps no great surprise that the Commission declined to grant an individual exemption both as far as the maritime transport agreements (price fixing and the CMP) and inland haulage price fixing were concerned. In this context the Commission analysed the preconditions found in the EC Treaty art. 85 (3) and found that they were not fulfilled. There is no need to penetrate this aspect any further.

2.4 Sanctions

Perhaps the most significant part of this topic is to observe the sanction that the Commission did not use. According to Regulation 4056/86 art. 19 and 20, the Commission is allowed to impose fines or periodic penalty payments respectively if undertakings infringe the EC Treaty art. 85 (1) or art. 86. The same right is conferred upon the Commission in Regulation 1017/68 art. 22 and 23.[33] Fines or periodic penalty payments were not imposed upon the TAA members for reasons not explained in the Commission Decision. This is connected with the fact that notification (28th August, 1992) to the Commission took place before the TAA became effective (31st August, 1992). In such time perspective Regulation 4056/86 does not allow for fines.[34]

On the other hand, the conclusions mentioned above were repeated and the undertakings concerned were required to bring an end forthwith to the infringements. The undertakings concerned were required to refrain in future from any similar arrangements and they were required to inform their customers that they

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32 This is shown also in Jonathan Faull, *Recent Developments in European Community Compensation Policy in the Maritime Field*, ETL 1995, 4 including a reference to the TAA-case which at that time was not yet decided by the Commission. Faull maintains that the combination of price fixing and capacity restrictions is "the most harmful type of cartel imaginable" . Cf. Commission Communication *Towards a new maritime strategy* COM (96) 81, 22, which maintains that capacity non-utilisation is a typical example of competition restriction.

33 However, the reference is to Regulation 1017/68 art. 2, not to the EC Treaty art. 85 and 86. The substance does not differ.

34 Regulation 4056/86 art. 19.2. subpara. 2: "The fines provided for . . . shall not be imposed in respect of acts taking place after notification to the Commission and before its Decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification".

were enticed to renegotiate the contract terms and contracts they were involved in.

The Decision was taken to the CFI and to the ECJ.

3 The FEFC-case

This case was taken to the EC through complaints dated earlier than the ones in the TAA-case, but the Commission Decision came later even if published on the same date as the TAA-case.

The FEFC-case is not as extensive concerning problems as the TAA-case. It argues around the question of multimodal transport and price fixing in connection with those services. This has to do with the previously mentioned fact that shipping lines stepped on land and started to compete with door-to-door services with the more traditional providers of those services. The multimodal operations in the FEFC-case automatically included a sea leg.

3.1 Background

It was maintained in the complaints that only the sea leg was covered by Regulation 4056/86 art. 3 concerning the exemption of price fixing, while inland transport and port cargo handling was not. Inland transport fell under Regulation 1017/68.

The FEFC had a wide service range both eastbound and westbound involving ports in Europe and the Far East. In carrier haulage the FEFC would handle the inland leg. Port handling services were not dealt with by the Commission.

A number of facts were reported in the Decision. The merchant had a choice between carrier and merchant haulage. Some 70 % was moved inland by carrier haulage. FEFC transport was to a considerable extent performed within the territory of the EC. The agreement in question covered rates for maritime transport, inland transport and terminal handling and other charges. Inland rates were settled already in 1971.

The Commission decided that the arrangements fell under the EC Treaty art. 85 (1). The TAA-observations were repeated, i.e. no concrete effects of restriction were needed, the possibility sufficed. The restrictive practices for the inland leg were considerable because of the number of containers (in 1991, 1 015 208 TEUs in Northern Europe) and large costs (average cost structures in 1992, inland leg share being 18,6% based on ten of the largest members of the conference). At the same time, it was considered that the agreement affected trade between Member States, not only relating to services but also relating to trade in goods.

