REPORT

on the application of EC competition rules to maritime transport (2005/2033(INI))

Committee on Transport and Tourism

Rapporteur: Rodi Kratsa-Tsagaropoulou
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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION
on the application of EC competition rules to maritime transport
(2005/2033(INI))

The European Parliament,

– having regard to Articles 80, 81, 82, 83, 85 and 86 of the EC Treaty,


– having regard to the conclusions of the Presidency of the Lisbon European Council of 23 and 24 March 2000 asking the Commission 'to speed up liberalisation in areas such as gas, electricity, postal services and transport',

– having regard to Council Regulation (EEC) No 954/791 of 15 May 1979, which contains a framework for applying the Code of Conduct for Liner Conferences so as to be compatible with the EC Treaty,

– having regard to Council Regulation (EEC) No 4056/862 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 (now Articles 81 and 82) of the Treaty to maritime transport,

– having regard to Council Regulation (EEC) No 3577/923 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage),

– having regard to Commission Regulation (EEC) No 823/20004 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia),

– having regard to Council Regulation (EC) No 1/20035 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,

– having regard to the Commission discussion paper of 13 July 2005 on the review of Regulation (EEC) No 4056/86 of December 2003,

– having regard to the final report of the 'Economic Assistance Study on Liner Shipping' conducted by ICF Consulting on behalf of the Commission's Directorate-General Energy

and Transport, published in May 2005,

– having regard to the Commission consultation paper of 27 March 2003 on the review of Regulation (EEC) 4056/86,

– having regard to the Opinion of the European Economic and Social Committee on the White Paper on the review of Regulation (EEC) No 4056/86, applying the EC competition rules to maritime transport of 16 December 2004,

– having regard to the Opinion of the Commission for Territorial Cohesion Policy of the Committee of the Regions on the White Paper,

– having regard to the Code of Conduct for Liner Conferences of the United Nations Conference on Trade and Development, 1974,

– having regard to the report of the Secretariat of the OECD 'Competition Policy in Liner Shipping' of 16 April 2002,


– having regard to the report from the Erasmus University of Rotterdam of 12 November 2003 concerning the assistance it provided in processing the submissions received relating to the Commission consultation paper on the review of Regulation (EEC) No 4056/86,

– having regard to Rule 45 of its Rules of Procedure,

– having regard to the report of the Committee on Transport and Tourism (A6-0314/2005),

A. whereas European shipping is a sector which is constantly developing and operates in a particularly globalised and competitive market characterised by new forms of cooperation, mergers and alliances which are constantly transforming the circumstances and conditions of the market in maritime transport, and whereas there is a tendency towards concentrations in a number of large shipping companies,

B. whereas maritime transport has so far fallen into two major categories: (a) the liner services market, i.e. scheduled services and (b) the market in international tramp vessel services, i.e. non-scheduled services, and whereas the first category of liner services has since 1875 been organised according to the system of liner conferences, while the second category operates in a non-scheduled manner and freight rates are freely negotiated according to supply and demand,

C. whereas the stabilising role of conferences was recognised in the Code of Conduct for Liner Conferences of the United Nations Conference on Trade and Development,

D. whereas Regulation (EEC) No 4056/86 exempted conferences from the rules of competition policy (Articles 81 and 82 of the Treaty), but allowed free trade, which means that substantive competition from outsiders is ensured, while international tramp vessel
services and cabotage services (maritime transport services that take place exclusively between ports in one and the same Member State) are excluded from the Community competition implementing rules (Regulation (EEC) No 1/2003),

E. whereas other forms of cooperation are already appearing, such as consortia of liner shipping companies, which are also the subject of a block exemption (Regulation (EC) No 823/2000), which has been amended, inter alia by Regulation (EC) No 611/2005; whereas, however, their scope is different because reference rates cannot be set under the regulation,

F. whereas the exemption for liner conferences which has been in effect for the last nineteen years has played a significant regulatory role in the development of international trade, and the present conference regime appears much more ‘liberal’ than in the past, while retaining the advantages of providing reliable liner services at competitive rates,

G. whereas over the period 1997 - 2004 there was a remarkable increase in the volume of international trade handled by major liner conference systems and a significant increase in the volume of such trade handled by minor conference systems (with some fluctuations),

