WHITE PAPER

on the review of Regulation 4056/86, applying the EC competition rules to maritime transport

Commission programme [2003/COMP/18]

1. INTRODUCTION

1.1. Purpose of this White Paper

1. The purpose of the present paper is to present the way forward in the maritime transport competition area. In particular, the paper analyses whether to maintain, modify or repeal the currently applicable provisions of Regulation 4056/86. Furthermore, the paper discusses whether it would be appropriate to replace the present block exemption for liner conferences laid down in Regulation 4056/86 with other Community instruments (such as for instance another block exemption or a set of guidelines) covering any new business framework of cooperation between liner services operators on trades to and from the EU (in addition to already existing forms of cooperation such as consortia and alliances).

1.2. Council Regulation 4056/86

2. Council Regulation 4056/86, applying Article 81 and 82 of the Treaty to maritime transport (hereinafter: "Regulation 4056/86"),[1] originally had a dual function. First, it contained procedural provisions, providing the Commission with the practical tools for effective fact-finding and enforcement of the EC competition rules in the maritime transport sector. Secondly, it contained some substantive provisions for the maritime sector. The most important one of these substantive provisions is a block exemption from the prohibition of Article 81(1) of the Treaty of certain categories of agreements, decisions or concerted practices by liner shipping conferences. The first function of Regulation 4056/86 has become redundant as from 1 May 2004, when Council Regulation 1/2003 became applicable, repealing the procedural provisions of Regulation 4056/86 and thus providing for common competition enforcement rules for basically all sectors, including the maritime transport sector (with some specific exceptions).[2] The substantive provisions of Regulation 4056/86, however, have not been amended until today. After ending the specific procedural competition regime for maritime transport, a logical next step is to review whether there is, in the current market circumstances, still a justification for the remaining substantive specific competition provisions in the maritime transport sector.

1.3. The review

3. The review should be seen in its overall EU context. The Lisbon European Council in March 2000[3] asked the Commission *"to speed up liberalisation in areas such as gas, electricity, postal services and transport"*. Furthermore, the review has also been inspired by a report of the OECD Secretariat that was published in April 2002 and that recommended to consider removing anti-trust exemption for price fixing and rate discussions.[4]

4. The main issue of the review is the present block exemption for certain restrictive practices by liner conferences, in particular price fixing and supply regulation. However, the review also covers some other provisions contained in Regulation 4056/86, that is the exclusion of certain maritime services (cabotage (that is

national maritime services) and tramp (non-scheduled) services) from the competition implementing rules, a provision for technical agreements and a provision on conflict of laws.

5. In the 18 years since the adoption of Regulation 4056/86 the liner shipping market has changed. In particular, the role of carriers offering liner shipping services outside a conference (independent operators) on most routes to and from the EU has become more important. Furthermore, operational forms of co-operation between carriers (not involving price fixing), such as consortia and alliances have increased. What is more, there has been a substantial growth of individual confidential contracting between carriers and shippers, such as individual service contracts. These developments raise the question whether a block exemption for price fixing and capacity regulation by liner conferences is still justified under Article 81(3) of the Treaty.

6. It has been agreed with the Member States[5] that the review is a three step process, consisting of: 1) fact finding, 2) a Commission paper and 3) a proposal for legislation. The review process started in March 2003, with the publication of a consultation paper (hereinafter: "Consultation Paper of 2003"), that is available at http://europa.eu.int/comm/competition/antitrust/legislation/maritime/en.pdf. In total 36 submissions were received, from providers of liner shipping services (carriers), transport users (shippers and freight forwarders), Member States, consumer associations and others. A team of economists from Erasmus University Rotterdam was commissioned to assist in processing the replies. The replies to the consultation paper and the final Erasmus report have been posted on the Commission's web-site. Following a public hearing that took place in December 2003, DG Competition has set out the outcome of the consultation process and its preliminary analysis in a discussion paper (hereinafter: "Discussion Paper"). The Discussion Paper served as a basis for a discussion with the Member States in May 2004 and was also published at http://europa.eu.int/comm/competition/antitrust/others/.

1.4. Issues

7. The review of Regulation 4056/86 raises basically the following issues:

   (a) Is there, in the present market circumstances, still a justification under Article 81(3) of the Treaty for the block exemption for freight rate fixing, supply and market regulation by liner shipping conferences?

   (b) If not, would it be necessary and appropriate to adopt other Community instruments (such as for instance another block exemption or a set of guidelines) covering any new business framework of cooperation between liner services operators on trades to and from the EU (in addition to already existing forms of cooperation such as consortia and alliances)?

   (c) Is there still a justification for the exclusion of tramp services and cabotage from the competition implementing rules in Regulation 1/2003?

(d) Is there a valid reason to maintain the specific exception for purely technical agreements in Regulation 4056/86?

(e) Is there a valid reason to maintain the conflict of laws provision in Regulation 4056/86?

2. THE BLOCK EXEMPTION FOR LINER CONFERENCES

8. Regulation 4056/86 provides, under certain conditions and obligations, for a so-called block exemption for agreements, decisions and concerted practices of all or part of the members of one or more liner conferences, as defined in Article 1(3)(b) of Regulation 4056/86, that have as their objective the fixing of rates and conditions of carriage, and that, in addition, cover one or more of the following forms of co-operation:

- the co-ordination of shipping timetables, sailing dates or dates of calls;
- the determination of the frequency of sailings or calls;
- the co-ordination or allocation of sailings or calls among members of the conference;
- the regulation of the carrying capacity offered by each member;
- the allocation of cargo or revenue among members.

9. It follows from the Regulation itself, from the decisional practice of the Commission and the case law of the Court that Regulation 4056/86 contains a *"wholly exceptional"* block exemption[6], because it exempts price fixing and capacity regulation, which are normally regarded as hard-core restrictions[7], for an unlimited duration and does not contain any market share thresholds. Indeed, the Regulation can only be explained in its historical context.

10. Liner conferences have sought to interpret the block exemption in broad terms. In particular, liner conferences considered capacity non-utilization agreements[8] and inland price fixing[9] to be covered by the block exemption. This has however not been accepted by the Commission, nor by the Court. Indeed, the block exemption derogates from Article 81(1) of the Treaty and should therefore be interpreted narrowly[10]. Goals pursued by other Treaty provisions can be taken into account only to the extent that they can be subsumed under the four conditions of Article 81(3) of the Treaty.[11]

2.1. Assessment

11. The EU competition rules are modelled on the presumption that competition provides the best services to the consumer at the most affordable prices. For that reason, the starting point under the Treaty is that competition should not be distorted and that any exemption from that rule needs to be justified. Agreements which restrict competition within the meaning of Article 81(1) of the Treaty (such

as price fixing and capacity regulation agreements) could only be exempted if they fulfil the four cumulative conditions laid down in Article 81(3) of the Treaty, namely:

1) the agreement 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) the agreement 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).

12. The application of Article 81(3) of the Treaty to categories of agreements by way of a block exemption regulation is based on the presumption that restrictive agreements that fall within its scope fulfil each of the four conditions laid down in Article 81(3) of the Treaty.

13. The justification of the liner conference block exemption is provided for in recital 8 of the preamble of Regulation 4056/86, which in essence assumes that conferences bring stability, assuring reliable services which could not be achieved by less restrictive means. In this regard the Court of First Instance stated that *"the Council did not assert (and indeed could not have asserted) that stability is more important than competition"*.[12]

14. It should be noted that the justification in recital 8 of Regulation 4056/86 has not been based on experience of the Commission in applying Art 81(3) to liner conferences[13]. In this regard, the core question examined in the review process is whether, in light of the cumulative conditions of Article 81(3) of the Treaty, the justification for price fixing and supply regulation by liner conferences in Regulation 4056/86 could (still) be said to be valid in light of the present market circumstances. If not, there would no longer be a legal justification for the block exemption, which consequently would have to be either abolished or revised. To that end parties have been invited to provide factual evidence.

15. As is explained in further detail in the annex, it follows from the consultation that the four cumulative conditions to justify an exemption for liner conference price fixing, supply and market regulation would appear to be no longer fulfilled. There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified.

3. OTHER FORMS OF LINER SHIPPING CO-OPERATION

3.1. Introduction

16. Conferences are not the only form of liner shipping organisation. Liner services could also be provided by consortia and alliances. The activities of consortia are group exempted pursuant to Article 81(3) of the Treaty under certain conditions and obligations, as set out in Regulation 823/2000. Carriers could also decide to merge their activities, which will have to be assessed under the applicable (national or EC) merger control rules.

3.2. Discussion agreements

17. Other forms of liner shipping co-operation than those already available on trades to and from the EU would for example be so-called discussion agreements. Discussion agreements exist in particular on US trades and on trades to and from Australia.[14] A discussion agreement is a sort of framework agreement by virtue of which carriers which are members of conferences and outsiders are able to co-ordinate 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 involve normally the exchange of sensitive business information between competitors and should therefore respect the settled case law of the Court on exchange of information. More importantly, as shown in the US, the inherent flexibility of discussion agreements makes them attractive to traditionally independent lines. In that respect, discussion agreements could in competition policy terms be worse than conferences, since they are liable to eliminate effective external competition to conferences.

18. Having said that, other forms of co-operation between ship-owners which would be in line with EC competition law are conceivable.

3.3. The ELAA proposal

19. European Liners Affairs Association (ELAA) has presented to the Commission a proposal for a new "regulatory structure" for liner shipping services operating to and from the EU[15], which it believes could replace Regulation 4056/86.[16] The Commission has taken note of this proposal and would like to stress that it is not the result of any negotiation or agreement with the Commission. The proposal merely reflects what the ELAA considers to be an appropriate business framework for liner shipping co-operation. In essence the ELAA proposal amounts to[17]:

- Exchange and discussion between lines of aggregated capacity utilization and market size data by trade and on a region/zone to region/zone basis (data with a month delay);

- Exchange, discussion and evaluation of commodity developments by trade (based on data aggregated with a month delay);

- Discussion and evaluation of aggregate supply and demand data by trade/commodity; forecasts of demand by trade and commodity would be published;

- Lines will obtain their own market share by trade, by region and by port (data aggregated with a month delay);

- Price index differentiated by type of equipment (e.g. reefer, dry) and/or trade (data aggregated with a quarterly delay). This information would be made publicly available;

- Surcharges and ancillary charges based on publicly available and transparent formulae; the details of which would be discussed with shippers.

3.4. Preliminary comments on the ELAA Proposal

20. The Commission welcomes the willingness of carriers to think about a future organisation of liner shipping, other than the current conference system. The industry itself has in fact suggested that certain carriers today are not always particularly interested in the activities exempted in Regulation 4056/86 (that is to say notably price fixing and supply and market regulation), but rather in the "discussion process" surrounding it. This goes without saying that any newly proposed co-operation framework between liner shippers will have to be carefully scrutinized as to its compatibility of the EC competition rules.

21. The Commission is well aware that conference carriers have been used to carrying out activities that in any other economic sector would normally have been prohibited under the EC competition rules. This privileged position of conference carriers might make it difficult for some of them to adapt to a situation in which they will have to comply with the normal EC competition rules like any other industry. In this light it is also understandable that, from a business point of view, carriers might seek for a "fading out" of the current regime or at least for an alternative regime that is close to the present regime and in which their perceived specific position is reflected best. It should however be kept in mind that any continued different treatment under the EC competition rules of the liner shipping industry compared to other capital-intensive industries with high fixed costs and fluctuations in demand (like for example air transport), should be convincingly motivated. Furthermore, the impact of any alternative system on the *overall* liner shipping industry should be taken into account; not only the interests of conference carriers but also the interests of their competitors (independent operators), customers (shippers) and final consumers should be considered. ELAA has emphasized that its proposal is good for the whole liner shipping industry, not just for carriers but also for their customers. In this light, the Commission would explicitly welcome the views of all interested parties, notably shippers, associations like the ESC as well as individual shippers, on the various elements of the proposal.

3.5. Conclusion

22. If the current block exemption for liner conference price fixing and capacity regulation is repealed this will basically make liner conferences on trades to and from the EU, as defined in Regulation 4056/86, incompatible with Article 81 of the Treaty.[18] The question is what kind of Community legal instrument would be required giving guidance on the applicability of Article 81 to other forms of co-operation for liner shipping services. Naturally, the need and type of such legal instrument would depend very much on the content of the proposed co-operation framework. In particular, whether it involves restrictions of competition within the meaning of Article 81(1) of the Treaty and if so, whether the conditions for an exemption under Article 81(3) of the Treaty can be said to be fulfilled.

23. The Commission would welcome the views of third parties on the need and possible form of a legal instrument for a possible new form of business co-operation framework between shipping lines.

4. CABOTAGE AND TRAMP SERVICES

24. International tramp vessel services as defined in Article 1(3)(a) of Regulation 4056/86 and maritime transport services that take place exclusively between ports in one and the same Member State (cabotage) as foreseen in Article 1(2) of Regulation 4056/86 are currently excluded from the Community competition implementing rules pursuant to Article 32 (a) and (b) of Regulation 1/2003.[19] [20]

25. As is explained in further detail in the annex, no credible consideration has been put forward to justify why these services need to benefit from different enforcement rules than those which the Council has decided should apply to all other sectors of the economy. It has also not been explained what legitimate negative consequences such procedural changes could have for the industry. On that basis, the Commission proposes to bring maritime cabotage and tramp vessel services within the scope of the general enforcement rules of Regulation 1/2003. In order to help the tramp industry to correctly assess notably their "pool agreements", however, the Commission will consider issuing some form of guidance in a manner that is to be determined.

5. TECHNICAL AGREEMENTS

26. Article 2 of Regulation 4056/86 allows maritime transport providers to conclude agreements which have the sole object and effect to achieve technical improvements or cooperation. Such agreements are not caught by Article 81(1) of the Treaty. The provision contains certain examples, such as standards or types in respect of vessels and equipment and the coordination of transport timetables for connecting routes.

27. As is explained in further detail in the annex this specific exception for technical agreements, as confirmed by the European Court of Justice, is merely declaratory and the paper therefore proposes to repeal this provision, like it was repealed by the Council in the air transport sector earlier this year.

6. CONFLICT OF LAWS

28. Article 9 of 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. In that case the Commission should consult the relevant authorities in third countries and ask the Council to authorize it to open negotiations, if needed. The ratio of including this provision in Regulation 4056/86 at the time was apparently that it was felt that, in view of the characteristics of international maritime transport, the application of Regulation 4056/86 might lead to a conflict with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests (*recital 15* of Regulation 4056/86).

29. As is explained in further detail in the annex, 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. Therefore there would appear to be no justification for maintaining this provision.

7. CONCLUSIONS

30. It follows from the above that the conclusions on the various issues are the following:

(a) *Is there, in the present market circumstances, still a justification under Article 81(3) of the Treaty for the block exemption for price fixing and supply and market regulation by liner shipping conferences?*. There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified. On that basis, the Commission considers proposing to repeal the present block exemption for liner shipping conferences.