3.2 Regulations 1017/68 and 4056/86 and Inland Haulage Rates

Considering the application of Regulation 1017/68 to the agreement, the Commission found that, as the Regulation repeated (art. 2) with little variation the text of the EC Treaty art. 85, it had to be interpreted without deviation from the basic competition rules of the EC Treaty. (7) Case law of the Court would therefore be relevant. The carrier haulage services inland tariff was prohibited according to both the EC Treaty art. 85 and Regulation 1017/68 art. 2. As price

fixing was of a commercial nature, it could not fall under the exemption in Regulation 1017/68 art. 3 concerning technical agreements.[35]

The members of the FEFC had argued that multimodal transport would fall under Regulation 4056/86 and the inland price fixing would be caught up by the block exemption in art. 3. The arguments used by the Commission were mostly the same as in the TAA-case on this specific point. It was not accepted by the Commission that collectively negotiated purchase of inland transport services fell under the block exemption, as Regulation 4056/86 art. 3 covered selling prices not buying prices. There were some further arguments that the Commission dealt with, but the ones referred to so far would be the most relevant. The Commission decided to cover the question of a possible individual exemption concerning collective price fixing for carrier haulage services as well, but declined, for reasons found in the Decision, to grant such an exemption.

Thus there is double verification by the Commission on how to treat multimodal services from EC competition law point of view concerning price fixing. In addition, the concept of "liner conference" has found its limits.

3.3 Sanctions

The same sanctions as mentioned in the TAA-case were adopted in the FEFC-case. However, the major difference is that in the latter also fines were imposed upon the undertakings involved in the FEFC agreement covering inland haulage price fixing. As a general starting point the Commission found that restricting price competition was (recital 145) "a matter of indisputable gravity". This basic principle was repeated concerning specifically the FEFC (recital 153). Other criteria for imposing the fines were also used starting with what was stated in Regulation 1017/68 art. 22 (2). The basic requirement for fines was intention or negligence. In judging intention the Commission stated that the members of the FEFC (recital 147) "could not have been unaware that their price-fixing activities in relation to inland transport services had as their object the restriction of competition".[36] Intention, according to the Decision, covered "non-unawareness". Another major factor was the long duration of the infringement (since 1971) and the warnings the conference members had received by the Commission before the final Decision. However, some mitigating factors influenced the Decision too. The latter led to fines at a "symbolic level". Thirteen members were fined ECU 10 000 each. One member was not fined due to non-involvement in the infringement.

4 The Follow-up

The TAA- and FEFC-cases are not the end of the line on the issues that were dealt with.

Several subsequent incidents are relevant in the continuing discussions, i.e. the further handling of the TAA-and the FEFC-cases in the CFI and the ECJ, a

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35 Regulation 1017/68 art. 4 concerning small and medium-sized undertakings was not applicable according to motivations found in the FEFC-case paragraphs 69-72.

36 Cf. Tippex v. Commission [1990] ECR 1261.

reference in another case to the ECJ for a preliminary ruling concerning the issues dealt with in the above-mentioned cases and the interim and, to come, the final report of the Multimodal Group.

4.1 The TAA/TACA-case in the CFI and the ECJ

The TAA-case eventually went to court. An action for the annulment of the Commission Decision was registered at the CFI. However, before that judgment the CFI had, due to a separate application, to take a standpoint on the Commission Decision by a possible suspension order.[37]

The President of the CFI on 10th March, 1995 made an order[38] covering several points, one of them being that the Commission Decision, insofar as it prohibited the applicant members from jointly exercising rate-making authority in respect of the inland portions within the Community of through-intermodal transport services, was suspended until delivery of the final judgment of the CFI in the main action.

It was explicitly stated that the measures sought must be provisional in that they must not prejudge the judgment on substance.

However, the applicants referred to a number of pleas that can be described as of substantive nature and the CFI President seems to partially have accepted those pleas. The suspension order verified as a *prima facie* case that the Commission had not taken into account inland container transport as a whole when determining the relevant market. It is important to explain this motivation by the President. As a general principle of EC competition law, an anticompetitive agreement must have an appreciable effect on competition or inter-State trade within the market for the EC competition rules to apply.[39]

The TAA Agreement had during the course of the administrative procedure been modified to a Trans-Atlantic Conference Agreement TACA.[40] According to another of the pleas, the Commission had applied to the TACA the conclusions which it had reached while examining the TAA. Also on this point there was a *prima facie* case.

To grant an interim measure there had to be a question of a risk of serious and irreparable damage. The CFI President found, based on the grounds put forward by the applicants, that there was (recital 56) "a not insignificant risk that changes to the framework in which they operate, such as the application of the contested decision would imply, might entail a general drop in rates such as even to affect the regularity of maritime transport". Further: "If such a situation were to arise, it could, in view of the economic importance of that market, lead to widespread

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37 The EC Treaty art. 185 and 186, Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 art. 4 and Rules of Procedure of the Court of First Instance art. 104 (2) and 106, OJ L 136/1 30.5.91 and later amendments. According to the latter, a suspension order by the President of the CFI is possible.