H. whereas, as regards the review of Regulation (EEC) No 4056/86, the Commission concludes that:

(a) there is no further justification for exempting liner shipping conferences,

(b) there is no justification for the exclusion of tramp services and cabotage from the general competition rules and competition implementing rules,

(c) there is no valid reason for maintaining the provisions for technical agreements or the conflict of laws provision and proposes that they be abolished;

I. whereas a majority of the parties involved is in favour of a review of the existing regime with a view to achieving price stability, effective, high-quality services and the continued competitiveness of liner shipping companies and small and medium-sized shipping companies,

J. whereas an impact study is currently being carried out by consulting firm Global Insight, on the Commission's initiative, with a view to assessing the consequences which might ensue if the block exemption for liner conferences included in Regulation (EEC) No 4056/86 were to be repealed and replaced with a system based on the alternative proposal put forward by the ELAA;

GENERAL

1. Calls upon the Commission and all parties concerned to understand that the purpose of the review of Regulation (EEC) No 4056/86 should be to preserve, and promote the expansion of, a viable and competitive European shipping sector within the framework of the Lisbon Strategy in conjunction with transport policy strategy, as summarised in the White Paper and the Marco Polo I and the Marco Polo II programmes, and that it is vital to do so especially in view of the fact that new maritime powers have emerged, namely
China, South Korea, and Taiwan;

2. Calls upon the Commission carefully to consider the consequences of a possible alternative system on the entire marine transport sector, namely members and non-members of liner conferences and their competitors (independent bodies) their customers (shippers) and the final consumers.

3. Calls upon the Commission to complete the announced impact study into repealing the block exemption; insists that this qualitative study should address the shortcomings outlined by previous studies in terms of scope and data and not be a mere repetition of what has been published so far; calls upon the Commission, should there be any negative impact, to take it into consideration in the framework of its new proposal and in compliance with Community competition law and to discuss it with the circles concerned, with Parliament and with the Council;

4. Calls upon the Commission, in the event of amendment of Regulation (EEC) No 4056/86, to bear in mind existing legal and operating regimes in other countries (USA, Australia, Japan and Canada), since any misalignment of the European system in relation to those regimes might create destabilising socio-economic effects worldwide and lead to protectionist measures.

5. Emphasises the likelihood of adverse consequences in the event of a general overhaul of the system, not so much for large merchant shipping lines, but rather for small and medium-sized ones and emphasises also that there is no evidence that the abolition of conferences will bring about a fall in prices;

6. Notes that full liberalisation involving the abolition of the exemptions for liners provided for in Regulation (EEC) No 4056/86 will necessitate corresponding changes to Regulation (EC) No 823/2000, which was itself amended by Regulation (EC) No 611/2005, which provides for block exemptions for consortia of liner shipping companies;

7. Maintains that any regulation in the sector will need to allow for the nature of regions affected by specific constraints, for example regions of the type described in Article 299(2) of the EC Treaty, which depend on the continued provision of services with special characteristics;

8. Underscores, as far as they comply with Community competition law, the importance of an increasing number of forms of cooperation, such as framework agreements, by virtue of which carriers, whether or not they are members of conferences, are able flexibly to coordinate their competitive conduct on the market in relation to freight rates and other services conditions;

**Liner conferences**

9. Concludes, on the basis of the case-law of the Court of Justice of the European Community (the TACA case), that the regulation of vessel capacity is permissible only if no artificial demand is created along with increases in freight rates and only if the power of conferences to fix freight rates has been significantly limited, the four cumulative conditions laid down in Article 81 of the Treaty thus being fulfilled, if only partially;
10. Points out that while Regulation (EEC) No 4056/86 adopts the system of closed conferences, it also allows free trade which means that substantive competition from outsiders is ensured and that no further restrictions on competition from liner conferences is permitted;

11. Supports the Commission's intention to review Regulation (EEC) No 4056/86, but in such a way as to ensure compliance with the rules of competition, chiefly by excluding the possibility of price-fixing, by estimating the additional freight rates and related expenditure, transparently and after dialogue with the shippers, and stresses that any such review must safeguard the stability of freight rates, the high quality of services and sound competition for all enterprises, whatever their size;