(b) *If not, would the Commission propose to replace the block exemption by a different legal instrument for liner shipping services applicable to trades to and from the EU?* The Commission will assess the relevant suggestions from the industry and comments from stakeholders with a view to taking a position, by means of an appropriate legal instrument, on an alternative co-operation framework among liners. ELAA has already put forward concrete ideas about such a framework. Before taking a position on those ideas, the Commission would like to invite interested third parties to submit their comments, as well as to provide alternative options.

(c) *Is there still a justification for the exclusion of tramp services and cabotage (i.e. national maritime services) from the competition implementing rules of Regulation 1/2003?* No credible consideration has been put forward to justify why these services would need to benefit from different enforcement rules than those which the Council has decided should apply to all sectors. It has also not been explained

what legitimate negative consequences such procedural changes could have for the industry. On that basis, the Commission considers bringing maritime cabotage and tramp vessel services within the scope of Regulation 1/2003. The Commission will provide the tramp industry with some guidance on the implementation of competition rules to this sector.

(d) *Is there a valid reason to maintain the specific exception for purely technical agreements?* The provision on technical agreements laid down by Article 2 of Regulation 4056/86, as confirmed by the Court, is merely declaratory and the Commission considers proposing to repeal this provision, like it was repealed by the Council in the air transport sector earlier this year.

(e) *Is there a valid reason to maintain the conflict of laws provision in Regulation 4056/86?* A conflict of laws has not arisen in the past and there would appear to be no justification for maintaining Article 9 of Regulation 4056/86. However, before taking a position on this the Commission would like to invite interested parties, notably its international counter-parts, to submit their views on the need of a conflict of laws provision.

8. PROPOSED ACTION

31. In light of the above conclusions the Commission proposes the following:

- To consider repealing the currently applicable substantive provisions of Regulation 4056/86, in particular the block exemption for liner conferences and the exception for technical agreements.
- To examine what type of instrument would be needed to replace Regulation 4056/86 and make an appropriate proposal in that regard, taking into account also the competitive position of the EU liner shipping industry in a global context.
- To carefully examine the ELAA proposal as set out in this paper in light of the comments received from interested third parties, as well as any other proposal that might be made by the industry or other interested parties.
- To propose a change to Regulation 1/2003, as to remove the current exclusion of tramp and cabotage services from its scope.
- To carefully examine whether there are reasons to maintain a conflict of laws provision.

9. INVITATION TO SUBMIT COMMENTS

32. The Commission invites the Member States, all other institutions and interested parties to submit comments on this White Paper within two months from publication to the following address:

By post, to the following address:

Directorate-General for Competition
European Commission
Unit D2 (transport)
White Paper on Maritime Review
Rue Joseph II 70, 2/237
1049 Bruxelles

By electronic mail, to the following address:

COMP-D2-REVIEW4056@cec.eu.int

Enclosure: Background paper

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1 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, OJ L 378, 31.12.1986, p.24, as amended by Council Regulation 1/2003 of 16 December 2002 (OJ L 1 of 04.01.2003, p. 1) .

2 Council Regulation 1/2003 of 16 December 2002 (OJ L 1 of 04.01.2003, p. 1).

3 SN 100/1/100.

4 OECD Secretariat report of April 2002, Competition policy in liner shipping, p. 74-80, available at http://www.oecd.org/dataoecd/13/46/2553902.pdf.

5 *Ad hoc* Advisory Committee of 25 March 2002.

6 See e.g. Case T-86/95, *Companie Générale Maritime*, [2002] ECR II-1011, para 254, 393 and 484.

7 Hard-core restrictions are generally considered as restrictions of competition by object caught by Article 81(1) of the Treaty, which generally do not fulfil the conditions for an exemption under Article 81(3) of the Treaty.

8 See TAA, EATA, Revised TACA decisions of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.

9 See TAA, FEFC, TACA, Rev TACA decisions of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.

[10] Joined Cases T-191/98 and T-212/98 to T-214/98 *TACA* [2003] ECR –not yet reported, para 568.

[11] See to that effect implicitly para 139 of Case T-17/93, Matra, ECR [1994] II-595 and Case 26/76, Metro (I), [1977] ECR 1875, para 43.

[12] Case T-395/94, *TAA* [2002] ECR II-00875, para 261.

[13] To compare, see for example Regulation 823/2000 on Consortia (OJ L 100 of 20.04.2000 p. 24), Regulation 1400/2002 on motor vehicles and Regulation 2790/1999 on vertical agreements (OJ L 336 of 29.12.1999, p. 21), in which the Commission explicitly referred to the experience acquired in the sector concerned which enabled it to define categories of agreements which could be regarded as normally satisfying the conditions laid down in Article 81(3).

[14] See for a further description of the situation in those jurisdictions the annex to this paper.

[15] Liner shipping services are defined by ELAA in its Proposal as "the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment, and ancillary activities" (compare Article 2(2) of Regulation 823/2000).

[16] ELAA Final Proposal of 6 August 2004, available at http://europa.eu.int/comm/competition/antitrust/others/maritime/elaa_proposal/elaa_proposal_6_august_2004_en.pdf.

[17] For a more detailed description of the ELAA proposal reference is made to the annex.

[18] At least a liner conference in the sense of a group of two or more vessel-operating carriers providing liner services under uniform or common freight rates (compare the definition of a liner conferences in Article 1(3)(b) of Regulation 4056/86).

[19] Regulation 1/2003 replaced as from 1 May 2004 the procedural provisions of Regulation 4056/86. The exclusion of cabotage and tramp from the scope of Regulation 4056/86 has in fact since 1 May 2004 no longer any practical meaning.

[20] To avoid any misunderstanding, the substantive competition rules (Article 81 and 82 EC) are applicable also to these services. The exclusion is limited to the competition *implementing* rules, in other words: Regulation 1/2003 is not applicable to tramp and cabotage.

Annex to the WHITE PAPER on the review of Regulation 4056/86, applying the EC competition rules to maritime transport (background working paper of the Commission services)

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1. LINER SHIPPING CONFERENCES

1. Liner shipping conferences exist since 1875. They are associations of ship-owners (carriers, providing liner shipping services to transport users (shippers)) served by a secretariat. The ship-owners set common or uniform freight rates and make a common policy on the discounts or rebates which may be offered to shippers. Furthermore, they may share the cargo between themselves in various ways and coordinate timetables. Conferences themselves do not bring about the joint operation of liner shipping services.[1] Rather the members of the conference do, either on an individual basis or in co-operation with other liner service providers (e.g. in a operational co-operation form such as a consortia).[2]

2. There are currently about 150 liner shipping conferences world-wide, of which 28 operate on trades to and from the EU.[3] The conferences on the three main trades to and from the EU (that is the transatlantic trade, the Europe-Eastern Asia trade and the Europe-Australia/New Zealand trade)[4] are respectively the Trans Atlantic Conference Agreement (TACA)[5], the Far Eastern Freight Conference (FEFC)[6] and the Europe Australia New Zealand Conferences (TEANZC)[7]. Their members include both European and non-European liner shipping carriers, e.g. 4 out of the 7 TACA members, 4 out of the 15 FEFC members and 6 out of the 7 TEANZC members are European carriers.

3. Conferences secretariats organise the meetings of the members of the conference and monitor trade conditions by collecting statistics of trade volumes and prices which are supplied to the secretariat by the members of the conference. The data collected and information exchanged may differ depending on the trade. According to the European Liners Affairs Association (ELAA), an organisation which was specifically established in May 2003 to represent the carriers' position on the review of Regulation 4056/86, the following data are provided by members to the secretariat and the following topics are discussed at the meetings for the three main EU conferences respectively:[8]

Table 1:

Conference	Data provided by members	Discussion topics
TACA	Lifting statistics, including currency fluctuations (CAF) and fuel price fluctuations (BAF), tariffs, overall market information 'exchanges of information are according to ELAA carried out in compliance with the undertakings given to the EC Commission)	Statistics, ocean tariffs, overall market conditions, outsider activity, general capacity issues, surcharge review and introduction of surcharges, inland pricing issues (US only), terminal handling pricing issues, customs and secrecy issues (US only), business plan and legal issues
FEFC	Lifting statistics, capacity, overall market information	Statistics (e.g. overall figures for supply and demand, utilization and volume), overall market conditions (e.g. implementation of rate restoration, state of the local market), general capacity issues, business plan and legal issues
TEANZC	Lifting statistics, tariffs and background on tariff matters, overall market information	Statistics, ocean tariffs, overall market conditions, internal agreements between lines (e.g. Trade Participation Agreements), rating strategy and implementation, requests for Conference Carrier Agreements

4. It is useful to note that the activities of conferences operating on trades to and from the EU have changed over the years. In the past, some conferences have, apart from fixing the maritime tariff, also been involved in price fixing covering the inland leg of multi-modal transport. Furthermore, some conferences concluded capacity non-utilization agreements, agreed on freight forwarder remuneration, prohibited or restricted individual service contracting by their members and/or agreed on prices and surcharges with independent operators (non-conferences). In a number of Commission decisions and Court judgments these activities were considered to be illegal under EC competition law and the conferences concerned were ordered to abandon these practices.[9]

5. Notably in its most recent decision as regards liner shipping services, the Revised TACA decision of 14 November 2002, the Commission has set a number of principles which should be emulated by all conferences operating on EU liner shipping trades: 1) conferences should refrain from inland price-fixing, 2) no restrictions should be placed on the right of conference members to enter into individual contracts with transport users, 3) collective regulation of capacity by members of a conference is only permissible where it is necessary in order to adapt to a short-term fluctuation of demand, and it must not be combined with a price increase.[10]

2. INTERNATIONAL DEVELOPMENTS REGARDING LINER CONFERENCES

2.1.1. Introduction

6. Most OECD countries have traditionally granted some form of anti-trust immunity or exemption to liner conferences. Some of the Community's main trading partners, such as the United States and Australia, have conducted reviews of their own liner shipping regimes.

2.1.2. United States[11]

7. On 1 May 1999 the Ocean Shipping Reform Act (OSRA) entered into force, substantially amending the United States 1984 Shipping Act. Two pro-competitive changes in particular were introduced: (1) carriers were no longer required to make public all essential terms of service contracts and (2) conferences could no longer prohibit their members from entering into individual service contracts. The Federal Maritime Commission (FMC) is in charge of monitoring agreements between carriers under the Shipping Act.[12]

8. The US reform has brought the US liner shipping competition regime closer to its current EC counterpart (Regulation 4056/86, as interpreted by the Commission and the Court of Justice). US law allows shipping lines to enter into agreements (on price fixing; or capacity regulation) similar to those allowed by the EU liner conference block exemption. However, there are still differences between US and EU law, the main one being that the US allows shipping lines to enter into "discussion agreements", i.e. to agree voluntary guidelines for prices and capacity, outside, the framework of conferences. The EU does not, because of the risk that effective competition between conferences and independent lines would be much reduced or eliminated altogether (see para 91- below).

2.1.3. Australia

9. Part X of the Australian Trade Practices Act 1974 ("the TPA") provides for a limited exemption for international liner cargo shipping conferences. Essentially, Part X allows lines, under certain conditions and obligations, to enter into co-operative arrangements, including the joint provision of services and agreements on capacity, service levels and prices charged.

10. Part X defines a conference quite broadly, ranging from full conferences to non-binding discussion agreements, as well as technical agreements covering slot swapping and rationalisation of sailings. The agreements must be registered at the Department of Transport and Regional Services.[13]

11. In 1999 a review of the TPA Part X performed by the Productivity Commission (an advisory body to the Government) was carried out. As a result, in 2000 amendments where made to the Part X of the TPA. Part X would be retained but the Minister for Transport and Regional Services and the Australian Competition and Consumer Commission (ACCC), would be granted increased powers to identify and address concerns about anti-competitive behaviour (including undertaking on its own initiative an investigation with a public benefit test) and to

deal with concerns about the operation of agreements which potentially cover a large proportion of a trade.

12. Currently, the Productivity Commission is undertaking, on the request of the Government, another review of the exemption system in Part X to see if it is still beneficial to the Australian community. The Productivity Commission has released in June 2004 an issues paper, inviting third parties to comment and is expected to issue its final report by the end of the year.[14]

2.1.4. The OECD

13. As part of the OECD's general Regulatory Reform Programme,[15] the OECD Secretariat presented a "Discussion document on regulatory reform in international maritime transport"[16] in May 1999. The document recommended *inter alia* that agreements to set common rates should no longer receive automatic antitrust immunity or exemption. It was then discussed at a joint workshop of the OECD's Maritime Transport Committee and Competition Law and Policy Committee in May 2000, at the end of which the OECD Secretariat decided to produce a draft report for discussion at a second workshop in 2001.

14. The draft report, circulated in November 2001, made, *inter alia*, the following findings of particular interest for EC maritime competition policy:

- The liner shipping industry is not 'unique' in the sense that its cost structure does not differ substantially from that of other transport industries and shipping lines do not suffer from exceptionally low returns on investment when compared to other scheduled transport providers. There is therefore no evidence that the industry needs to be protected from competition by anti-trust immunity for price-fixing and rate discussions;

- There is no evidence that the conference system (with anti-trust immunity or exemption for price-fixing) leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. On the contrary, the OECD finds support for the view that the most competitive markets provide the greatest stability.

15. In the light of its findings, the draft Report came to the conclusion that countries should:

- Re-examine anti-trust exemptions for common pricing and rate discussions, with the goal of removing them, except where specifically and exceptionally justified;

- Have the discretion to retain exemptions for other operational arrangements so long as these did not result in excessive market power.

16. Following discussion at an OECD Workshop in December 2001, the OECD Secretariat published its final report on 16 April 2002.[17] The report essentially endorsed the above findings. In particular, it found that it had not been established that collective price-fixing, whether by conferences or within discussion

agreements, was an indispensable pre-requisite for stable freight rates and regular scheduled services.[18]

3. THE BLOCK EXEMPTION FOR LINER CONFERENCES IN REGULATION 4056/86

3.1. Relevant provisions

17. Article 3 of Regulation 4056/86 provides for a so-called block exemption for agreements, decisions and concerted practices of all or part of the members of one or more liner conferences, as defined in Article 1(3)(b) of Regulation 4056/86, that have as their objective the fixing of rates and conditions of carriage, and that, in addition, cover one or more of the following forms of co-operation:

- the co-ordination of shipping timetables, sailing dates or dates of calls;
- the determination of the frequency of sailings or calls;
- the co-ordination or allocation of sailings or calls among members of the conference;
- the regulation of the carrying capacity offered by each member;
- the allocation of cargo or revenue among members.

18. Article 4 of the Regulation attaches a condition to the exemption: the above agreements must not cause detriment to ports, transport users or carriers by applying rates and conditions of carriage which vary without justification according to the country of origin or destination or port of loading or discharge. In addition, various obligations are attached to the block exemption (Article 5). Lines must consult with transport users; while they may institute loyalty arrangements, such arrangements must contain safeguards for transport users. Transport users must also be free to make their own arrangements concerning inland transport and quayside services. Tariffs and other conditions applied by the conference must be made available to transport users on request, or must otherwise be available for examination.

