

SHIPPING & TRADE LAW

EU competition law and maritime transport

Seismic shock or gentle grumble?

For almost 40 years parts of the maritime transport sector have for all practical purposes been exempt from EC competition rules. In October 2004 the European Commission released a White Paper on competition rules and maritime transport. This White Paper forms part of a reform process aiming to increase competition in the EC maritime transport sector by repealing provisions permitting anti-competitive practices, including the block exemption for liner conferences. A Regulation may be expected in the course of the year and reform is imminent – but what reform?

EU competition rules

The EU competition law system operates on the basis that genuine competition results in the best services for the consumer, at the most affordable prices. Articles 81 and 82 of the Treaty establishing the European Community (EC Treaty) contain the core rules. While Art 81 prohibits all agreements, concerted practices and decisions between undertakings that might restrict or distort competition within the common market, Art 82 prohibits any abuse of a dominant position that may affect trade between the Member States.

Agreements restricting competition within the EC market can be exempted, provided only that they fulfil the four cumulative conditions listed in Art 81 (3): they must increase efficiency; consumers must receive a fair share of the resulting benefits; the restrictions must be indispensable to the attainment of these objectives; and, finally, such agreements must not allow the elimination of competition. So-called block exemptions can be granted under Art 81(3) to categories of agreements fulfilling these criteria.

EC legislation in the field of maritime transport

For many years the competition law system created by Arts 81 and 82 of the EC Treaty did not find application in the field of maritime transport. One feasible reason for this was the fact that, before the accession of the UK, Ireland and Denmark in 1973 and Greece in 1981, transport between the Member States was essentially land-bound. Another reason may be the long tradition of self-regulation characterising the international shipping industry. Its self-regulatory system was based partly on agreements among carriers, concluded in order to provide stability to the maritime transport sector (conferences), and partly on a particular form of alliance among carriers, whose aim was to share the high costs involved in managing container fleets and to improve the quality of the service (consortia).

The first attempt at regulating competition in the maritime transport sector at EU level was the simultaneous promulgation in 1986 of four Regulations.

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Council Regulation (EEC) Nos 4055/86 and 4058/86 ensured the application of the principle of freedom of services to the maritime transport sector. Council Regulation (EEC) No 4057/86 aimed to eliminate distortion of competition coming from third country carriers. Finally, the cardinal piece of legislation relating to the maritime sector was the now controversial Council Regulation (EEC) No 4056/86, containing, notably, procedural rules and a block exemption for liner conferences.

The collective effect of these Regulations was to apply the competition rules enshrined in Arts 81 and 82 to the maritime transport industry, but with a separate set of procedural rules as well as certain additional substantive rules. The most notable substantive rule was the block exemption for liner conferences, contained in art 3 of Regulation 4056/86. As for the procedural rules, they were *lex specialis* for the maritime sector until the entry into force in May 2004 of Council Regulation (EC) No 1/2003, which repealed the procedural rules in Regulation 4056/86. The enforcement procedure enshrined in Regulation 1/2003 now applies equally to the maritime transport sector. While Regulation 1/2003 has radically reformed EC competition law enforcement, it does not modify the substantive provisions of Regulation 4056/86, nor displace the block exemption for liner conferences.

A final piece of legislation worth mentioning in this context is Council Regulation (EC) 823/2000, containing a block exemption for liner shipping consortia. That Regulation allows carriers to share costs and provide higher quality services, and remains largely uncontroversial and universally accepted as producing benefits.

The block exemption in Regulation 4056/86

The block exemption contained in art 3 of Regulation 4056/86 has some singular features compared to the norm. Unlike other block exemptions, it is not subject to renewal but unlimited in time. It also permits the use of joint price-fixing and capacity regulation – practices not permitted by any other block exemption. As a result, it allows any type of cooperation between carriers, provided that it fulfils the terms and conditions set out by the Regulation's art 4. The rationale behind the introduction of the block exemption was that, at the time of the adoption of Regulation 4056/86, the Council and the Commission believed that liner conferences were necessary to enhance productivity and capacity utilisation, reduce costs, improve the quality of services, and grant stability to the maritime sector.

While originally seen as a useful tool, Regulation 4056/86 and the block exemption for price-fixing have become increasingly controversial. With Regulation 1/2003 providing for comprehensive procedural reform, modifications of

substantive provisions would seem a logical next step. Opponents of the block exemption claim that liner conferences are effectively able to act as a monopoly, representing a threat to competition within the meaning of Art 81.