12. Takes the view that the proposal of the ELAA contains interesting points which should be taken up by the Commission in drafting any amending regulation and that any such new regulation might be made to come into force for a limited period of five years after the expiry of which an assessment would be carried out; takes the view that the Commission should examine the compliance of these points with the four cumulative conditions laid down in Article 81(3) of the Treaty;

13. Calls upon the Commission, within its terms of reference and on the basis of undertakings under the Code of Conduct for Liner Conferences to hold discussions with the other contracting parties before proposing amendment or repeal of Regulation (EEC) No 4056/86; believes that those discussions should seek to find the most appropriate method of adaptation for Member States (those than still have bilateral commitments under the Code of Conduct) to the possible new legal status, with a view to avoiding any adverse consequences;

*International tramp vessel and cabotage services*

14. Points out that the tramp sector remains overwhelmingly deregulated and operates on the basis of the rules of fair competition; supports the Commission proposal for these services to be brought within the scope of Regulation (EC) No 1/2003;

15. Considers it to be in the interests of legal certainty and clarity that the Commission should establish, in a single process, guidelines as regards the compatibility of bulk pools and specialised trades with the rules of competition, subject to the proviso, however, that it should not do so until the proposals have been published and consultations held with the circles concerned;

16. Points out that the cabotage services sector has already been deregulated pursuant to Regulation (EEC) No 3577/92; takes the view that given that these services are carried out between ports in one and the same Member State, intra-Community trade between the Member States is not affected (Articles 81 and 82) and consequently there is no need or legal obligation for this sector to be brought within the scope of the provisions of Regulation (EC) No 1/2003;

*Purely technical agreements*
17. Calls upon the Commission not to continue with the proposal to abolish the arrangements contained in Article 2 of Regulation (EC) No 4056/86 governing the legality of technical agreements, since it believes that retaining a purely legal framework governing technical agreements will contribute to legal security and a better orientation for service providers;

**Conflict of laws**

18. Calls upon the Commission not to continue with the proposal to abolish Article 9 of Regulation (EEC) No 4056/86 which provides for negotiations to be held in the event of a conflict between Community law and the law of third countries, especially in view of the Commission's intention to revise competition law in respect of maritime transport;

19. Instructs its President to forward this resolution to the Council and the Commission.
EXPLANATORY STATEMENT

A. Introduction

The European shipping industry and market constitute a sector which is constantly developing in a particularly globalised context. The explosion of international trade has generated spectacular profits and constant demand for the services of the major freight container carriers, while new forms of cooperation, company mergers and alliances are constantly changing market circumstances: this concerns the European Union, since 90% of external trade and 43% of internal trade is carried by sea. The European Union's transport strategy seeks to promote the effectiveness and competitiveness of this sector.

It is essential to bear these new circumstances in mind in revising the existing arrangements governing competition in maritime transport, so as to prevent any negative repercussions for the competitiveness on Europe's economy, in particular the European fleet and its ability to operate properly with commercial and entrepreneurial success. Such a revision must also take into account existing legal and operational arrangements in other regions (USA, Australia, Japan) since any rearrangement of Europe's carrying capacity may have a destabilising effect worldwide.

Brief outline

The shipping market and maritime transport in particular may be divided into two broad categories:

(a) the liner market i.e. scheduled services

Since 1875 this category has been organised by the system of Liner Conferences with a view to ensuring stability of supply, demand and prices in this sector. 'Liner 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.

The demand by developing countries for greater involvement of their fleets in liner services led to the adoption by the United Nations Conference on Trade and Development (UNCTAD) in 1974 of the Code of Conduct for Liner Conferences. This Code came into effect in 1983 and is the chief legal basis governing regular international maritime liner services.

Since 1986 Council Regulation 4056/86 has provided for the exemption of 'conferences' from competition policy rules (Article 85 and 86 of the Treaty) subject to certain conditions, terms and obligations, such as the condition that an agreement shall not cause detriment to certain ports, transport users or carriers owing to the application of rates and conditions of carriage.
which differ according to the country of origin or destination or port of loading of discharge unless such rates or conditions can be justified. With Regulation 4056/86 the European Community has adopted the system of closed conferences, while at the same times allowing free trade, thereby ensuring that outsiders can continue to compete substantively.