19. Failure to observe the above and other conditions may cause the Commission to withdraw from the conference the benefit of the block exemption. It may also lead to the imposition of fines.

20. The justification for the block exemption for liner conference agreements is given in the eighth recital of the preamble to Regulation 4056/86, which states:

> *Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilising effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the co-operation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from*

both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned.

21. The legislator has thus assumed in the past that price-fixing and capacity regulation within conferences leads to stability of freight rates, and that stability assures shippers of reliable scheduled maritime transport services.

22. It follows from the Regulation itself, from the decisional practice of the Commission and the case law of the Court that Regulation 4056/86 contains a *"wholly exceptional"* block exemption[19], because it exempts price fixing and capacity regulation, which are normally regarded as hard-core restrictions[20], for an unlimited duration and does not contain any market share thresholds. Indeed, the Regulation can only be explained in its historical context.

23. Liner conferences have sought to interpret the block exemption in broad terms. In particular, liner conferences considered capacity non-utilization agreements[21] and inland price fixing[22] to be covered by the block exemption. This has however not been accepted by the Commission, nor by the Court. Indeed, the block exemption derogates from Article 81(1) of the Treaty and should therefore be interpreted narrowly[23]. Goals pursued by other Treaty provisions can be taken into account only to the extent that they can be subsumed under the four conditions of Article 81(3) of the Treaty.[24]

3.2. Assessment

3.2.1. Legal and economic framework

24. The EU competition rules are modelled on the presumption that competition provides the best services to the consumer at the most affordable prices. For that reason, the starting point under the Treaty is that competition should not be distorted and that any exemption from that rule needs to be justified. Agreements which restrict competition within the meaning of Article 81(1) of the Treaty (such as price fixing and capacity regulation agreements) could only be exempted if they fulfil the four cumulative conditions laid down in Article 81(3) of the Treaty, namely:

    1) the agreement 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) the agreement 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).

25. The application of Article 81(3) of the Treaty to categories of agreements by way of a block exemption regulation is based on the presumption that restrictive agreements that fall within its scope fulfil each of the four conditions laid down in Article 81(3) of the Treaty.

26. As said above, the justification of the liner conference block exemption is provided for in recital 8 of the preamble of Regulation 4056/86, which in essence assumes that conferences bring stability, assuring reliable services which could not be achieved by less restrictive means. In this regard the Court of First Instance stated that *"the Council did not assert (and indeed could not have asserted) that stability is more important than competition"*.[25]

27. It should be noted that the justification in recital 8 of Regulation 4056/86 has not been based on experience of the Commission in applying Art 81(3) to liner conferences[26]. In this regard, the core question examined in the review process is whether, in light of the cumulative conditions of Article 81(3) of the Treaty, the justification for price fixing and supply regulation by liner conferences in Regulation 4056/86 could (still) be said to be valid in light of the present market circumstances. If not, there would no longer be a legal justification for the block exemption, which consequently would have to be either abolished or revised. To that end parties have been invited to provide factual evidence.

3.2.2. Burden of proof

28. In this context supporters of the block exemption (notably ELAA) have emphasised that the burden of proof in the review of Regulation 4056/86 would be at least a shared one and that the Commission should show that a possible revocation or amendment of the liner conference block exemption is justified.[27] Naturally, it follows from Article 253 of the Treaty that, when proposing (changes to existing) legislation the Commission shall motivate its proposals. This implies e.g. that if the Commission proposes to repeal the present block exemption for liner shipping conferences it will have to explain the reasons why price fixing and supply regulation by the conferences would, in the present market circumstances, no longer be exemptable from the prohibition of Article 81(1) of the Treaty.

3.2.3. Outcome of the consultation on the block exemption

29. In broad terms the reactions that were received to the Commission's Consultation Paper of 2003 could be divided in two groups: those who are in support of maintaining the liner conference block exemption (essentially the carriers) and those who would like to see it repealed (basically the shippers and a leading consumer association).

30. In essence, the supporters of the block exemption argue that the liner shipping industry, because of its specific features (such as high fixed costs, high investment

risks, inelastic demand and supply, asymmetries in demand etc) would be inherently unstable and that this would require special treatment under EU competition law. According to this argument, price fixing by liner conferences provide for stability in a large sense, which could not be achieved to a similar extent by alternatives such as consortia and service contracting. Stability would be to the benefit of all actors involved.

31. Opponents contest that there is evidence of stability and even question the relevance of the concept of stability. Rather, reliable shipping services would be what matters to consumers. Furthermore, they contest the alleged benefits of price fixing for consumers and favour a free competitive market for liner shipping services. The respective positions have been summarized in more detail in the Discussion Paper, which has been posted on the Commission's web-site.

32. The argument of the supporters of the block exemption is based on the notion of "destructive competition", and is not new. It has been advanced by carriers in various liner shipping cases that the Commission examined under the EC competition rules.[28] In these cases the Commission has explained why it is not convinced of the applicability of this economic concept to liner shipping. There is no concrete evidence that the liner shipping industry should be treated substantially different than other global capital intensive industries.[29] Any explanation or justification for price fixing and supply regulation by liner shipping conferences should be considered in light of the four cumulative conditions of Article 81(3) of the Treaty. The argument of the carriers that the liner shipping industry is unique and would require special treatment cannot imply that the conditions of Article 81(3) of the Treaty do not apply. Rather, the argument should be considered within the framework of Article 81(3) of the Treaty, notably its first condition

3.2.4. The four cumulative criteria of Article 81(3)

3.2.4.1. Efficiencies

33. The first condition of Article 81(3) requires that the agreement produces economic benefits, in terms of e.g. cost efficiencies or qualitative efficiencies such as new or improved liner shipping services. Only objective benefits can be taken into account. Cost savings arising from mere exercise of market power, such as price fixing, cannot be taken into account [30]. ELAA appears to argue that conferences improve maritime services by providing stability in terms of rate stability and stability of supply.

34. Carriers have relied in this context mainly on the alleged price stability that conferences would achieve. The data which have been provided in this regard are however not conclusive. Shippers have even contested the relevance of the concept of price stability as such in the context of Article 81(3).

35. It is questionable whether price stability as such could be regarded as sufficient for the fulfilment of the first condition of Article 81(3). Price stability only becomes relevant if it is read in conjunction with the concept of "reliable services",

meaning the maintenance over time of a scheduled service providing shippers with the guarantee of a service suited to their needs.[31] As the Commission has indicated in its Guidelines on the application of Article 81(3)[32], there must be a sufficient and direct causal link between the agreement and the claimed efficiencies. Whatever may have been the force of the justifications that led at the time to the block exemption of price fixing by liner conferences, it is doubtful whether it can be maintained today that the provision of reliable services result directly from the conference price fixing. In this regard, it should be recalled that conference members increasingly offer services on the basis of service contracts.[33] It is not excluded that under the current market circumstances price stability and reliability of services are mainly brought about by such contracts. Moreover, the increase of both internal price competition within conferences and external competition by independent operators have not changed significantly the overall level of reliability of liner shipping services. It would therefore appear that the alleged causal link between the restrictions (i.e. price fixing, supply and market regulation) and the claimed efficiencies (reliable services) is too tenuous to meet the first condition of Article 81(3) of the Treaty.

3.2.4.2. Consumer benefits

36. The second condition of Article 81(3) requires that, if liner conferences were to achieve economic benefits, a fair share of these benefits should be passed on to consumers. Consumers must be compensated for the negative effects resulting from the restrictions of competition. In case of hard-core restrictions, such as horizontal price fixing, it is clear that the negative effects are serious and that any positive effect must therefore be very clear-cut.

37. None of the benefits that have been identified by the carriers would appear to at least neutralize the negative effects for consumers of conference price fixing. In this regard weight should also be given to the fact that consumers themselves fail to see any benefits of price fixing by conferences.[34] The OECD Secretariat concluded in its report that conference price-fixing leads to rates being set at the level necessary to cover the average cost of the least efficient member of the conference. Under this system, efficient members of the conference reap benefits stemming from rates that are above their costs, while the cost savings and efficiency gains of these carriers are not passed on to shippers.

3.2.4.3. Indispensability

38. Under the third condition of Article 81(3) of the Treaty, even if there were economic benefits to the benefit of consumers, it will have to be established that the restrictions of competition are indispensable, i.e. reasonably necessary and proportionate to produce these economic benefits. The test is basically whether there are less restrictive alternatives than conference price fixing which would assure reliable liner services to the benefit of consumers.

39. In this regard account should be given to the growing importance of independent operators and the increase of service contracting between carriers and shippers, in particular individual service contracts, both showing that reliable liner shipping services can be provided by carriers totally or partially outside the conferences framework.

40. It has not been contested that independent operators, which operate outside conferences on all main trades to and from Europe, are capable of providing reliable liner shipping services outside conferences. The fact that the market share of independents has since the adoption of the block exemption generally increased on the main trades, to the detriment of conferences, indicates that the liner services provided for by independents achieve at least equal efficiency gains. The existence of reliable liner shipping services by independents shows therefore that the restrictions of competition by conferences are not indispensable for the promotion of technical or economic progress of liner shipping services[35].

41. Also service contracts contribute to stable and reliable services. The importance of service contracting, in particular individual service contracts, has increased significantly since changes were made in US Law[36] and the Commission in its 1998 TACA decision removed barriers to conclude such contracts.[37] Service contracts are generally less restrictive than price fixing by liner shipping conferences. The benefits of service contracts in terms of assuring shippers of reliable services are generally accepted. The Commission has explicitly recognized that service contracts provide benefits to shippers, e.g. they allow for special services tailored to particular needs. Furthermore, because the price negotiated is established in advance and does not fluctuate for a predetermined period (usually up to one year), service contracts can contribute to price stability – if that is what an individual shipper wants. Service contracts also help to reduce search costs and can offer "all-in"" prices, thereby removing the uncertainty as to the level of surcharges to be imposed.[38]

42. Even in so far as there would be felt a need for cooperation, operational co-operation agreements between shipping lines such as consortia and alliances show that there are less restrictive forms of cooperation than liner conference price fixing and market regulation. Alliances establish co-operation among a group of carriers over certain major trade routes, which can be described as global. These agreements cover a wide range of forms of operational co-operation, e.g. space chartering, slot charter and schedule/sailing arrangements and they aim at the integration of each participant's services into one whole. These alliances do however not include common pricing.

43. Liner consortia are industrial co-operation agreements between liner shipping companies aimed primarily at supplying jointly organised services by means of various technical, operational or commercial arrangements.[39] Thanks to consortia agreements, ship owners can organise jointly the services they supply (in particular container liner shipping) and thus provide users with a better service while rationalising their maritime transport activities and securing economies of scale and cost reductions. [40]

44. The argument has been advanced that the success of consortia is closely linked to the activities which take place within conferences. Such argument is difficult to accept under EU competition law. The consortia block exemption does not allow horizontal price fixing and it covers both consortia operating within a liner conference and consortia operating outside such conferences. In competition policy terms the argument rather reinforces the general concern that the existence of the conference system combined with the growth in operational co-operation

through consortia and alliances could possibly raise the potential for sensitive market information to spill over to other non-Conference market actors.

45. These alternatives already available on the market show that shipping lines do not need any longer to engage in price-fixing, supply and market regulation to provide reliable shipping services.

3.2.4.4. No elimination of competition

46. Finally, the fourth condition of Article 81(3) requires that the conference should remain subject to effective competitive constraints.

47. Competitive constraints on conferences can come from independent operators. Agreements between conference and non-conference members do not benefit from the block exemption and the Commission has in the past intervened to avoid that such agreements would undermine competition between independent and conference carriers. In general, independent operators have increased their market share on the main trades to and from Europe.[41] However, the importance of the competitive constraints from independent operators on a particular trade, depends also on their capacity to compete and their incentive to do so.

48. Service contracting between individual shippers and members of the conference is another source of competition. In the past liner conferences have sought to limit effective competitive constraints from individual contracting. The Commission has acted against this in order to ensure that there are no restrictions on conference members as regards their freedom to negotiate and enter into service contracts with shippers.[42] As a result, individual contracting has increased importantly in recent years, for example, on the Transatlantic trade nowadays only 10 % of the cargo carried by the TACA conference members is moved under the conference tariff.[43]

49. However, given the increasing number of links between carriers (i.e. consortia, alliances, vessel-sharing arrangements and slot-charters) determining the extent to which a particular conference is subject to effective, internal and external, competition can be a very complex exercise, even if the conference in question does not have a substantial market share. In any event, such an assessment would necessarily have to be made on a trade by trade basis.

3.2.5. Conclusion on Article 81(3) EC

50. The four cumulative conditions to justify an exemption for liner conference price fixing, supply and market regulation would appear to be no longer fulfilled. There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified.

4. IMPACT OF WITHDRAWAL OF THE BLOCK EXEMPTION ON THE MARKET

4.1. Introduction

51. Under EC competition law price agreements and agreements on supply and market regulation between competitors are restrictive of competition by object. It follows from the above that, in the present market circumstances, there seems to be no justification under the EC competition rules to exempt these type of agreements by liner conferences from the prohibition of Article 81(1) of the Treaty. The present "wholly exceptional" regime for liner conferences, compared to other (capital intensive) industries, seems no longer justified under EC competition law.

52. The overall objective of removing the present "wholly exceptional" regime for liner conferences would be to make the liner shipping industry on trades to and from the EU more competitive, to the benefit of consumers. Bringing liner shipping conferences under a normal competitive regime is expected to have important pro-competitive effects on liner shipping services in terms of increased economic efficiencies (less efficient lines will be forced to become more efficient due to competitive pressure) and, in a competitive market, these efficiencies are expected to be passed on to shippers (e.g. in terms of more competitive prices and better quality of service) and the ultimate consumers.

53. Based on the above, it would appear that the present block exemption in favour of liner conferences should be repealed.

54. In this regard there are in essence two policy options. The first option would be to repeal the present block exemption and not replace it by any other legal instrument. This would bring the whole liner shipping industry on equal footing as most other industrial sectors and would imply that conference members, like any other shipping carrier, will have to carry out a self-assessment as to whether their activities would fall within the scope of Article 81(1) of the Treaty and, if so, whether they would fulfil the conditions for an exemption under Article 81(3) of the Treaty. Lines would be assisted in this regard by the decisional practice of the Commission, various guidelines issued by the Commission and the case law of the Court.

55. The second option would be to repeal the present block exemption, but in parallel explore the need and possibilities to replace it with a new legal instrument recognising the compatibility with Article 81 of the Treaty of other forms of cooperation of liner services operating to and from the EU, in addition to forms of co-operation for which there exists already a legal framework (e.g. consortia, mergers). This option will be discussed in further detail in the following chapter.

56. Hereinafter the possible impact (positive and negative) on liner shipping services on trades to and from the EU the first option (i.e. simple withdrawal of the present block exemption), are examined. On subjects where the impact assessments is limited to a static analysis of the current situation, there are no indications that the withdrawal of the block exemption will have any effect on the respective issue in future.