38 Case T-395/39 ECR 1995 11-0595, OJ C 159/23 24.6.95.

39 This is a de mininis - rule, for example, Korah 60 et seq.

40 The Carsberg Report, infra, also indicates that the TACA includes some modifications compared with previous arrangements. However, these seem to be concerned only with improved possibilities for shippers to use containers.

damage of undeniable significance". Consequently, it was found that immediate application of the Commission Decision might cause serious and irreparable damage to the applicants and might also compromise the stability of the market.

The essential arguments used by the CFI President show that there is at least a slight inclination towards disregarding the Commission Decision as far as the status of "non-conference" is concerned. This seems to be due to the fact that a modified agreement, the TACA, which the Commission had not examined, had replaced the TAA. Further, it seems that should the inland haulage tariffs be considered as infringements of Regulation 1017/68 art. 2 and, at the same time, not fall under the block exemption in Regulation 4056/86 art.3, the CFI might approve of a transitional period during which such tariffing would be abolished rather than accept an abrupt end to a system that has been in application since the early 1970s.

However, as the follow-up below shows, some aspects of the TAA-case may fall under a preliminary ruling to come from the ECJ.

Unsurprisingly, the Commission brought an appeal to the ECJ, inter alia, to set aside the order of the CFI President.[41] The President of the ECJ on l9th July, 1995 made an order.[42] The same basic rule as in dealing with appeals of substantive nature is found: an appeal may lie only on questions of law and may not extend to any assessment of the facts.[43] Consequently, it was not possible to call into question the CFI President's assessment of facts. As a point of principle the ECJ President established that the judge hearing the applications enjoys a broad discretion. That main consideration must steer the decision concerning any possible error in law.

There were several points put forward by the Commission on appeal, but the most interesting one was the Commission's claim that its Decision only concerned the TAA, not the TACA. The ECJ President found that this was not so, as the Commission in its Decision had required the undertakings in question to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the agreements and practices based on the TAA. This requirement "undeniably" covered the TACA which was an amended version of the TAA. Consequently, that plea was rejected. Also, the other arguments in the other pleas put forward by the Commission were rejected, such as the argument that the applicant must demonstrate that it will suffer specific, serious and irreparable harm. Foreseeability with a sufficient degree of probability was enough. Further, the ECJ President explicitly stated that initial findings by the CFI President concerning possible drops in rates, the effect on the regularity of the maritime transport etc. were acceptable.

The conclusions on the basis of the CFI President's order gain further strength by the order made by the ECJ President and the specific arguments that he used.

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41 The EC Treaty art. 168a and the Statute of the Court of Justice of the E.C. art. 50 (2). The ECJ decides upon suspension and intern measures according to the EC Treaty art. 185 and 186 and Rules of Procedure of the Court of Justice art. 83 (2) and 85, OJ L 176/7 4.7.91 and later amendments. The latter allows the President of the ECJ to make a suspension order.

42 Case C-149/95 ECR 1995 1-2165.

43 The EC Treaty art. 168a and the Statute of the Court of Justice of the E.C. art. 51 (1).

Even this did not sufffice. There was a further application to the CFI for an order preventing an anticipated (!) decision of the Commission, among other things, withdrawing from the applicants their immunity from fines, "from entering into effect as long as the Court of First Instance has not given final judgment on an application for its annulment". The CFI President made an order on 22nd November, 1995[44] whereby the application for interim measures was dismissed.

4.2 The FEFC-case in the CFI

The FEFC-case also went to court. An action against the Commission of the European Communities was brought in the CFI by all but one of the addressees to the Commission decision.[45]

The applicants claimed the annulment of the Commission Decision. There were some procedural grounds for it, but the main line was quite different. The applicants maintained that defining the "relevant market" properly would lead to the multimodal transport services being considered part of the maritime transport thus enabling the application of Regulation 4056/86. Alternatively, the applicants wanted to emphasize the same wrongful definition by the Commission of the concept of "relevant market" concerning inland transport services as was mentioned above in connection with the TAA-case and the CFI President order. Also, the whole exemptive system created for price fixing in Regulation 4056/86 would lose its meaning, as few liner conferences, if any, did not have a multimodal tariff. Such a result could not have been the EC legislator's intention. The application also included grounds dealing with exemption possibilities.

The FEFC-case still pending in court ends here for the time being.