The exemption permits conferences to engage in various practices such as the coordination of shipping timetables, the allocation and frequency of sailings, the allocation of cargo or revenue among members, the regulation of carrying capacity, etc.; but it also allows them to fix freight charges and manage the supply of vessels, which constitutes a substantive departure from the rules of free competition.

Today there are 150 international liner conferences, 28 of which have departure and arrival points in the European Union. The Member States principally involved in scheduled liner services include Denmark, Germany, Italy, the Baltic countries and Cyprus. It is worth pointing out that, according to the latest available data (UNCTAD - 2003, Stopford - 2003), 60% of the overall value of international maritime trade was carried by scheduled services (liner conferences), while over 25% of the 5.9 billion tonnes transported by sea in 2002 was carried by these services.

(b) the international tramp vessel services market, i.e. non-scheduled services

Tramp vessel services operate non-scheduled routes where the freight rates are freely negotiated in accordance with the conditions of supply and demand.

Other forms of cooperation

- Liner shipping companies (consortia) which provide liner shipping services (focusing on containers) but are not involved in the joint fixing of freight rates. Regulation 4056/86 was supplemented by Commission Regulation 823/2000 which provides for block exemption for liner shipping consortia.

- Discussion agreements. A discussion agreement is a sort of framework agreement by virtue of which carriers which are members of conferences and outsiders are able to coordinate flexibly their competitive conduct on the market in relation to freight rates and other service conditions. The scope and content of such agreements may vary. Discussion agreements concern normally the exchange of sensitive business information between competitors and should therefore respect the settled case law of the court on exchanges of information.

B. Commission proposal - White Paper

The Commission's proposal for a review of Regulation 4056/86 forms part of an overall European framework for the liberalisation of services, including transport, as the Lisbon European Council had demanded in 2000. The review proposed by the Commission concerns:

1. Liner conferences

In reviewing liner conferences, the Commission considers whether, under present conditions, block exemptions provided for by Regulation 4056/86 continue to fulfil the four conditions
laid down below, thereby justifying the continuation of the exemption from the general rules of competition:

1. they must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress (efficiency);
2. consumers must receive a fair share of the resulting benefits (pass-on);
3. the restrictions must be indispensable to the attainment of these objectives (indispensability), and finally
4. they must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question (no elimination of competition).

The Commission concludes that exemption is no longer justified since price stability may be achieved by other less restrictive forms of cooperation and the four cumulative conditions which justify it are no longer met. It thus considers whether the existing block exemption for liner services should be abolished and, after evaluating the proposals submitted by the sector and other interested parties, whether it should espouse an alternative framework for cooperation between liner services by adopting a suitable legal instrument.

2. Cabotage and tramp vessel services

The Commission proposes to bring cabotage and tramp vessel service within the scope of Regulation 1/2003 (full competition). However, in order to help the tramp industry to correctly assess notably its 'pool agreements' and in order to facilitate individual assessment of cooperation agreements by carriers and group cooperation agreements (bulk pools), the Commission will consider issuing some form of guidance in a manner that is to be determined.

3. Technical agreements

Regulation 4056/86 allows maritime transport providers to conclude agreements which have the sole object and effect to achieve technical improvements or cooperation and are not caught by Article 81(1) of the Treaty (full competition). The Commission concludes that the specific exemption for technical agreements, as confirmed by the Court of Justice, is merely declaratory and therefore proposes to repeal this provision.

4. Conflict of laws at international level

Regulation 4056/86 provides for a procedure which should be followed in case the application of the Regulation would amount to a conflict with the law of a third country. The Commission points out that a conflict of law has not arisen in the past and is unlikely to arise, even if the Liner Conference block exemption is fully repealed. It concludes that there would appear to be no justification for maintaining this provision.

C. Position of interested parties

The ELAA (European Liner Affairs Association) which represents the liner shipping industry worldwide proposes a new flexible transitional regime which seeks to achieve market
stability, but unlike Regulation 4056/86, does not refer to the fixing of prices and freight rates or restrictions to the management of vessel supply. The ECSA (European Community Shipowners Association) which represents European associations of shipowners is opposed to the repeal of the exemption of conferences and agrees to the ELAA proposal as a basis for discussion.