4.2. Impact assessment

57. As a preliminary remark it should be noted that an assessment of the impact on liner shipping services, in terms of economic, social and environmental consequences, in a situation without the present block exemption would necessarily be largely hypothetical.[44] Indeed, traditionally in all jurisdictions liner conferences have been granted some form of immunity or exemption from the competition rules and none of the competent authorities who looked into it or who are reviewing this (e.g. US, Canada, Australia, Japan) have removed that immunity/exemption so far.

58. Hereinafter, on the basis of facts and developments on the liner shipping market an impact assessment has been carried out, notably in terms of the likely effect on trade, investment and fleet, innovation, consumer prices, employment. Furthermore, experience from other liberalised markets has also be taken into account.

4.2.1. Effect on trade

59. Sea transport[45] is responsible for about 45% of EU25 external trade in value terms and about 75% in volume terms. Container transport by sea accounts for approximately 40% of EU25 external trade by sea in value terms (and between 9% [imports] - 28% [exports] in volume terms). Finally, sea containers make up for 6% of all EU25 imports in volume terms (18% in value terms) and 21% of all EU25 exports (see table 1). Conferences have market shares between 40%-70%[46] on the major trades.

Table 2:

Sea container share in total transport

EU 15		1998	1999	2000	2001	2002
Total import	Value	18%	17%	16%	16%	17%
	Volume	4%	5%	5%	5%	6%
Total export	Value	20%	20%	19%	18%	18%
	Volume	16%	17%	17%	18%	18%
EU 25		**1998**	**1999**	**2000**	**2001**	**2002**
Total import	Value	19%	19%	17%	18%	18%
	Volume	4%	5%	5%	6%	6%
Total export	Value	22%	22%	21%	20%	21%
	Volume	18%	19%	20%	20%	21%

Source: DG COMP Volume in tons

60. The origin of imports of goods by sea of EU15 in 2002 were equally shared between America, Africa, the other European countries and Asia.[47] However, the trend differed slightly when focusing on exports, for which the volumes handled were always inferior to imports. America took the largest share (40%), Asia also had a larger share in the exports of the EU15 than in the import (25%), while the opposite was true for Africa (17%) and other European countries (17%).

Table 3:

Quantity (1000 tonnes) and value (million Euros) of imports and exports in the exchanges between EU and the world regions by maritime transport, 2002

	Imports of EU			Exports of EU			Total		
	Volume	Value	Euros/Tonne	Volume	Value	Euros/Tonne	Volume	Value	Euros/Tonne
Other European countries	212.432	64.214	302	48.071	47.738	993	260.503	111.952	430
North Africa	111.140	27.885	251	28.164	24.243	861	139.304	52.128	374
Other African countries	116.443	23.507	202	19.607	22.089	1.127	136.050	45.596	335
North America	75.858	57.532	758	88.817	123.742	1.393	164.675	181.274	1.101
Central America and Caribbean	17.147	8.131	474	9.055	16.364	1.807	26.202	24.495	935
South America	139.094	29.269	210	10.228	17.177	1.679	149.322	46.446	311
Near and Middle Eastern countries	120.182	26.512	221	23.445	34.740	1.482	143.627	61.252	426
Other Asian countries	73.482	145.111	1.975	45.978	84.816	1.845	119.460	229.927	1.925
Australia and New Zealand	42.966	7.264	169	3.085	10.866	3.522	46.051	18.130	394
Other countries of Oceania and Polar regio	764	623	815	444	1.078	2.428	1.208	1.701	1.408

Source: Comext database

61. Conferences are predominant on deep sea routes between Europe and Asia, America and Australia. Hence EU trade with these regions would consequently be most affected by any regulatory change. On the other hand, routes in the Mediterranean, North, Baltic and Black Sea are typical short-sea shipping routes, where conferences are less important. Consequently, the considerable EU trade with North Africa, Near East or other European Countries would be less affected by regulatory change.

62. Petroleum products and solid mineral fuels represent the largest part (42%) of total volume of goods imported by sea by EU15 from extra EU partners in 2002. In terms value of imports the group "machinery, transport equipment, manufactured and miscellaneous articles" had the largest share. For exports from the EU15 to non-EU members, petroleum products were also the most important category in terms of volume (32%), while "machinery, transport equipment, manufactured and miscellaneous articles" had again the largest share in total value of goods. In extra EU trade, the volume of goods exported by EU15 was three times lower than the volume of imports. However, the respective values of the goods exported and imported by EU15 were almost the same, which can be explained by the fact that Member States export goods with higher value than the good they import.[48]

Table 4:

Share of each products in the total volume of goods exchanged by maritime transport between Eu and world regions, 2002

	NST/R chapters	America	Asia	Africa	Oceania and Polar regions	Other European countries
0	Agricultural products and live animals	5%	4%	6%	3%	8%
1	Foodstuff and animal fodder	17%	8%	5%	4%	3%
2	Solid mineral fuels	11%	6%	15%	**53%**	7%
3	Petroleum products	**26%**	**48%**	**48%**	0%	**46%**
4	Ores and metal waste	19%	3%	9%	31%	4%
5	Metal products	3%	3%	2%	2%	5%
6	Crude and manuf. minerals, building materials	5%	5%	3%	1%	15%
7	Fertilizers	1%	1%	3%	0%	2%
8	Chemicals	6%	7%	2%	1%	5%
9	Machinery, transport equipment, manufactured and miscellaneous articles	7%	15%	7%	4%	6%

Source: Comext database

63. It should be noted that while some of the goods can practically only be transported by bulk carriers such as petroleum, chemicals or solid mineral fuels, most of the remaining goods can be carried by either bulk, specialised or container carriers, e.g. foodstuff or machinery.

4.2.2. Effect on investment and fleet

64. Investment decisions in vessel capacity depend on the complex supply and demand conditions on four different markets that are the global freight market, the charter market and the market for new and second-hand vessels. Rising freight rates indicate capacity shortage and consequently prices for second-hand and charter vessels increase. When second-hand and charter rates climb, building new vessels become more attractive and carriers start to invest before new-building prices also start to rise. However, when the new capacity arrives on the market with a two-year time-lag, demand for ocean transport might have dropped or carriers might have overestimated demand. Thus freight rates will fall again. If this cyclical nature of the container vessel market remains undisturbed from any co-ordination or collective action, it might generate a continuous flow of companies entering and exiting the market. Inefficient carriers leave the market by selling their vessels and new efficient companies are able to enter the market, which promotes overall efficiency in the long-run.

65. Entry into the liner shipping market is however more difficult since it requires a minimum number of container vessels. The basic mechanisms are nevertheless the same. It is very questionable whether co-ordinated action or planning of conferences as regards capacity and freight rates is able to adjust imbalances on all four markets simultaneously and whether the result of conference action is superior to free competition.

66. Vessel chartering has become a widespread practice in liner shipping. Recent figures show that charter owners now account for 45% of the current fleet and nearly 60% of vessel orders[49]. There are two different charter markets: the long-term and short-term charter market. The latter market covers all time and voyage charter contracts of up to two years. It mainly serves to fill capacity gaps at short notice, comparable to a rental car in case of a breakdown or accident.

67. The long-term charter market is of greater importance to carriers. Carriers may decide to own or charter a vessel. In the case of long-term charter, carriers enter into a legally binding contract of more than two years, typically between five and ten years, before the vessels is being built. A large number of shipowners that charter out vessels are benefiting from tax incentives and are not active in the liner shipping market. Hence, long-term charter can be seen as a flexible way of vessel financing.

68. However, when a carrier is able to obtain a long-term charter contract over a relatively limited period of five years, it can substantially mitigate its investment risk. Thus, carriers with a well-balanced portfolio of owned vessels and long-term charter contracts of different durations are not bearing a great investment risk while at the same time these carriers are able to react independently (i.e. outside of conference co-ordination) to capacity imbalances at relatively short notice.

69. Carriers attempt to mitigate their investment risk through their participation in conferences. This might however lead to the so-called "moral hazard" phenomenon: a carrier might invest in "too much capacity" which is not in accordance with supply and demand projections on the market. In this case a carrier relies on the conference price-setting system which ensures that freight rates are only partly or with a certain time-lag reflecting supply and demand conditions on the market. While such a strategy could be profitable for a single carriers, it might lead to overcapacity in the market when a larger number of carriers follow this strategy. Under these circumstances conferences would systematically provide poorer market results than free competition.

70. The OECD[50] affirms that liner shipping industry has record of over-investing heavily in new capacity. Recent data of Containerization International[51] appears to confirm this trend. In 2003, the global container fleet grew by 10% and slot capacity by 18%. In November 2003, 500 ships were on order and the world fleet was expected to grow another 8% in 2004 and 8.5% in 2005. Only a few experts however expected transport demand to rise that much.

71. Many conference and non-conference carriers follow the path of ordering new and larger vessels in order to achieve economies of scale which would allow them potentially to cut costs. A number of experts however hint at the trade-off between capacity vessel and transhipment costs, i.e. economies of scale brought by larger vessels can be easily wiped out by increasing transhipment costs. It therefore appears that the industry's conventional wisdom regarding economies of scale is not necessarily as well founded as carriers might hope to believe.[52]

72. In conclusion: it is not evident that capacity co-ordination under the conference system is capable of delivering a better market outcome than an entirely competitive market organisation.

Table 5:

Top 20 Container service operators in 2003						
			operating capacity		capacity on order (owned, long-term charter)	
Rank	Carrier	Country	TEU	Total number of ships	TEU	Total number of ships
1	AP MOELLER	**DK**	844626	328	130936	30
2	MSC	CH	516876	217	188770	28
3	Evergreen Group	Taiwan	442310	152	132040	18
4	P&O Nedlloyd	**UK-NL**	419527	157	113550	25
5	CMA CGM	**F**	299174	150	118570	18
6	Hanjin Group	Korea	290677	76	38500	5
7	Cosco	China	274128	148	54228	8
8	APL	Singapore	273573	82	11000	2
9	MOL	Japan	222533	72	28424	5
10	NYK	Japan	233934	91	24914	4
11	CP ships	**UK**, Canada	201706	85	38277	9
12	K Line	Japan	186017	63	93744	18
13	OOCL	Hong-Kong	185502	55	64504	8
14	Zim	Israel	174480	79	45179	9
15	Hapag-Lloyd	**D**	154850	41	50928	7
16	Yang Ming	Taiwan	153783	55	65728	13
17	CSCL (China shipping)	China	143655	94	97470	16
18	Hyundai	Korea	136548	35	43703	7
19	CSAV Group	Chile	123378	55	68607	16
20	PIL Group	Singapore	10650	92	5152	6

Source: Containerization International November 2003

73. Five out of the top 20 and three out of the top five container service operators are of European origin. These top 20 carriers are operating about two thirds of the world capacity, which is relatively fragmented for a global and capital intensive industry. A more competitive environment in the fragmented liner shipping market may lead to more concentration, i.e. mergers and take-overs.

74. Mergers might generate efficiency gains in terms of economies of scale and scope, learning economies, enhanced technical progress or improving the efficiency of management. On the other hand, mergers may have anti-competitive effects such as the unilateral increase of market power or greater risk of collusion due to a reduction of market players.

75. While more concentration in liner shipping may well lead to considerable efficiency gains, it is questionable whether a single liner shipping operator could exercise more market power than a conference or whether a liberalised but more concentrated liner shipping market would be more prone to collusion than the conference system. In addition, EU merger control aims at preventing mergers that "significantly impede effective competition". Hence, it is not excluded that in the long and medium term transport users and consumers might even gain from increased concentration within a liberalised market.

76. It is difficult to anticipate the outcome of concentration processes since most of the carriers are parts of larger corporate entities. Profitability and financial strength of an individual carrier might make it less vulnerable to a take-over. On the other

hand, larger corporate entities might be less guided by profitability of carriers as a single business unit, but by their overall business strategy, e.g. diversification or vertical integration strategies, or the profitability of the entire door-to-door logistics service. Moreover, it should be noted that a number of carriers "still lack the ability to accurately track and assign costs on a specific, rather than average basis" and pricing regimes are based on average costs[53]. Average cost pricing and inaccurate cost assignment may adulterate profitability calculations of inter-modal services and hence the profitability of a carriers within a larger business entity.

4.2.3. Effect on innovation

77. Competition is generally associated with static efficiency gains in terms of better price-output combinations. In the long-term competition also contributes to dynamic efficiency gains, i.e. cost savings, research, innovation of new products and services. However, in order to innovate or carry out research firms usually require sufficient financial resources or a considerable market size.

78. Liner shipping is characterised by relatively low concentration rates in general as well as on a trade-by-trade basis[54]. Most of the major carriers are parts of larger corporate business entities and are vertically integrating (e.g. dedicated container terminals, information technology, integrated global logistics services)[55]. Although container transport has seen technical progress over the last decades, for instance increasing vessel sizes, it is more than likely that competition will further accelerate technical progress in liner shipping. Experience from liberalisation of other sectors shows that a liberalised liner shipping sector will see reinforced horizontal concentration, i.e. inefficient firms will leave the market or will be taken over by competitors, as well as vertical integration, both tendencies together lead to more innovation and a quicker dissemination of innovation, e.g. inter-modal solutions. Liner shipping companies will become big enough to carry research and to innovate and there will also be an incentive to use these innovations in vertically integrated inter-modal logistics chains.

4.2.4. Effect on consumer prices

79. According to ECSA "the transport cost element in shelf price of consumer goods has reached a marginal level in percentage: TV set 2%, 1 kg coffee 1.2%, bottle of whisky 0.5%, vacuum cleaner 1.3%, cassette recorder 1% and 250cc motor cycle 1.4%."[56] Such a view suggest that there is no impact on consumer prices at all since the transport cost share is relatively limited. It neglects however long-term effects of "too high" transport costs. Transport costs can significantly influence investment decisions in upstream or downstream markets. In the manufacturing industry for instance transport cost of 1.4% for a motorcycle can be decisive when it comes to deciding whether to build the motor cycle in Europe or Asia. In addition, a large part of liner shipping companies' customers are logistics providers for which ocean transport is a major part of their overall costs.