4.3 Reference for a Preliminary Ruling in the Case of Compagnia di Navigazione Marittima v Compagnie Maritime Belge (The SUNAG-case)

It was expected that a CFI judgment on the substance of the TAA-case, and obviously also the FEFC-case, was imminent. However, a case has arisen in the national court system of the Member States, i.e. Compagnia di Navigazione Marittima v Compagnie Maritime Belge in the High Court of Justice, Queen's Bench Division (Commercial Court) in England. The national court decided to refer the case for a preliminary ruling by the ECJ.[46]

The case for a preliminary ruling concerned a number of shipping lines providing services between ports in western Europe and in the Arabian Gulf. The services included multimodal carriage in the same fashion as mentioned above in the other cases. Several questions have to be answered by the ECJ including similar to those in the Commission Decisions in the TAA- and the FEFC-cases. However, clearly, the questions do elaborate in greater detail the previously mentioned problems and it seems that practically every single aspect in need of clarification by the ECJ has been taken into consideration in putting forward the

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44 Case T-395/94, OJ C 16/13 20.1.96.

45 Case T-86/95, OJ C 137/32 3.6.95.

46 Case C-339/95, OJ C 351/4 30.12.95.

questions. Contrary to the TAA-case, there does not, however, seem to be any CMP type of problem involved.

It is perhaps of less interest to dwell upon details, as there is basically nothing new concerning the most relevant parts of the multimodal transport problem. Rather, it might be of some interest to discuss what procedural forms will be applied. Should the CFI pursue or should the preliminary ruling by the ECJ be given priority even if arrived at in the EC court system later? According to Rules of Procedure of the Court of First Instance[47] art. 77, proceedings in the CFI may be stayed in circumstances, among others, specified in the Statute of the Court of Justice of the E.C. art. 47 (3).

The latter article states the following "Where the Court of Justice and the Court of First Instance are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the Court of First Instance may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice shall have delivered judgment.... In the cases referred to in this subparagraph, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the Court of First Instance shall continue".

The CFI, according to the conventional understanding of the text, does have discretion to decide the issue, i.e. whether to proceed with the case or stay the proceedings until the preliminary ruling has been given. The ECJ has the same discretionary power concerning the procedure before it.

As the legal problems in the TAA-, FEFC- and SUNAG-cases do not totally coincide, there is an additional problem of policy for the courts. The CFI on 26th June, 1996 issued an order in the TAA- case. There was support for both alternatives as presented to the CFI, either stay or continuation of the TAA-case. As shown above, there is wide discretion for the court. The CFI ordered the TAA- case before it to be stayed until judgment shall have been delivered in the SUNAG-case. This was due to the fact that the questions submitted to the ECJ in the SUNAG- case would enable the CFI to answer the questions put to it. The stay was in "the interest of sound administration of justice". Exactly the same concept was used in the CFI order of the same date concerning the FEFC-case. This means that the SUNAG- case will be decisive to the whole problem concerning multimodal transport and price fixing for the inland leg. There is no further indication as to the reason for these orders.

To a certain extent even the Commission could have the position of consulting with the national court in competition matters.[48]

4.4 The Multimodal Group and the Carsberg Report

Before the respective Commission Decisions in the TAA- and FEFC-cases, there was a reaction to multimodal transport and the price fixing mechanism in the Commission Maritime Transport Report of 8 June 1994, work having been initi-

47 Reference in footnote 35.

48 See further details in David W. K. Anderson, *References to the European Court*, 1995, 1-057.

ated in 1993.[49] After examination of the report in various Transport Council meetings a group of "wise men", the Multimodal Group including Jan Ramberg as member, was set up in order to examine how policies on multimodal transport price fixing should be implemented. A more cost effective inland haulage system was to be created for the improved benefit of transport users which would simultaneously be compatible with EC competition law. This aim was in accordance with the Commission Maritime Transport Report. The wise men were not to examine the right to price fixing set up in Regulation 4056/86. Obviously this explicit reaction was to calm the shipping industry fears of the total abolishment of such rights.

The Multimodal Group adopted an Interim Report- the Carsberg Report[50] - on 6th February, 1996, the name indicating that the Group was to pursue with its activities.[51]

The Group found that the inland leg could be improved - especially the movements of empty containers - in order to make multimodal services more efficient. Such factual improvements were not found to exist by the Multimodal Group. However, the fundamental problem was the "collective fixing of inland rates by Conferences within a multimodal operation". The Multimodal Group emphasized the starting point in the EC Treaty art. 85. This led to consider what the benefits for consumers would be in collective price fixing of the above - mentioned kind. Should benefits be found, the additional requirement would then be that the price fixing would be indispensable for the attainment of those benefits.