The economics of the situation are straightforward – within a market, any sort of agreement to fix prices constitutes an impediment to competition, in that it removes the possibility of offering the same service at different prices. As might be expected, the legal aspect is more complex. The ruling of the European Court of Justice in *Pronuptia de Paris GmbH v Irmgard Schillgalis* (Case C-161/84) [1986] ECR 353 determined that restrictions to competition do not represent a distortion to competition within the meaning of Art 81, as long as they are objectively necessary in order to grant the successful functioning of an economic system. In other words, the Court is willing to weigh up the advantages and disadvantages of an agreement related to competition. Applying this precedent to the maritime transport sector, the argument is that liner conferences are necessary in order to provide stability in the sector – but supporters of reform argue that while that line of reasoning was valid at the time of the adoption of Regulation 4056/86, the market situation is radically different today, in that some 43% of internal trade and over 90% of external trade goes by sea.

Notable criticism of Regulation 4056/86 came in the form of the OECD report *Competition Policy in Liner Shipping* (April 2002), according to which there is no evidence of a positive influence from the antitrust exemptions for price-fixing granted by Regulation 4056/86. The report outlined the possibility of enhancing the efficiency of the sector by other means than liner conferences, by adopting agreements aimed at reducing costs. The report also emphasised the exclusion from the maritime transport market of new independent operators, who are willing to provide liner services but cannot compete with the liner conferences.

The process of change: Commission White Paper

In October 2004 the Commission published its *White Paper on the review of Regulation (EEC) No 4056/86, applying the EC competition rules to maritime transport* (COM/2004/0675). The purpose of the White Paper is to assess whether to modify or repeal the provisions of Regulation 4056/86, based on an analysis of the current situation in the maritime transport sector.

The White Paper discusses whether, in the current market situation, there remains justification under Art 81(3) of the Treaty for the block exemption for freight rate-fixing by liner conferences. The White Paper emphasises the extent to which the liner shipping market has changed in the two decades since the adoption of Regulation 4056/86. In particular, the

role of independent carriers offering liner shipping services outside a conference framework has become considerably more important. Furthermore, the Commission recognises how forms of cooperation between carriers not involving price-fixing practices (such as consortia and alliances) have increased considerably. The White Paper also highlights the significant growth of individual confidential contracting between carriers and shippers, by means of individual service contracts. The analysis results in serious doubts about the current compatibility of the block exemption for liner conferences with the EU competition law system.

The White Paper then turns to the consideration of a possible alternative framework, repealing the block exemption established through Regulation 4056/86. The result of simply repealing Regulation 4056/86, including the block exemption, would be to impose the full weight of EC competition law on the maritime transport sector – an option not seriously contemplated. Instead, the White Paper takes into account other forms of shipping cooperation, the first being so-called discussion agreements. These are essentially framework agreements, by virtue of which carriers who are members of conferences and outsiders are able to organise their competitiveness on the market in relation to freight rates and other service settings in a flexible manner. This type of agreement already exists on US trades and on trades to and from Australia. Through the promotion of dialogue among carriers, discussion agreements should, according to the Commission, represent a valid alternative to the existing block exemption.

The other option contemplated is the proposal advanced by the European Liner Affairs Association (ELAA), which outlines a new regulatory framework amounting to promotion of communication between carriers, the introduction of price indices differentiated by type of equipment, and the possibility for liners to hold their own market share defined by trade, by region and by port. Commenting on this proposal, the Commission recognises the need for a phase-out of the preferential treatment enjoyed by carriers, but unequivocally stipulates the need for any regime to comply with Art 81(3).

Comments

On the one hand, it is true that the maritime transport industry has always been a sector *sui generis*. Policy has been governed by the concern that without self-regulation and

price-fixing arrangements, the industry would take the road of destructive competition, resulting in destabilisation of the entire system. The arguments supporting the block exemption granted by Regulation 4056/86 to the liner shipping industry remain unaltered (high fixed costs, high investments risks, the need for stability). On the other hand, the block exemption introduced by Regulation 4056/86 has led to a distortion of the competitive situation in the maritime transport sector that is increasingly difficult to justify under Art 81(3). Since 1986 the market situation in the maritime transport sector has evolved considerably. Competition from individual operators is impeded by the system of liner conferences promoted by the block exemption.

As is often the case with White Papers, this Commission White Paper does not adopt a firm stance but ponders compromise solutions. The resoluteness to repeal Regulation 4056/86 is balanced by a desire to allow some features of the status quo to persist. Discussion agreements will hardly be the means to satisfy pro-competition hardliners, for whom a regulatory framework based on communication of information between carriers is risky business – such communication is designed to involve the exchange of important business information between competitors, with inherent risks of cartel formation. More importantly, the extreme flexibility of discussion agreements makes them attractive to independent liner operators. If these are all enticed into concluding such agreements, this will eliminate external competition entirely – a consideration recalled by the Commission itself in point 17 of the White Paper. But indecisiveness is prompted by the fact that no one knows exactly what results strict enforcement of the hard line would produce – and the EU is dependent on maritime transport for its exports.

The ELAA contributed its compromise solution to the review process on the proviso that its strong preference is for Regulation 4056/86 to remain in force – meanwhile, the pro-competition corner is as ardently fought by freight forwarders and others who smell the benefits of a removal of the block exemption.

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