4.2.5. Effect on employment

80. By far the biggest share of all global seafarers (approximately 700000) are Philipinos (28%), followed by Russians and Ukrainians. There is no indication however that repealing the block exemption will have any effect on the supply and

demand conditions for seafarers. There is growing shortage of sailors in the European Union. Since the beginning of the 1980s, the EU lost 40% of its seamen. There is a desperate need for merchant shipping officers. Between now and 2006 the EU will be some 36 000 sailors short.[57]

Table 6:

Estimated number of seafarers on merchant ships by nationality in 2002			
	total	officers	rating
Austria	1056	378	678
Belgium	646	519	127
Czech Republic	657	196	461
Denmark	9405	5091	4314
Finland	9528	3804	5724
France	6033	1931	4102
Germany	13799	5726	8073
Greece	30954	16167	14787
Hungary	1930	744	1186
Ireland	3374	1381	1993
Italy	22391	9035	13356
Luxembourg	933	489	444
Netherlands	11091	5427	5664
Poland	11532	5653	5879
Portugal	2117	398	1719
Slovak Republic	100	35	65
Spain	9528	3804	5724
Sweden	9145	4280	4865
United Kingdom	22994	12634	10360
EU total (19)	**167213**	**77692**	**89521**

Source: OECD 2003

4.2.6. Experience from other liberalised markets

81. By increased competitive pressure, deregulation of economic sectors has encouraged firms to be more efficient and helped boost the productivity of entire industries. Increased efficiency leads to lower prices for consumers and business. Prices have fallen significantly and often swiftly where regulatory reforms strengthened competition. Deregulation of the electricity and road and air transport sector in Europe as generally lead to price reductions from 10% to over 30%, while the telecommunication sector has seen price drops of up to 70%.[58]

82. Following European airline liberalisation low-cost carriers have become major players in European aviation and had captured 12% of all intra-EU capacity by the end of 2002. Many of the biggest fare reductions were available on intra-European services, especially in Germany and the UK. This followed from some full service airlines restructuring their fares to meet increasing threat from the low-cost sector.[59]

83. The implementation of the European telecommunications regulatory package introduced competition to the sector, which is bringing prices for consumers down

overall. Incumbents' long distance calls are down 11% in price since 2000 and 45% down since 1998. Overall average monthly expenditure for national calls went down from €85.57 to €68.54 for business users between 1998 and 2001. Incumbents' international calls are also further down in price, by 21% since 2000 for business users.

84. New entrants' prices are in most cases considerably lower, with one new entrant in Germany offering prices 75% lower than the incumbent's for long-distance, for example, and reductions for local calls of up to 29%. New entrants in Belgium, France, Spain and the United Kingdom charge between 36% and 56% less than the incumbent for long-distance calls. There has also been a trend, that prices are starting to reflect the actual cost of providing the service.

85. The strength of competition in the telecoms sector is evident from the fact that the whole population of twelve Member States can choose between more than five operators for long distance and international calls. For local calls, six Member States report that the whole population has a choice of more than five operators.[60]

4.2.7. Position of EU carriers in global context

86. Although in liner shipping relevant markets are determined on a trade-by-trade basis, liner shipping has a global context. It has been advanced in this regard that repealing the EU block exemption could affect European carriers more than non-European carriers since the latter could more easily move their services to other trades, where they would still be subject to immunity/exemption from the competition rules. In this regard the following remarks could be made.

87. First, repealing the block exemption for liner conferences in Regulation 4056/86 will affect all carriers that are part of conferences on trades to and from the EU. These carriers are both EU and non-EU carriers (see para 2 above). Less efficient carriers may perhaps have an incentive by changes in regulatory regime to move their operations to other more regulated, non-EU trades. The resulting capacity gap would be filled by more efficient carriers since freight rates would be expected to rise in the short term. In the long term however, due to competitive forces, freight rates would drop even below the initial freight rates since EU trades are served by more cost-efficient, competing carriers. Hence, it is not to be expected that carriers in general, whether EU or non-EU, would decide to leave trades to and from the EU. To the contrary, it might be expected that EU trades will be served more cost-efficient. Secondly, the regulatory context in which liner carriers operate is not static. In fact, various jurisdictions have or are reviewing the respective immunity/exemption and it is not to be excluded that they will end or substantially limit the present privileges granted to liner conferences.[61]

4.3. Conclusion

88. Although an assessment of the impact of repealing the present block exemption on liner services on trades to and from the EU remains to some extent hypothetical, it would go too far, as some carriers have suggested, to speak in this regard of a "leap in the dark". Economic theory, facts and developments on the liner services market as well as examples from other industries provide sufficient information to weigh the various pro's and con's of repealing the block exemption. Also the

position of consumers should be taken into account. Shippers, for example, have explicitly stressed that they are willing "to take the risk" of a competitive liner shipping world. Overall, the available evidence shows that, although less efficient carriers are likely to be affected most, there are no indications that the liner shipping operators on trades to and from the EU, or European carriers as such, will be worse off without conference price fixing in the long term.

5. OTHER FORMS OF LINER SHIPPING CO-OPERATION

5.1. Introduction

89. Conferences are not the only form of liner shipping organisation. Liner services could also be provided by consortia and alliances (see para 43- above). The activities of consortia are group exempted pursuant to Article 81(3) of the Treaty under certain conditions and obligations, as set out in Regulation 823/2000. Carriers could also decide to merge their activities, which will have to be assessed under the applicable (national or EC) merger control rules.

90. In order to examine the possible alternatives to the present block exemption it is useful to have a closer look at forms of cooperation between lines which exist already in other parts of the world, notably the US and Australia, such as so-called discussion agreements, and provide a preliminary assessment of their compatibility with EC competition law.

5.2. Discussion agreements

91. A discussion agreement is a sort of framework agreement by virtue of which carriers which are members of conferences and outsiders are able to co-ordinate 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.

92. Discussion agreements exist in particular on the US trades. They emerged in the 1980s, when conferences saw the emergence of strong non-conference carriers. While conference carriers were unable to convince independent carriers to join them and engage in binding rate fixing, they were able to bring them under the discussion agreement umbrella of voluntary ratemaking and capacity management. In the US many discussion agreements include most of the major carriers operating within their respective geographic scopes and thus have generally high market shares.[62]

93. While discussion agreements, unlike conferences do not set fixed common prices for specific commodities, they provide a forum for members to discuss the trade. Under US law carriers are permitted to collect, exchange and discuss market information, discuss and propose common approaches to pricing, develop and propose standardized surcharges, and to coordinate their conduct in the market in relation to other conditions of service. While the rates set by discussion agreements are non-binding, in practice most of the members to the discussion

agreements seem to follow them, at least when they are dealing with small and medium sized shippers.

94. Furthermore, while the Ocean Shipping Reform Act of 1998 (OSRA) made it possible for conference members to negotiate confidential individual service contracts with a shipper at rates differing from the conference tariff, OSRA also allows carriers participating to the discussion agreement to adopt voluntary guidelines applicable to their members' individual service contracting. These may cover minimum rates for specific commodities, surcharge and specific charges. A few discussion agreements' guidelines also specify the minimum volume necessary to quality for a service contract, set limitations on credit and discount policies and agree on set percentage increases for inland rates. Moreover, some guidelines also involve a voluntary agreement to provide information to the secretariat, or to other members about contracts being negotiated.[63]

95. Discussion agreements also exist in Australia. For example, the Asia-Australia Discussion Agreement (AADA) permits the parties to the agreement to discuss, consult and develop consensus on their rates, charges, classifications, practices, terms, conditions, rules and regulations applicable to the transportation of cargo in the trade, notice periods for changing rates, receiving and demurrage charges, free time practices, detention and demurrage, container freight stations and the time and currency in which the parties collect their rates and charges. There is no voting on the issues discussed or consulted, the agreement operates on a non-binding consensus basis. This has however not prevented parties from forming and sustaining a consensus on various matters, including pricing.[64]

5.3. Comments

96. Discussion agreements involve normally the exchange of sensitive business information between competitors and should therefore respect the settled case law of the Court on exchange of information. More importantly, as shown in the US, the inherent flexibility of discussion agreements makes them attractive to traditionally independent lines. In that respect, discussion agreements could in competition policy terms be even worse than conferences, since they are liable to eliminate effective external competition to conferences. The compatibility of discussion agreements of the same type of those existing in the US and Australia with Article 81 EC Treaty is questionable.

97. Furthermore, voluntary guidelines of the type that exist in the US would not be compatible with EU competition law if they would relate to commercial matters, in particular pricing of individual service contracts. Purely technical guidelines would be unobjectionable.[65]

5.4. The ELAA proposal

5.4.1. Main elements

98. ELAA has presented to the Commission a proposal for a new "regulatory structure" for liner shipping services operating to and from the EU[66], which it

believes could replace Regulation 4056/86.[67] The Commission has taken note of this proposal and would like to stress that it is not the result of any negotiation or agreement with the Commission. The proposal merely reflects what the ELAA considers to be an appropriate business framework for liner shipping co-operation. In essence the ELAA proposal amounts to:

- Exchange and discussion between lines of aggregated capacity utilization and market size data by trade and on a region/zone to region/zone basis (data with a month delay);
- Exchange, discussion and evaluation of commodity developments by trade (based on data aggregated with a month delay);
- Discussion and evaluation of aggregate supply and demand data by trade/commodity; forecasts of demand by trade and commodity would be published;
- Lines will obtain their own market share by trade, by region and by port (data aggregated with a month delay);
- Price index differentiated by type of equipment (e.g. reefer, dry) and/or trade (data aggregated with a quarterly delay). This information would be made publicly available;
- Surcharges and ancillary charges based on publicly available and transparent formulae; the details of which would be discussed with shippers.

5.4.2. Details

99. The various elements of the Proposal have been explained by the ELAA in further detail as follows.

Industry Body(ies) or Agreements and Committees per Trade

100. The envisaged system of information exchange would be based upon one or more industry body(ies) or agreements and committees per trade. The industry body(ies) or agreements would organize the input of data from the individual lines, which would then be aggregated such that no individual line could, detect other lines' data. The industry body(ies) or agreements would provide the aggregated data either directly to the participating individual carriers and/or to the trade committees, consisting of the trade managers of participating lines, who would then interpret the figures produced. The ELAA has emphasised that there would be no discussion of individual lines data within these committee meetings.

101. The industry body(ies) or agreements and their committees would be subject to clear competition compliance rules. The ELAA is willing to discuss the modalities of the independent industry body(ies) or agreements, including the implementation of appropriate firewalls and compliance policies, its voting structure and finances.

The exchange of information system

102. In terms of information input, the proposed information exchange system envisages each carrier providing the industry body(ies) with data based on its bill of lading[68], vessel loadings and vessel capacities. The information would be provided on a port-port and trade basis. The data would be summarized by the industry body(ies) with "macro data", which would include trade and port statistics obtained from various sources and outside consultants reports. The industry body(ies) would then process the data input and the output would be provided to either (depending on the information) the above mentioned trade committee and/or directly to individual carriers. According to the ELAA no carrier or employee of any carrier would have any access to data provided to the industry body(ies).

103. The output side of the envisaged exchange of information system would comprise data relating to capacity forecasting, commodity developments, forecasts of demand, market shares, a price index and formulae for surcharges and ancillary charges.

Capacity forecasting

104. The first element of the envisaged system of information exchange relates to the exchange and discussion between lines of aggregated capacity utilization and market size data by trade and on a region/zone to region/zone basis. The data is exchanged with one month's delay. The information output would be provided to the trade committee and to member carriers on a monthly basis. Each member would also receive its own volume and capacity utilisation data.

105. The trade committee would interpret the capacity utilisation and market size data provided. Furthermore, it would discuss information that comes out of the envisaged system, e.g. trade patterns and trend sin demand, to better understand market developments. The output would be a report, the contents of which would still need to be discussed. According to ELAA the envisaged output would be more robust, accurate and useful in comparison to what is available today.

106. According to the ELAA there would be no coordination or consultation between the lines on matters that are to be decided at individual company level (such as capacity, investment, deployment etc).

107. The ELAA has advanced the following justifications for the exchange and discussion of capacity utilization and market size data. First, it would allow carriers to make better investment decisions (i.e. how many vessels to deploy in each trade, their capacity etc). Secondly, more accurate figures on vessel capacity would improve individual lines' understanding of how future supply and demands for liner services would evolve and ensure stability of supply, that is it would allow carriers to better meeting growing demand for liner services. As concerns the time interval of information exchange the ELAA considers that one month is

necessary and indispensable for a useful discussion of demand and supply in the liner shipping industry, given the duration of a sailing in a particular trade.

Commodity developments

108. The second element of the envisaged information exchange system relates to the exchange, discussion and evaluation of commodity developments by trade, based on data aggregated with a month's delay. Carrier members would provide data to the industry body(ies) on volumes of specific commodities carried on the trade.

109. In this regard the ELAA has noted that different commodities require different type sof equipment. The ELAA considers the envisaged information exchange as vital for taking effective investment decisions, as a) different types of containers are needed for different types of goods, b) different specifications are required for vessels.

110. As a justification for the exchange of this type of information the ELAA has advanced that the exchange of information concerning commodity development allows lines to better access commodity/trading patterns. According to the ELAA this contributes to carriers making better investment decisions and, in turn, would ensure stability of supply. The ELAA also noted that the essential content of this kind of information (derived from the bill of ladings) would already be exchanged today in trades to and from the US.

Published forecasts of demand

111. The previous two elements of the envisaged system of information exchange would result in the discussion and evaluation of aggregate supply and demand by trade/commodity; forecasts of demand by trade and commodity would be published and made available to shippers.

Market shares

112. As a third element of the envisaged system of information exchange, lines will obtain their own market shares by trade, by region and by port (data aggregated with a month delay). According to the ELAA the market shares data output will not be the subject of any discussion between the lines.

113. The ELAA has submitted that the exchange of information concerning market shares will enable each individual line to track its own performance, follow the market and improve its own decision making and, in turn, ensure stability of supply. Furthermore, the ELAA notes that market shares are already publicly available on US trades and have apparently not impacted competition.

Price index

114. As its fourth element, the envisaged system of information exchange also includes a price index differentiated by type of equipment (e.g. reefer, dry) and/or trade (data aggregated with a quarterly delay). The price index will be based on actual spot and contract prices (without indication of shipper identity) and will reflect how equipment (reefer or dry) prices have developed on the market (trade leg based). According to the ELAA the price index would not disclose individual line data (aggregated data only, derived from the average rate per TEU on a trade). In terms of scope, the ELAA has noted that the price index would relate only to ocean transport.

115. The output data (3 months old) would according to the ELAA be historic and would therefore not be capable of reflecting projected future prices. The ELAA considers that the price index would provide no means of facilitating collusion, as no line knows the individual rates of the other lines, each line has thousands of pricing points on a trade and, according to the ELAA, concentration in liner shipping trades and port pairs is very low.

116. According the ELAA the price index is justified since it would allow lines, in combination with capacity utilisation data, to make better investment decisions. The ELAA has submitted that lines will only invest if they have reasonable belief and expectation that such investments would be profitable. Rates and capacity utilization are according to the ELAA not necessarily positively correlated at all times. The price index would provide a more informed vie win the past, and would thus help a line better comprehend whether or not to invest and, in turn, provide more reliable liner services.

117. According to the ELAA the price index will be transparent: it is to be provided to the trade committee, the lines, as well as shippers.

Formulae for surcharges and ancillary charges

118. Finally, the ELAA Proposal comprises the establishment of publicly available and transparent common formulae for surcharges[69] and ancillary charges. [70] The envisaged formulae would be based on a pass-trough principle and are in the ELAA's view indispensable and necessary because individual contracting (by liens or shippers) would result in uncertainty and involve greater transaction costs.

119. According to the ELAA common formulae are in the interest of consumers as they would provide a stable and consistent framework of application. Given the concerns raised by shippers with regard to common formulae, the ELAA proposes to discuss with customers its proposal.