The Group stated that there were no convincing signs of increased profits or the facilitation of on-shore investment by collective inland price fixing. On-shore investment circumstances were no different from that of other industries. The Group found no reason to suggest the application of the EC Treaty art. 85 (3) dealing with exemption.

As for the future, several recommendations were given. Among them, the Group found that the conferences should be allowed to agree upon a minimum price rate which should not be below the cost incurred by arranging the inland leg. This "not-below-cost" principle would exist on an interim basis. The question of price recommendations was not dealt with further. No block exemptions were recommended as yet. Discrimination against merchant haulage, such as financial penalties, had to disappear.

Perhaps the most dramatic recommendation comes last, as the Group suggests that the mode of transport should not be decisive for price fixing possibilities and that within unnamed transport systems the possibility of exemption should be open to all operators. This would "ensure the regularity and reliability of such transport services". For present purposes though, no understanding for immedi-

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49 SEC (94) 933 final. Also Commission Communication "Towards a new maritime strategy" COM (96) 81 includes policies on competition.

50 The Group was headed by Sir Bryan Carsberg.

51 A number of expert witnesses, representing shipowners, shippers, freight forwarders and the Commission, were heard. One shipper witness does in reality not represent shippers, but rather an operator with very specific arrangements with shippers. This is not specified in the Annex listing the witnesses.

ate exemptions is established in the Carsberg Report. The conclusions reached include a follow-up of WTO development and a comparison with US antitrust law.[52]

Again, the very same issues were dealt with as were, by the time of the Carsberg Report adoption, *sub judice* in the CFI (two cases on appeal and one suspension order already having been made and another application having been dismissed) and the ECJ (one suspension order by appeal having been made and one preliminary ruling pending) and having gone through the Commission (two cases). Also, there already was one Commission report. However, there is some indication in the Carsberg Report that the hypothesis of maintaining the collective price fixing for the sea leg continues to live as a basic value within the EC and that the same value could even possibly be enlarged under the concept of unnamed transport. Such indications are not found in the Commission Decisions in the TAA- and FEFC-cases. The status of price recommendations has been left open, not only in the Carsberg Report, but, in fact, also in the FEFC-case. However, it should be fairly clear that recommendations would initially fall under the EC Treaty art. 85 (l).[53]

The final report by the Multimodal Group is to be presented during the course of 1996, but it was not available at the time of writing.

5 Consortia - a Further Form of Cooperation

The definition of a liner conference has been problematic not only in relation to EC competition law as so clearly noticeable in the TAA-case, but also in relation to other forms of co-operation between undertakings, such as consortia which are based on joint-service agreements. There is Council Regulation No 479/92 of 25 February 1992 on the application of article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).[54] This enabling legislation gives the right to the Commission to issue further rules by regulation. However, it is stated in art. 1 that the only acceptable purpose for co-operation within this framework is rationalization of liner shipping companies' operations by means of technical, operational and/or commercial arrangements - with the exception of price fixing.

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52 Similar comparisons are made in the Commission, Faull 4. US antitrust laws seem to allow price fixing agreements by liner conferences in a multimodal context, Kreis 167. The Commission's present policy is based on the globalisation of shipping, consequently resulting, for example, in emphasis on world-wide competition rules and free shipping services, Commission Communication “Towards a new maritime strategy” COM (96) 81, 12 and 20 et seq.

53 This is not expressed quite as strongly by Holmes para. 66, even if she does clearly implicate the risks in such cases.

54 OJ L 55/3 29.2.92. One of the recitals clarifies the consortia: “Whereas joint-service agreements between liner shipping companies with the aim of rationalizing their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as consortia). . .”. Another recital continues: “Whereas consortia in liner shipping are a specialized and complex type of joint venture; whereas there is a great variety of different consortia agreements operating in different circumstances; whereas the scope, parties, activities or terms of consortia are frequently altered …”.

Commission Regulation 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92[55] stipulates in further detail when and what kind of co-operation in the form of consortia, whether inside or outside a conference, is allowed.[56] The disallowance of price fixing is repeated.