The ESC (European Shippers Council), which represents the national, European and global freight transport interests of European manufactures and retailers, supports the repeal of Regulation 4056/86 since it does not provide any calculable benefit as regards the stability and competitiveness of freight rates or the provision of services.

The OECD (Organisation for Economic Cooperation and Development) also supports this position in a technical report by its secretariat.

**D. The rapporteur's position**

Your rapporteur's position on the matters raised by the review of Regulation 4056/86 as presented in the White Paper is as follows:

(a) The exemption for liner conferences over the last 16 year or so has managed to ensure regular and reliable links at competitive freight rates. Your rapporteur would also point out that the present liner conference regime appears much more open 'liberal' than in the past, while it maintains a balance between small and large undertakings and prevents oligopolistic practices. Bearing in mind recent EU case law which rules that vessel supply management is permitted only on condition that it does not create artificial demand in conjunction with freight rate increases and the power of conferences to fix freight rates is restricted to a significant extent, it may be said that the four cumulative criteria of Article 81(3) of the Treaty have been met, if only partially.

(b) Nevertheless, your rapporteur supports the Commission's intention to revise Regulation 4056/86 so as to ensure compliance with the rules of competition chiefly by excluding the possibility of the prior fixing of freight rates. Within this framework, she supports the creation of a system which will allow free access to market information. She considers that the proposal by the European Liners Affairs Association (ELAA) contains interesting elements which could be used by the Commission in drafting the new regulation, which should have a limited timeframe of five years after which a reassessment would take place. This period could provide the Commission with an opportunity to renegotiate the 1974 UNCTAD Code of Conduct for Conferences.

(c) As regards the Commission's position about bringing tramp vessel and cabotage services within the scope of Council Regulation 1/2003 on 'the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, your rapporteur takes the view that the White Paper's approach may be accepted for the tramp sector.

As regards cabotage, this sector has already been deregulated since 1993 as part of Regulation 3577/92. These services are carried out between ports of the same Member State and do not affect intra-Community trade between Member States (Articles 81 and 82); consequently there is no need or legal obligation to bring this sector under the scope of the provisions of Regulation 1/2003. The Commission's intention to bring this sector under the scope of the
provisions of Regulation 1/2003 is without any substantive or legal necessity.

(d) Your rapporteur does not believe that the provisions contained in Article 2 of Regulation 4056/86 governing the legality of technical agreements should be repealed. The maintenance of a clear legal framework governing technical agreements will contribute to legal certainty and give service providers a clearer orientation.

(e) Finally, your rapporteur does not consider that Article 9 of Regulation 4056/86 which provides for negotiations to be held in the event of conflicts between Community law and the law of third countries should be repealed. Particularly in view of the Commission's intention to revise the law of competition in respect of maritime transport, it is particularly important that this arrangement be maintained.

Finally, your rapporteur is in favour of a regime which respects both competition rules and the specificity of a sector which has operated, and must continue to operate, successfully for the external and intracommunity trade of the European Union, thereby ensuring genuine competition between shipping companies and stability on the European and the international market.
# PROCEDURE

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<th>The application of EC competition rules to maritime transport</th>
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<td>Procedure number</td>
<td>2005/2033(INI)</td>
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<tr>
<td>Basis in Rules of Procedure</td>
<td>Rule 45</td>
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<tr>
<td>Committee responsible</td>
<td>TRAN 10.3.2005</td>
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<td>Committee(s) asked for opinion(s)</td>
<td>ITRE 10.3.2005, ECON 10.3.2005</td>
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<td>ITRE 17.3.2005, ECON 30.11.2005</td>
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<td>Motion(s) for resolution(s) included in report</td>
<td>Rodi Kratsa-Tsagaropoulou 15.3.2005</td>
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<td>15.6.2005, 29.8.2005, 11.10.2005</td>
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<td>Date adopted</td>
<td>11.10.2005</td>
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<td>Result of final vote</td>
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<td>Substitutes present for the final vote</td>
<td>Luigi Cecilovo, Den Dover, Markus Ferber, Sepp Kusstatscher, Pier Antonio Panzeri, Zita Plešťinská, Hannu Takkula</td>
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<td>Substitutes under Rule 178(2) present for the final vote</td>
<td>Johan Van Hecke</td>
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