5.5. Preliminary comments on the ELAA Proposal

5.5.1. General remarks

120. The Commission welcomes the willingness of carriers to think about a future organisation of liner shipping, other than the current conference system. The

industry itself has in fact suggested that carriers today are no longer particularly interested in the activities exempted in Regulation 4056/86 (that is to say notably price fixing and supply and market regulation), but rather in the "discussion process" surrounding it. This goes without saying that any newly proposed co-operation framework between liner shippers will have to be carefully scrutinized as to its compatibility of the EC competition rules.

121. The Commission is well aware that conference carriers have been used to carrying out activities that in any other economic sector would normally have been prohibited under the EC competition rules. This privileged position of conference carriers might make it difficult for some of them to adapt to a situation in which they will have to comply with the normal EC competition rules like any other industry. In this light it is also understandable that, from a business point of view, carriers might seek for an alternative regime that is close to the present regime and in which their perceived specific position is reflected best. It should however be kept in mind that any continued different treatment under the EC competition rules of the liner shipping industry compared to other capital-intensive industries with high fixed costs and fluctuations in demand (like for example air transport), should be convincingly motivated. Furthermore, the impact of any alternative system on the *overall* liner shipping industry should be taken into account; not only the interests of conference carriers but also the interests of their competitors (independent operators), customers (shippers) and final consumers should be considered. ELAA has emphasized that its proposal is good for the whole liner shipping industry, not just for carriers but also for their customers. In this light, the Commission would explicitly welcome the views of all interested parties, notably shippers, associations like the ESC as well as individual shippers, on the various elements of the proposal.

5.5.2. Differences of the ELAA proposal compared to present conference activities

122. An important difference of the ELAA proposal compared to the present conference activities is that the ELAA proposal makes no reference to "naked price fixing" (that is, jointly setting conference tariffs) or the regulation of capacity.[71] However, it does contain elements of pricing (notably a price index) as well as capacity forecasting (envisaged exchange of information on capacity utilisation and market size).

123. On some other elements, the ELAA proposal seems to go further than the current activities of conferences on trades to and from the EU. It covers a number of items that are currently not exchanged between conference members, such as the exchange of the bill of lading, market shares and information on type of commodities.

124. Furthermore, while the exchange of information is central in the ELAA proposal, Regulation 4056/86 does not explicitly allow carriers to exchange information. Allowing conference carriers to fix freight rates and regulate capacity, as well as some other activities, *implicitly* seems to assume that some form of information exchange between carriers in the context of a conference takes place. Carriers themselves have stated that in practice conference members today are already

involved in a rather extensive exchange of information. Conference members provide data to the conference secretariat and they meet on a regular basis to discuss various topics (see para 3 above). In fact, according to the ELAA, its proposal would not amount to substantial differences with the current practice of conferences on trades to and from the EU in this regard. This is illustrated by the following table, provided by the ELAA:

Table7:

Conference activities / Information exchange	FEFC	TACA	TEANZC	ELAA proposal for a new system
Capacity utilisation	Total capacity and total utilisation	Total capacity and total utilisation	No specific information is provided	Total capacity and total utilisation
	weekly individual	weekly individual submitted to FMC	utilisation is discussed	monthly aggregate
	by region	by trade direction	in a general way in meetings	
	Delay of one week	Delay of one month		
	Weekly forecasts of future capacity utilisation	Ad Hoc forecasts of future capacity utilisation		
	Quaterly individual capacity by trade	based on public domain information		
Volume	weekly individual liftings	weekly individual liftings	monthly individual liftings	monthly aggregate liftings
	by line, by trade	by trade direction	by trade, by export area	by Region/Zone
	monthly individual liftings	delay of one week	delay of one month	
	by line, by region/country			
Market share	monthly individual	quarterly individual	no conference estimates	monthly aggregate
	estimate of market share of total trade per line	based on US Journal of Commerce	Lines use publicly available information	by Region/Zone
Market forecasting	business plan	business plan	business plan	aggregated price index
	announced yearly with regular adjustments	announced yearly with phases, which are then announced as required	announced yearly by direction	by region/zone
Surcharges and ancillary charges	set surcharges and ancillary charges	set surcharges and ancillary charges	set surcharges and ancillary charges	formulae for transparent pass through of costs
	per trade, country, port, directions as relevant	per trade, country, loading rate direction as relevant	per trade, port, direction	
Commodities	no information collected/distributed	no information collected/distributed	no information collected/distributed	aggregated commodity developments; no individual line, shipper, consignee information

125. Any exchange of information that carriers operating on EU trades might already be involved in today, could not legitimately cover activities which fall within the scope of Article 81(1) of the Treaty and are not covered by the block exemption (such as individual carrier information relating to individual service contracts,

exchange of individual market shares etc.) or which have not been exempted in an individual exemption decision under Article 81(3) of the Treaty. Whether or not the information exchanged is within the boundaries of EC competition law is best to be assessed on a case-by-case basis.[72]

126. Finally, Regulation 4056/86 does not cover "discussion agreements". It should be noted that, although the ELAA proposal makes no reference to discussion agreements as such either, on substance there are some similarities with e.g. discussion agreements as they currently exist in the US, as follows from the following table provided by ELAA itself:

Table 8:

Comparison of Conference Activities *					
		1) 4056/86	2) TACA II**	3) ELAA proposal	4) OSRA***
Joint Activity / Authority					
I Commercial Issues:					
A) Tariff (Ratefixing)					
1)	fixing of Maritime Tariff-Rates	yes	yes	see 16	yes
2)	fixing of Maritime Tariff-Additionals	yes	yes	no	yes
3)	fixing Through Rates	no	no	no	yes
4)	fixing of Inland Tariffs (in the USA)	no	no	no	yes
5)	fixing Forwarder Agent's Commission (FAC's)	no	no	no	yes
6)	fixing Time Volume Rebates (TVR's)	no	yes****	no	yes
7)	joint service contracting	-	yes	no	yes
8)	joint multi-carrier service contracting	-	yes	no	yes
9)	Independent actions (I.A.s)	-	yes	irrelevant	yes
10)	agree on terminal handling charges (THC) and other (sur-)charges (subject to consultation)	-	yes	yes	yes
11)	voluntary standard Agreement Service Contract (ASC) form (may be used as reference point for individual or multi-carrier service contracts (ISC and MSC)	-	yes	no	yes
12)	Voluntary Guidelines on service contracts (S/Cs) (only in respect to technical, non-commercial matters)	-	yes	no	yes
13)	discuss and agree on any matter related to individual S/Cs	no	no	irrelevant	yes
14)	enter into Loyalty Contracts	yes	yes	no	no
15)	pay deferred rebates	yes	yes	no	no
16)	price index (one month old rate movements)	-	-	yes	-
B) Marketing					
17)	regulation of carrying capacity	yes*****	limited	no	yes
18)	allocation of cargo or revenue (Volume or Revenue Pools)	yes	yes	no	yes
19)	Pooling of Earnings and Loss	no	no	no	yes
20)	discuss weekly liftings	-	yes	monthly	yes
21)	exchange, discuss and evaluate information on commodity developments	-	-	yes	-
22)	discuss number of sailings, in both directions	-	yes	yes	yes
23)	discuss monthly liftings under conference off-tariff deals	-	yes	irrelevant	yes
24)	discuss Capacity Utilization (TACA II = not less than weekly basis)	-	yes	monthly	yes
25)	discuss Market Share Data (TACA II = to the extend it is publicly available)	-	yes	no	yes
26)	discuss Service Patterns (TACA II = in respect to direct calls only)	-	yes	yes	yes
II Operational Issues					
27)	joint purchasing of inland services	no	yes******)	no	yes
28)	Coordinating of shipping time tables, sailing dates / calls	yes	limited	yes	yes
29)	determination of frequency of sailing or calls	yes	limited	no	yes
30)	co-ordination or allocation of sailings or calls	yes	limited	discussion only	yes
31)	discuss, fix or regulate rate and condititons with marine terminal operations (Ops)	no	no	no	yes
32)	enter into working agreements with marine terminal operations	no	no	no	yes
33)	enter into working agreements among themselves	limited *******	limited	no	yes
III Other Issues					
(I) Obligations / Requirements:					
34)	Filing of Conference Agreement	no	yes	to be discussed	yes
35)	to be open Conference	no	yes	yes	yes
36)	provide for a consultation process	yes	yes	yes	yes
37)	provide for I.A.s	no	yes	irrelevant	yes
38)	Publication / make available of Tariffs	yes	yes	irrelevant	yes
39)	mandatory to maintain a tariff in order to qualify for Conference Status	yes	yes	irrelevant	yes
(II) Prohibited					
40)	to restrict member/-s to enter into confidential S/Cs with shipper/-s	x	x	irrelevant	x
41)	to force member/-s to disclose negotiation of S/C or terms (other than filed Key terms)	x	x	irrelevant	x
42)	to place mandatory rules affecting the right of a member/-s to enter into S/Cs	x	x	irrelevant	x
43)	to grant "kick-backs" (from Tariff or S/Cs)	-	x	irrelevant	x
44)	to retaliate against shippers	-	x	irrelevant	x
45)	discriminatory practices (rates and charges, space, etc.)	-	x	irrelevant	x
46)	unreasonably refuse to deal or negotiate (with shippers)	-	x	irrelevant	x

127.

Remarks:
*) Based on information provided by the ELAA;
**) "TACA II" means conference activities on the Trans-Atlantic Trade that, according to the ELAA, take place in practice since the 1998 TACA decision (in which the Commission e.g. prohibited restrictions on individual service contracting by conference members) and subsequent Commission decisions, such as the 2001 Revised Taca decision (in which the Commission granted an individual exemption under Article 81(3) of the Treaty to the Revised TACA agreement and set a number of principles which should be emulated by all conferences operating on EU liner shipping trades, see para 12 above) and case-law of the Court;
***) Conference activities as, in the Commission's understanding, permitted under US law (OSRA);
****) In the Revised TACA decision the Commission granted an individual exemption under Article 81(3) of the Treaty to the cargo handling services in a port, given the specifics of the case at stake;
*****) Under very strict conditions, that is for temporary or short-term adjustments only, such as adjustments to address seasonal changes in demand (see TAA and EATA Commission decisions).
******) According to ELAA. Not addressed in the Commission's revised TACA decision.
*******) For example under Reg 823/00 (consortia)

128. Hereinafter, the various specific elements of the proposal, as presented by the ELAA, will be looked at in further detail.

5.5.3. Capacity forecasting

129. In order to make good investments decisions it would appear that an individual carrier would indeed need knowledge on the size of the market and capacity utilisation. To some extent information on capacity utilisation and market size is already today available through public domain sources such as Drewry's and Clarkson's. The ELAA however holds the view that the existing information is not sufficiently accurate, mainly due to lack of detailed input and adequate analysis. According to the ELAA, currently, there are major forecasting errors that can result in e.g. too little capacity being made available to the market.

130. As a preliminary issue, it would be useful for the Commission to obtain the views of interested third parties (including other market operators than conferences, like e.g. independent operators) whether they share the position of the ELAA that the information that is publicly available today is not sufficiently accurate and complete to make adequate investment decisions.

131. If this indeed is felt to be the case, the main question would appear to be whether there is a need in the liner shipping market for a *collective* system of exchange of information between carriers on market size and capacity utilisation (common capacity forecasting) and if so, how detailed that exchange of information should be (e.g. should it be on a trade, a region or even a more detailed basis (e.g. port/port) in order to allow (individual) carriers to make accurate investment decisions. In this regard, the Commission would also like to hear the views of interested third parties on the position of the ELAA that given the duration of a sailing in a particular trade, one month old data are, in the liner shipping industry, to be regarded as historic data.

132. Another question is whether there is a need, apart from to exchange information between carriers, also to collectively *analyse* the collected information, as envisaged in the ELAA proposal by the Trade Committee (consisting of trade managers of the carriers in question). Should this, in the view of interested third parties, be an essential part of the envisaged system?

133. Moreover, third parties may wish to elaborate on the issue how the long-term and short-term vessel charter markets (including relevant tax incentive schemes) influence investment decisions and capacity forecasting of carriers, i.e. mitigation of carriers' investment risk or offsetting of capacity imbalances.

134. Furthermore, it might be queried to what extent the proposal would result in concrete efficiencies to the benefits of consumers. Notably, would customers, such as shippers, expect that the envisaged information exchange and discussion of capacity utilisation and market size data lead to benefits for shippers, e.g. in terms of more reliable liner shipping services than currently provided by individual carriers, on the basis of currently available information on capacity utilization and market size? What are the views of interested third parties on the envisaged transparency vis-à-vis the demand side (the ELAA Proposal envisages to publish forecasts of demand by trade and commodity and make them available to shippers).

5.5.4. Commodity developments

135. This type of information exchange does not currently take place on routes to and from the EU according to the ELAA. The Commission would like to obtain the views of interested third parties to what extent the exchange of this kind of information is felt necessary and believed to achieve efficiencies to the benefit of consumers.

5.5.5. Market shares

136. The fact that market shares are apparently available on some trades could in itself not justify why an exchange of information on market shares on all EU trades would be necessary for the provision of reliable liner shipping services. The Commission would like to hear the views of interested third parties on whether the

exchange of market shares would amount to concrete efficiencies to the benefit of consumers.

5.5.6. Price index

137. The ELAA has submitted that given the alleged historic nature of the output data (three months old) the price index would not be capable of reflecting projected future prices. The Commission would like to hear the views of interested third parties on the need for carriers of having a price index, in addition to capacity utilisation data, in order to make better investment decisions.

138. According to ELAA the price index will provide no means of facilitating collusion. The Commission would like to have the views of interested third parties on this, also in light of the envisaged market coverage of the proposal.

139. The price index will be made available to the trade committee, to carriers as well as shippers and will therefore be transparent. The Commission would welcome the views of notably shippers on the envisaged transparency, and its possible contribution to achieving efficiencies to the benefits of consumers.

5.5.7. Formulae for surcharges and ancillary surcharges

140. The ELAA Proposal on surcharges and ancillary in essence seems to amount to maintaining status quo. The core issue would appear to be if there is a need for *collective* formulae on surcharges and charges to be agreed between carriers, rather than individual carriers deciding on their own how to pass on their costs to their customers. The ELAA has argued that a formula would be in the interest of shippers, since it would lead to lower transaction costs. In the view of the ELAA the absence of a joint formula would necessarily lead to individual contracting with ports. The Commission would like to hear from interested third parties whether they consider that there is indeed a need for common formulae for surcharges and ancillary surcharges, where appropriate distinguishing between the various types of (sur)charges.

141. Carriers have also stressed that they would like to discuss the formulae with shippers. It would in particular be useful for the Commission, before taking any position, to have the substantiated view of the carriers' customers on the various proposed formulae.