As the consortia regulations do not allow price fixing by common tariffs there are three alternatives to create such a possibility. First, an individual exemption is applied for and granted. Second, consortia are transformed into liner conferences. Third, consortia become members of liner conferences. At the same time it is quite clear that the price fixing problem concerning the inland leg of a multimodal operation is in no way clarified by the consortia regulations, except indirectly. The consortia regulations indicate that price fixing possibilities should exist only in very limited circumstances.[57]

In connection with the consortia legislation, and this is of some interest in multimodal operations too, the criticism has been made that any effort by the EC to cover competition problems within regular shipping has in the shipping industry's view failed, as the legislation is too rigid and inflexible. It does not meet with modern needs for advanced logistical transport systems.[58]

It should be obvious that commercial realities should as efficiently as possible be reflected in EC competition law and in this light lack of clarity concerning the status of multimodal transport is surprising.[59] Some understanding for emphasis on the commercial reality underlying unnamed transport is noticeable in the Carsberg Report.

Should the present allowed forms of co-operation not be enough there is the final possibility of co-operation by merger as long as it takes place in accordance with Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings.[60] Mergers for price fixing purposes do not

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55 OJ L 89/7 21.4.1995. Consortium is defined in art. 1: “means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container relating to a particular trade and the object of which is to bring about co-operation in the joint operation of a maritime transport service, which improves the service which would be offered individually by each of its members in the absence of the consortium, in order to rationalize their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing…”.

56 Regulation 870/95 art. 3.However, the application of the article is connected with further conditions such as those relating to share of trade, art. 6.

57 See citation of Faull in footnote 61.

58 Critical views concerning Regulation 479/92, see Michele Lacalamita, *Consortia, Opening Remarks*, ETL 1995, 845 et seq. and Helmut W.R. Kreis, *Consortia in Liner Shipping*, ETL 1995, 849 et seq.

59 For other areas there seems to be a more constructive approach available. For example, as a matter of policy, there is concern in the EC for securing short sea shipping interests as reflected in Council Resolution on short sea shipping of 8 December 1995, ETL 1996, 3. According to the Resolution, the main objectives of Short Sea Shipping Policy are: 1. To achieve a balanced growth of this mode of transport and 2. Positive and active integration of Short Sea Shipping, including feeder services, into the intermodal transport chain.

60 OJ L 395/1 30.12.89.

seem to have become the primary solution for the shipping industry, but have taken place due to other economic reasons.

6 Conclusions

All the above-mentioned procedures concerning the same basic issues reflect the fact that there are some problems in coordinating intra-Community action. One point of relevance is that it would be common sense to await the ruling of the highest court, i.e. the ECJ, and then proceed on political, legislative and administrative levels. Or does the situation reflect some competitive efforts between different institutions of the EC and also in the member states?

There is a danger that manoeuvring- especially by operators as illustrated by the change of the TAA to the TACA - will postpone any proper decision-making to an unacceptable extent. Remembering that the TAA agreement was concluded in 1992 with predecessors since the early 1970's and that the inland rates for the FEFC were settled already in 1971, considerable - unreasonable - time has passed and the EC, the Member States and the industry are still, at the time of writing, waiting for final clarifying legally relevant solutions.

In the end, the proper "technical" method of correcting the above-mentioned essential competition law problems does not lie in a forced interpretation of Regulation 4056/86 but in a new and fresh approach by the legislative forces of the EC without further serious delay. It seems that Commission "policies", different reports and perhaps even rulings by the courts simply do not suffice in order to create an organized legal structure for multimodal operations. This approach seems to be in contradiction to the Commission's long term view that Regulation 4056/86 is in no need of adjustments.[61]

As the follow-up shows, cases are pending and other work is at an interim stage. This story must therefore have an open end. It does, however, enlighten the reader as to 1) what principles of interpretation concerning EC competition law may be taken into consideration, 2) what the state of law *de lege lata* and *de lege ferenda* is in a specific sector of EC shipping competition law, and 3) ideas on how the maritime transport sector should possibly be dealt with by the EC and what attitudes to expect from the shipping industry itself.

The principles of interpretation of EC law explicitly applied in the TAA- and FEFC-cases are numbered from (1) to (7) above. The list shows how it is possible to clarify the *ratio legis* of EC legislation with the help of Conventions and EC Parliamentary sources.