5.6. Conclusion

142. If the current block exemption for liner conference price fixing and capacity regulation is repealed this will basically make liner conferences on trades to and from the EU, as defined in Regulation 4056/86, incompatible with Article 81 of the Treaty.[73] In this regard the Commission would like to invite interested third parties to submit their views on the kind of co-operation framework that could be worked out as a possible alternative.

143. Naturally, the type of such legal instrument would depend very much on the content of the proposed co-operation framework. In particular, whether it involves restrictions of competition within the meaning of Article 81(1) of the Treaty and if so, whether the conditions for an exemption under Article 81(3) of the Treaty can be said to be fulfilled.

144. The Commission would welcome the views of third parties on the need and possible form of a legal instrument for a possible new form of business co-operation framework between shipping lines.

6. CABOTAGE AND TRAMP SERVICES

6.1. Relevant provisions

145. International tramp vessel services as defined in Article 1(3)(a) of Regulation 4056/86 and maritime transport services that take place exclusively between ports in one and the same Member State (cabotage) as foreseen in Article 1(2) of Regulation 4056/86 are currently excluded from the Community competition implementing rules pursuant to Article 32 (a) and (b) of Regulation 1/2003.[74]

146. To avoid any misunderstanding, the substantive competition rules (Article 81 and 82 EC) are applicable also to these services. The exclusion is limited to the competition *implementing* rules, in other words: Regulation 1/2003 is not applicable to tramp and cabotage.

6.2. Outcome of the consultation

147. Few contributions were received on this topic in the consultation process. As regards cabotage, the majority of those who replied (carriers and freight forwarders) saw no need for Community implementing regulations since cabotage services are unlikely to have an appreciable affect on trade between Member States. As regards tramp services, the majority of those who responded considered that tramp vessel services should not be brought within the scope of the Community implementing regulations. Those who motivated their answers referred to the free and competitive environment in which the (vast majority) of tramp vessel services operate (carrier representatives and two Member States) or to the specificity of the transport (freight forwarders). No data or further explanations were given to support these positions. One of the carrier representations took the view that inclusion would lead to less legal certainty. A Member State wanted to know whether the current exclusion has caused practical difficulties, whereas other national authorities and one academic were in favour of including tramp vessel services, so as to ensure effective implementation of Community competition rules. No responses were received from shippers' representatives.

6.3. Assessment

6.3.1. General remarks

148. Since the substantive competition rules, set out in Articles 81 and 82 of the Treaty, apply without exception also to cabotage and tramp services, bringing these sectors within the scope of an implementing regulation would not result in any additional restriction or change the way the industry must already today be organised in order to comply with EU competition rules. Making these services subject to the same enforcement rules that govern all other sectors would however facilitate an effective and uniform application of the competition rules within the EU.

149. The Community implementing rules, laid down in Regulation 1/2003, give the Commission the practical tools needed for efficient and reliable fact-finding and they ensure effective enforcement of the competition rules. Moreover, the implementing rules codify and safeguard certain rights of defence and regulates the burden of proof in a Commission proceeding.

150. In February 2004, the Council decided that the previous exclusion from the implementing rules for air transport services between the Community and third countries should be repealed[75]. As a result, maritime cabotage and tramp vessel services are today the only areas of activity where the Commission cannot use the above outlined specific enforcement powers, but instead has to fall back on the cumbersome procedural framework set out in Article 85 of the Treaty.[76]

151. Examples from Article 85 investigations in the airline sector illustrate the practical consequences of having to rely on the general Treaty provisions.[77] Not only do such proceedings result in long and resource intensive investigations. The actual end result will also depend on the Member States' ability and powers to take the actions deemed to be necessary to bring the infringement to an end. The latter will depend on national law and hence vary significantly from one Member State to the other, leading to unequal treatment of the EU operators.

152. Excluding maritime cabotage and tramp vessel services from the normal procedural framework has consequences also for the powers of the national authorities and national courts. Regulation 1/2003 creates a de-centralised system in which national competition authorities and national courts can apply Articles 81 and 82 EC in full. To that effect, the newly established network of national competition authorities and the Commission ensures that cases are dealt with by the most appropriate authority and avoids an incoherent competition policy through information exchanges and consultations. This de-centralised system will however not apply to maritime cabotage and tramp vessel services, falling outside the scope of Regulation 1/2003, for which there will be no rules governing information exchanges or efficient case-allocation between the EU competition authorities. The role of the national courts in these sectors will be similarly restricted. National courts may, in the absence of an applicable implementing regulation, only rule on Article 81 EC when the Commission or a national competition authority has held that a given practice is infringing Article 81 EC.[78] In practice, this would mean that national courts – contrary to the very aim of the

new enforcement regime - are not empowered to rule on any Article 81 EC infringement in the maritime cabotage and tramp vessel services sectors.

153. It is clear from the above that the enforcement powers for tramp vessel services and maritime cabotage services are an anomaly from a regulatory point of view. As such, it is to be expected that the different procedural treatment given to these services is convincingly motivated and justified.

6.3.2. Cabotage

154. The Community implementing rules only apply to cases which fall within the scope of Article 81 and 82 EC, which would *inter alia* require an appreciable effect on intra-Community trade.[79] In most cases cabotage services would be expected only rarely to affect trade between Member States to an appreciable extent. However, there are clearly cases where intra-Community trade could be affected (such as services covering a significant share of a single Member State, like service to big islands such as Corsica or Sicily or cabotage feeder services for the transhipment of goods destined for another Member State). Maritime cabotage services would therefore not *per se* fall outside the scope of EU competition rules. The consideration that such services would in a majority of cases not affect intra-Community trade would not justify why these services should from the outset be excluded from the scope of the implementing regulation in cases where intra-Community trade would be affected.

6.3.3. Tramp

155. Non-regular maritime transport services of bulk and break-bulk today covers a wide range of highly diversified services of significant economic importance of which most have a clear European dimension. Regulation 4056/86, as well as its preparatory work, contains little information that can explain why this important sector was excluded from the general enforcement rules.

156. The first draft (of 1981) of what would later become Regulation 4056/86 referred to "bulk transportation" or "bulk transport" instead of "tramp vessel services" and reasoned that these services should be excluded due to the Commission's lack of experience in this area. The term "tramp vessel services" only occurs in the second amended draft (of 1985), but without any information on what circumstances might have caused the change in terminology.

157. The responses received in the consultation process have not brought forward any convincing arguments that would justify why tramp vessel services should be excluded from the general enforcement rules.

158. The argument most frequently used in the responses underline that these services operate on a free and competitive market. This would, however, be a presumption for all de-regulated services, without it being deemed necessary or appropriate to exclude such services from the implementing regulations. Other responses argued that the vast majority of these services operate according to the competition rules and therefore that it would not be necessary to change the present arrangements. This argument appears to be misplaced. Including tramp vessel services under the general enforcement rules do not mean that possible restrictive agreements in the

sector would be of sufficient Community interest to merit an investigation. If, indeed, the market is functioning well, that would only mean that neither the Commission, nor the national competition authorities would have a reason to make use of their powers. That fact alone doesn't however justify why the EU competition authorities should be excluded from using such enforcement powers when a competition problem does exist in the market.

159. References have also been made in the replies to specificities in the market, without specifying what those specificities might be and why they would justify exclusion. It is repeated that market characteristics would be an important element when considering whether a certain case/sector would merit further investigation. It is however difficult to understand why such market characteristics would per se exclude effective enforcement of the EU competition rules.

160. Lastly, legal uncertainty has been advanced as a justification for not repealing the current exclusion. In order to avoid any misunderstandings, it should again be stressed that any future change in the procedural rules would have no effect on the substantive competition rules already applying fully and without exception to the tramp vessel service sector. If anything, it could be argued that the current situation would cause legal uncertainty for the industry as to how and by whom the EU competition rules will be interpreted and enforced.[80]

161. From the standpoint of competition policy, there would not appear to be any justification for leaving tramp vessel services outside the scope of sufficiently effective procedural rules.

6.3.4. Conclusion

162. No credible consideration has been put forward to justify why these services need to benefit from different enforcement rules than those which the Council has decided should apply to all other sectors of the economy. Considering the disadvantages of the current exclusion from a practical and policy point of view, the Commission would favour repealing Article 32 of Regulation 1/2003.

7. TECHNICAL AGREEMENTS

7.1. Relevant provision

163. Article 2 of Regulation 4056/86 allows maritime transport providers to conclude agreements which have the sole object and effect to achieve technical improvements or cooperation. Such agreements are not caught by Article 81(1) of the Treaty. The provision contains certain examples, such as standards or types in respect of vessels and equipment and the coordination of transport timetables for connecting routes.

7.2. Outcome of the consultation

164. Few comments were received on this issue in the consultation process. Carriers generally considered the exception for technical agreements useful as guidance, in

particular in view of the self-assessment of their agreements to be carried out by liner conferences after modernisation and plead for its maintenance, even if not applied in practice. Their views were supported by one national authority. Other national authorities however considered the provision as not essential and concluded that it could be deleted. One academic was of the opinion that the existence of this provision could mislead ship owners as regards the legality of certain allegedly technical agreements. Neither shippers nor freight forwarders have expressed views on the issue.

7.3. Assessment

165. The exception for technical agreements in Article 2 of Regulation 4056/86 has been interpreted very strictly by the Commission as relating only to agreements with the "sole object and effect" to achieve technical improvement or cooperation, therefore purely technical agreements. Agreements which are not purely technical but also involve some form of commercial co-operation will not fall within the scope of Article 2.[81] The practical meaning of this provision is therefore very limited, it only confirms that agreements involving purely technical co-operation are not caught by the prohibition of Article 81(1). The provision in Regulation 4056/86 is therefore of a merely declaratory nature.[82]

166. Most respondents who replied to this question acknowledge this, however, some of them nevertheless felt that the provision should be maintained because it might serve a "guidance" function, notably in the context of modernisation, when undertakings have to assess for themselves whether their agreements are caught by Article 81(1) of the Treaty. The Commission does not consider this as a strong argument in favour of maintaining the provision for technical agreements in Regulation 4056/86. The "guidance" function of this provision has shown to be fairly limited in practice. Indeed, the provision, and notably the list of examples it provides for, has led to confusion. Notably, undertakings who rely on the provision tend to interpret it too broadly, as covering also agreements which are not purely of a technical nature. The case law of the Commission and the Court has provided further clarification on the (very limited) scope of the provision but at the same time shown that the provision merely intends to confirm that agreements which are not restrictive of competition in the first place do not fall under Article 81(1) of the Treaty.

167. For the same reasons the Commission does not share the fear expressed by some respondents that repealing the provision may lead to legal uncertainty. The case law of the Commission and the Court on Article 81(1) of the Treaty have made sufficiently clear that purely technical (non-commercial) agreements are not caught by the prohibition of Article 81(1) of the Treaty.[83] In appropriate cases, there would be alternative ways for the Commission to provide its views on purely technical provisions falling outside the scope of Article 81(1), e.g. by deciding in an individual case on the inapplicability of Article 81, where the Community public interest so requires.

168. Finally, it should be noted that the Council has recently decided to repeal a similar provision on technical agreements in the air transport sector for the same reasons.[84]

7.4. Conclusion

169. In light of the above, there would appear to be no convincing justification to maintain the provision on technical agreements in Regulation 4056/86.

8. CONFLICT OF LAWS

8.1. Relevant provision

170. Article 9 of 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. In that case the Commission should consult the relevant authorities in third countries and ask the Council to authorize it to open negotiations, if needed. The ratio of including this provision in Regulation 4056/86 at the time was apparently that it was felt that, in view of the characteristics of international maritime transport, the application of Regulation 4056/86 might lead to a conflict with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests (*recital 15* of Regulation 4056/86).

8.2. Outcome of the consultation

171. Few respondents to the consultation paper commented on this issue. European carriers generally argued in favour of maintenance of the conflict of laws provision for reasons of legal certainty. In their view the reasons why it was included at the time would still be valid. Transport users did not reply to the question. Some national authorities felt that it might be appropriate to maintain the provision. Other national authorities were in favour of deleting the provision.

8.3. Assessment

172. A conflict of laws would arise when one jurisdiction requires something that another jurisdiction prohibits.[85] Such a conflict has not arisen under the application of Regulation 4056/86 so far and it is highly unlikely that it will arise in the future, even if the block exemption for liner conferences were to be repealed in its entirety. Indeed, no country with jurisdiction over liner conferences operating to or from the EU requires those lines to engage in horizontal price fixing and capacity regulation and it is highly unlikely that any jurisdiction ever will. It should also be noted that competition regulations with regard to other international transport sectors, such as international air transport, do not contain a provision like Article 9 of Regulation 4056/86.

8.4. Conclusion

173. The Commission cannot foresee any possible conflict of laws and the consultation process has not brought forward any convincing reason why the conflict of laws provision should be maintained. There would therefore appear to be no justification for maintaining the provision in Article 9 of Regulation 4056/86. Before taking any position on this it would however be useful to receive the views of interested parties, notably our international counter-parts.

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1 Compare TACA decision of 16 September 1998, OJ L 95 of 9.4.1999, p. 1) para 93-95.

2 A consortia is a form of operational co-operation between liner companies, see for consortia para 43.

3 OECD Secretariat report of April 2002, Competition policy in liner shipping, available at http://www.oecd.org/dataoecd/13/46/2553902.pdf. p. 19. and ELAA submission of 18 June 2003 to DG Competition's consultation paper available at [www.europa.eu.int/comm./competition/antitrust/review/submissions/elaa.pdf.

4 These trades are ranked first (Far East-Europe), second (Transatlantic route, with the US), and sixth (Australia and New Zealand) of all trades to and from the EU.

5 The 7 members of TACA are: AP Moller/Maersk (DA), Atlantic Container Line AB (US), Hapag-Lloyd Container Line GmbH (DE), Mediterranean Shipping Co S.A. (SWISS), Nippon Yusen Kaisha NYK Line (Japan), Orient Overseas Container Line (China) and P&O Nedlloyd Limited (UK/NL). See www.tacaconf.com

6 The 15 members of FEFC are: ANL Container Lines Pty Ltd (Australian but fully owned subsidiary to CMA CGM France), CMA CGM SA (FR), APL Co Pte Ltd. (Singapore), Egyptian International Shipping Co., Hapag-Lloyd Container Linie GmbH (DE), Hyundai Merchant Marine Co. Ltd. (Korea), Kawasaki Kisen Kaisha Ltd. (Japan), Maersk SeaLand (DA), Malaysia International Shipping Corporation Berhad, Mitsui O.S.K. Lines Ltd (Japan), Nippon Yusen Kaisha (Japan), Norasia Container Lines Ltd (Hong Kong), Orient Overseas Container Line (Hong Kong), P & O Nedlloyd Ltd (UK-NL)., Yangming Marine Transport Corporation (Taiwan). See www.fefclondon.com

7 The 7 members of TEANZC are: Australia National Line - ANL, Consortium Hispania Lines (ES), Contship Containerlines (UK), Hamburg-Suedamerikanische Dampfschiffahrts Gesellschaft Eggert & Amsinck (DE), Hapag Lloyd (DE), Lloyd Triestino (IT). P&O Containers (UK-NL). See http://www.anl.com.au.

8 ELAA response of 18 June 2003 to the consultation paper, page 68, available at [www.europa.eu.int/comm./competition/antitrust/review/submissions/elaa.pdf

9 See in particular Commission decisions of 19 October 1994 (*TAA*, OJ L 376 of 31.12.1994 p. 1), 21 December 1994 (*FEFC*, OJ L 378 of 31.12.1994 p. 17), 16 September 1998 (*TACA*, OJ L 95 of 09.04.1999, p. 1), 30 April 1999 (*EATA*, OJ L 193 of 26.07.1999), 16 May 2000 (*FETTSCA*, OJ L 268 of 20.10.200, p. 1). For the Court judgments see in particular: Case T-86/95, *Companie Générale Maritime*, [2002] ECR II-1011, Case T-395/94, *TAA* [2002] ECR II-00875, Case T-86/95, *FEFC*, [2002] ECR II*01011*, joined Cases T-191/98 and T-212/98 to T-214/98 *TACA* [2003] ECR –not yet reported.

10 Revised TACA decision of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.

11 Canada has also recently re-examined the case for antitrust immunity or exemption. The outcome, as laid down in the amended Shipping Conferences Exemption Act, is largely similar to the United States.

[12] See for further details www.fmc.gov.

[13] There are a number of discussion agreements that operate in several Australian trades which are currently registered under Part X, including the Asia-Australia Discussion Agreement (AADA). The exemption granted to this agreement is currently being re-examined by the Australian Competition Authority (ACCC). See position paper of the ACCC of April 2004, available at www.accc.gov/au.

[14] See for further details www.pc.gov.au/.

[15] The Programme is a result of the request by Ministers in 1995 that the OECD should embark on a study of the reform of regulatory regimes in OECD countries. The review of liner shipping has a parallel in a similar OECD review of air cargo transport.

[16] DSTI/DOT/MTC(99)8, 19.5.1999.

[17] DSTI/DOT(2002)2, 16.4.2002.

[18] Report, pages 69 and 76.

[19] See e.g. Case T-86/95, *Companie Générale Maritime*, [2002] ECR II-1011, para 254, 393 and 484.

[20] Hard-core restrictions are generally considered as restrictions of competition by object caught by Article 81(1) of the Treaty, which generally do not fulfil the conditions for an exemption under Article 81(3) of the Treaty.

[21] See TAA, EATA, Revised TACA decisions of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.

[22] See TAA, FEFC, TACA, Rev TACA decisions of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.

[23] Joined Cases T-191/98 and T-212/98 to T-214/98 *TACA* [2003] ECR –not yet reported, para 568.

[24] See to that effect implicitly para 139 of Case T-17/93, Matra, ECR [1994] II-595 and Case 26/76, Metro (I), [1977] ECR 1875, para 43.

[25] Case T-395/94, *TAA* [2002] ECR II-00875, para 261.

[26] To compare, see for example Regulation 823/2000 on Consortia (OJ L 100 of 20.04.2000 p. 24), Regulation 1400/2002 on motor vehicles and Regulation 2790/1999 on vertical agreements (OJ L 336 of 29.12.1999, p. 21), in which the Commission explicitly referred to the experience acquired in the sector concerned which enabled it to define categories of agreements which could be regarded as normally satisfying the conditions laid down in Article 81(3).

[27] See in particular the ELAA technical paper on burden of proof of 3.12.2003.

[28] See TACA decision of 16 September 1998 (OJ L 95 of 09.04.1999, p. 1), para 332-367, EATA decision of 30 April 1999 (OJ L 193 of 26.07.1999) para 107-142.

[29] For a more detailed discussion of the economic theories in this regard reference is made to the above mentioned discussion paper, available on DG Competition's web-site [www.europa.eu.int/comm./competition/antitrust/others/maritime/review_4056.pdf].

[30] Commission Notice - Guidelines on the application of Article Article 81(3) of the Treaty (OJ C 101 of 27.04.2004 p. 97) .

[31] See TAA decision of 19 October 1994 (OJ L 376 of 31.12.1994, p. 1), para 388. See also FEFC decision of 21 December 1994 (OJ L 378 of 31.12.1994 p. 17), para 129: reliable services are those which are of a reasonable quality, such that the shipper's goods come to no harm, and at the same price irrespective of which day and which line is chosen to carry the cargo. Reliability in the supply of transport services is the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs.

[32] Commission Notice - Guidelines on the application of Article 81(3) of the Treaty, para 73-83 (OJ C 101 of 27.04.2004, p. 97).

[33] Service contracts, such as e.g. individual service contracts (ISCs) on the transatlantic trade, are contracts by which a shipper undertakes to provide a minimum quantity of cargo to be transported by an individual carrier over a fixed period of time and the carrier commits to a certain rate or rate schedule as well as a defined service level.

[34] See for further details the DG Competition discussion paper para 26 and 95-103.

[35] Compare the TAA decision of 19 October 1994 (OJ L 376 of 31.12.1994 p. 1), para 485 and the FEFC decision of 21 December 1994 (OJ L 378 of 31.12.1994, p. 17) ,para 121, where the Commission, with regard to inland carrier haulage services, concluded that collective price fixing was not essential for the provision of these services since many independent carriers offered equivalent or similar services outside the framework of a conference and without fixing prices in common with any other line for the provision of carrier haulage services.

[36] The US Ocean Shipping and Reform Act (OSRA) of 1998 allowed shippers and carriers on US trades to enter into confidential contracts without prior notice.

[37] On the transatlantic trade the vast majority of liner shipping cargo (up to 90%) is nowadays transported through service contracts (ISCs). Also on the Europe/Australia and New Zealand trade the majority (75-80%) of cargo, according to ELAA, moves under contracts. (ELAA submission of 18 June 2003 available http://europa.eu.int/comm/competition/antitrust/review/submissions/elaa.pdf. According to the ELAA service contracts are common on all trades (ELAA submission of 30 June 2004 to the Commission's consultation document on Regulation 823/00.

[38] TACA decision of 16 September 1998 (OJ L 95 of 09.04.1999 p. 1, para 472-476.

[39] In many cases, members of a consortium are also members of a conference. However, a consortium can also be composed entirely of otherwise independent lines or it can include both conference and non-conference members. Consortia are under certain conditions covered by the block exemption of Regulation 823/2000, provided that they do not fix prices.

[40] The Consortia block exemption will expire on 25 April 2005 and DG COMP has in May 2004 published a paper on its web-site in order to consult the industry and Member States on possible options for the future regime of consortia. The consultation paper is published against the background of the ongoing review of the Maritime Regulation. What possible consequences the on-going review process of the Maritime Regulation might entail for the Consortia Block Exemption cannot yet be foreseen. Accordingly and awaiting the results of the review of the Maritime Regulation renewal of Regulation 823/2000 (with only minor modifications that are independent from the Review of Regulation 4056/86) would appear the most appropriate option at this stage.

[41] For example, on the Transatlantic trade the market share of independents has increased from about 39% in 1994 to about 52% in 2001 (Revised TACA decision of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53), para 45 and table 1).

[42] E.g. TACA decision of 16 September 1998 (OJ L 95 of 09.04.1999, p. 1) .

[43] Also on the Europe/Australia and New Zealand trade the vast majority (75-80%) of cargo, according to the ELAA, moves under service contracts.

[44] This is also recognized by e.g. ELAA: .. "*a critical problem in examining both the effectiveness of the conference system and possible substitutes for it is one of history. The liner conference has been a fact of life in European (and, indeed, worldwide) shipping for centuries, and as such very little empirical evidence of alternatives exists. Economic theory and examples from other industries with similar characteristics must be called upon in order to forecast how liner shipping, its pricing structure and stability might function without conferences.*".... (CI March 2004, page 37).

[45] Including deep sea and short sea transport. For data on EU 15 see EU Energy and Transport in Figures – Statistical Pocketbook 2003, European Commission, DG Energy and Transport.

[46] See ELAA Response to the Commission Consultation Paper dated 18 June 2003, p. 48.

[47] The import shares based on volume in tons were: America 26%, Africa 25%, other Europe 23% and Asia 21%.

[48] Statistics in focus – theme 6/7 – 4/2004: Intra-and Extra-EU trade by sea.

[49] In the early Nineties only about 18% of tonnage of the top30 carriers were chartered. By 2000, the proportion had risen to 40% and currently 45%. See Lloyd's List, 29 July 2004, p. 5.

[50] See OECD report (2002), p. 47-49.

[51] Containerization International, November 2003, p. 57-61.

[52] See OECD report (2002), p. 49.

[53] OECD report (2002), p. 47.

[54] Annex to the Consultants' report, p. 95-96.

[55] Consultants' report, p. 3.

[56] ESCA answer to Consultation Paper dated 13 June 2003, p. 5.

[57] COM (2001) 0370, White Paper, "European transport policy for 2010 : time to decide ", p 40.

[58] OECD Report on Regulatory Reform – Syntesis (1997), p. 11-12.

[59] DG TREN – Analysis of the European air transport industry 2002, Final Report December 2003, Contract number: B2-7040B-S07.17962.

[60] COM (2001) 706, 7th Report on the Implementation of the Telecommunications Regulatory Package.

[61] In Australia the Productivity Commission, the Australian Government's principal review and advisory body on microeconomic policy and regulation, is undertaking a review of Part X of the Trade Practices Act (1974) which is the regulatory regime for international liner cargo shipping operations in Australia. In the US the Free Market Antitrust Immunity Reform (FAIR) Act of 2001 has been issued.

[62] For instance, the Transpacific Stabilization Agreement ("TSA"), the discussion agreement which replaced the conferences in the Pacific trades, has a market share close to 85 percent.

[63] Discussion agreements in the US must be filed to the Federal Maritime Commission (FMC) and are monitored by them. See www.fmc.gov.

64 See www.accc.gov.au. The AADA was exempted under Part X of the Trade Practices Act 19974 but in April 2004 the Australian Competition and Consumer Commission has issued a position paper which concludes that there should be a partial revocation of the exemption. Furthermore, it is currently being reviewed whether part X of the Trade Practice Act 1974 should continue.

65 Compare the Commission's decision of 14 November 2002 in Revised TACA (OJ L 26 of 31.01.2003 p. 53).

66 Liner shipping services are defined by ELAA in its Proposal as "the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment, and ancillary activities" (compare Article 2(2) of Regulation 823/2000).

67 ELAA Final Proposal of 6 August 2004, available at http://europa.eu.int/comm/competition/antitrust/others/maritime/elaa_proposal/elaa_proposal_6_august_2004_en.pdf.

68 Bill of lading data comprises according to the ELAA data on load port/discharge port, volume (20'/40'/CMB), cargo details, shipper/consignee data and price.

69 Defined by Cap Analysis (associated to ELAA) in its report on ancillary charges and surcharges of July 2003 as additional increase in charges that are triggered by or associated with the operation of moving containers, e.g. terminal handling charges (THC), demurrage costs, change of destination, special equipment and charges based on the nature of the cargo (dangerous, obnoxious, refrigerated etc).

70 Defined by Cap Analysis in the above report (see fnt 69) as charges meant to cover uncertainties, such as the Bunker Adjustment Factor (BAF), Currency Adjustment Factor (CAF), Congestion Surcharges and War risk Surcharge.

71 Today both activities are exempted by Regulation 4056/86, although the Commission's decisional practice and the case law of the Court have made clear that Regulation 4056/86 should be interpreted narrowly and that *only* temporarily capacity adjustments for seasonal fluctuations are allowed (see e.g. Commission decisions TAA para 359-370 [OJ L376, 31.12.1994] and EATA para 149-151 [OJ L193, 26.7.1999]).

72 For example, in the Revised TACA case the Commission examined the proposed arrangements for the exchange of information by the TACA parties and concluded that, following amendments to these arrangements, neither the TACA secretariat nor the TACA members will have access to non-aggregated carrier-specific information relating to cargoes travelling under individual service contracts and mutual service contracts and that the parties would exchange information relating to such cargoes only on an aggregated conference wide-basis (Revised TACA decision of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) para 70-72).

73 At least a liner conference in the sense of a group of two or more vessel-operating carriers providing liner services under uniform or common freight rates (compare the definition of a liner conferences in Article 1(3)(b) of Regulation 4056/86).

74 Regulation 1/2003 replaced as from 1 May 2004 the procedural provisions of Regulation 4056/86. The exclusion of cabotage and tramp from the scope of Regulation 4056/86 has in fact since 1 May 2004 no longer any practical meaning.

75 Council Regulation No 411/2004 of 26.02.2004 (OJ L 68 of 6.3.2004, p. 1).

76 Article 85 of the Treaty empowers the Commission, if it finds that there has been an infringement of the EC competition rules, to propose appropriate measures to bring it to an end and, if this is not done, record such infringement in a reasoned decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

77 See press release IP/03/284 of 26.02.2003.

78 Judgment of 30.04.1986 in Cases from 209 to 213/84 Ministére public v Asjes [1986] ECR 1425.

79 The effect on trade concept is explained in detail in a newly adopted Commission notice, which also contains a de minimis rule indicating when a trade is generally not capable of appreciably affecting intra-Community trade (see Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101 of 27.04.2004 p. 81).

80 The exclusion for tramp vessel services only applies to such services that fulfils all of the five criteria set out in Article 1(3)(a) of the Regulation (i.e. transport of goods in bulk or in break-bulk in a vessel charted (wholly or partly) to one or more shippers on the basis of a voyage or a time charter on any other form of contract for non-regularly scheduled or non-advertised sailings where freight rates are freely negotiated case by case in accordance with the conditions of supply and demand) regardless of how the industry itself would qualify the service. Unlike the exclusion for maritime cabotage, the definition of tramp vessel services requires a thorough analysis of the specific service before one can determine whether it constitutes tramp vessel service within the meaning of the Regulation. This has naturally implications both for the industry as well as the competition authorities, who would both have to devote considerable resources into assessing the concept of tramp vessel services before determining which action could be taken and by whom.

81 Compare Case T-229/94, *Deutsche Bahn*, [1997] ECR II-1689) with regard to a similar provision in Regulation 1017/68.

82 See in this sense for example the Commission decisions in FEFC (OJ L 378, 31.12.1994, p. 17 par 66) and FETTCSA (OJ L 268, 20.10.2000, p. 1 par 146-147) with regard to provision for technical agreements in Article 3 of Regulation (EEC) No 1017/68 and Article 2(1) of Regulation (EEC) No 4056/86 respectively.

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

84 See Council Regulation No 411/2004 of 26.02.2004 (OJ L 68 of 06.03.2004, p. 1).

85 This view is shared by the OECD Maritime Transport Committee whose members "considered that a conflict of law occurs when a particular agreement or particular conduct is required by one competition regime and is at the same time prohibited by another competition regime. See "MTC conclusions on work on promotion of compatibility of competition policy applied to international liner shipping including multimodal transport with a maritime leg", OECD report, January 1998. http://www.oecd.org/dataoecd/39/56/1924198.pdf