Generally speaking, shipping law has traditionally been considered a kind of independent sector and the shipping industry has been treated accordingly. This tradition of separatism seems to apply also on the EC level. The introductory Chapter above shows how maritime transport services were regarded from the very start as not quite part of the comprehensive EC competition law. There were no EC sanctions possible in the beginning and when they eventually did

61 The view is shown for example in Faull 10. On the other hand, the Commission is willing to review the previously mentioned Regulations 4057/86 and 4058/86 which are part of the same package as Regulation 4056/86, Commission Communication 'Towards a new maritime strategy" COM (96) 81, 21 et seq.

become possible in 1986, an essential sector in maritime transport services, i.e. the liner conference system, was granted a block exemption for the price fixing mechanism. This specific separatism eventually met with trouble as the pure form of maritime transport no longer provided the financial basis for commercial operations. An expansion of services by the shipping industry has been necessary for some time now. There seems to be no corresponding change in attitudes in the industry which still expects the doctrine of separatism to prevail. The Commission reaction in the TAA- and FEFC-cases shows that the days of tolerance are over. On the other hand, the creation of reasonable business opportunities in the shipping sector should not be impeded. The industry must be treated on an equal basis with other business sectors without favours or disfavours. With this hypothesis in mind, the realities in and the opinions of the shipping industry should reasonably be taken into account, as partly explained above in connection with the consortia issue.[62] However, the Carsberg Report does not penetrate in detail the problem concerning price fixing on all transport sectors. It would seem obvious that serious arguments must be found to support such a large exemption from the basic competition law concept within the EC.[63] Many doubt that such arguments can be found.

Individual exemption possibilities do, however, exist and in special circumstances that might be the route to fulfil conference and shipping industry needs, for example, in connection with price fixing of multimodal operations. There was no success so far on this point in the TAA- and FEFC-cases, but it is quite clear from the sources used in this article that should the applicant produce convincing evidence concerning all the requirements needed to grant an exemption, the Commission is prepared for such an approach. One example in this respect is the application by Finncarriers Oy Ab and Poseidon Schiffahrt AG for an individual exemption for the Baltic Liner Conference Agreement.[64] The parties to that conference agreement operate a joint service consisting of regular ferry services for ro-ro, container and rail/ferry traffic between ports in the Nordic countries and Germany and other parts in those areas. The application took a standpoint on the requirements concerning exemption. Generally, the special character of the Baltic traffic was emphasized in the application. Where the indispensability of restrictions was concerned, the applicants maintained “that the 'thin' nature of Baltic trade and the high level of investment in specialized equipment requires close cooperation between the parties and that the restrictions of competition brought about by the agreement are necessary for the provision of efficient maritime and multimodal services”. The Commission granted the applicants in May, 1996 an individual exemption until 21st April, 2000.[65]

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62 Cf Kreis 175.

63 Cf Faull 4 concerning the block exemption in Regulation 4056/86: “Shipowners already have the benefit of a most generous block exemption . . . and it is not surprising that the Commission has resisted efforts to interpret it widely or to secure amendments in order to increase its coverage”.

64 OJ C 44/3 16. 2. 96.

65 This took place in connection with the Commission authorisation of four consortium agreements in accordance with Regulation 870/95: St. Lawrence Co-ordinated Service, East Africa Container Service, Joint Mediterranean Canada Service and, finally, Joint service between

Perhaps it is appropriate to end with a general note from Commission Communication "Towards a new maritime strategy", 1996, concerning competition restrictions by liner conferences[66] which indicates that price fixing agreements and other forms of anti-competitive measures are not necessarily acceptable without criticism: "The maritime activities of traditional liner conferences are authorised under EC competition rules because, in general, they are believed to bring an appropriate degree of stability to maritime transport. However, inefficiencies may have been engendered by conferences with all operators charging the price determined by the conference, sometimes at the expense of the more innovative operator who could not charge the premium price for a premium service. Conversely, in conferences, the more cost-efficient operator is not allowed to charge a lower price to its customer, as it is bound by the common tariff. Furthermore, it is possible that trade-lane based conference rules hinder the provision of global services by consortia. Application of competition rules is also important in light of the cyclical overcapacity which appears to be a recurrent feature of liner shipping markets. Especially with regard to liner shipping, the possibility of increasing freight rates or managing capacity in times of low capacity utilization may tend to foster uneconomic investment decisions, the consequences of which would ultimately be borne by the transport user."

Andrew Weir Shipping Ltd and Euro Africa Shipping Line Co, see European Information Service European Report May 11, 1996.

66 COM (96) 81, 23.