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SCANDINAVIAN INSTITUTE OF MARITIME LAW

Ezekiel Ward

Collaboration in Liner Shipping under Article 81 Ec

Agreements between liner shipping
undertakings following the repeal of
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1 Introduction

1.1 Aims and scope of work

On 18th October 2006 liner shipping companies became subject to the full force of EC competition law. During the first two years, conferences of carriers will remain in existence but by 18th October 2008 will cease to exist altogether. With a hardcore restriction of competition being removed, this thesis aims to establish what agreements are left for liner shipping companies to make amongst themselves.

It is known that price fixing, the most hard core restriction of competition possible, will no longer be possible. But the maritime transport industry has shown itself to be as creative as European legislators in defining the boundaries of its existence. There are other arrangements by which carriers will be able to rationalise their services.

Once established, the remaining agreements between carriers will be examined in the light of EC competition law. The focus will be on Article 81 EC. Not only is a full analysis of this sector under all EC competition law too wide for the scope of a master thesis, but the debate surrounding Article 82 EC and the liner shipping industry is rather more settled, as that provision has been applicable for a long time¹.

Also outside the scope of this work will be mergers. Whilst they are agreements between carriers and in theory could be an alternative to conferences, analysing mergers is a topic broad enough for a much larger thesis in its own right. The discussion

¹ This topic is fully discussed in Blanco, 'Shipping Conferences Under EC Antitrust Law', (2007), at Chapter 4, p. 407

about mergers has its own complexities which are largely independent of a discussion of agreements of a more temporary nature between lines under EC Competition law.

Lastly, this is not an economics paper. It is often tempting to enter the interesting debate over whether or not price fixing is a legitimate activity for carriers. Or what the impacts of the prohibition of liner conferences will have for the profits of liner companies. These are ancillary issues. The thrust of this thesis is legal. As such the EC Treaty will be its basis.

The framework of the paper is intended to appeal to the shipping industry's perspective. The legal debate is therefore structured around liner shipping agreement. On the wider level, these agreements will be classed into 'port', 'deep-sea/vessel', 'cargo' and 'other' arrangements. The particular areas studied will include arrangements such as consortia, technical agreements, capacity management programmes, the offering of individual service contracts and revenue pools. In addition to this, the possibility of multimodal transport agreements will be examined.

1.2 The recent debate

The struggle between liner conferences and the economic theory of competition has existed for over a century². In the European Community, where a policy towards the maritime transport industry was late to emerge, the issue gained momentum in the late 1970s. This coincided with the popularity of the UNCTAD Code on Liner Conferences amongst Member States³. The Community's

² See, for example, The Royal Commission in Great Britain and The Alexander report in the United States of America, as discussed in Dinger, 'The Future of Liner Conferences in Europe', (2004), p.23

³ The UNCTAD Code on Liner Conferences, (1974)

entry to the area of maritime policy and decision, albeit indirectly, that liner conferences were the means by which its shipping was to be organised, was politically charged and controversial. Indeed, the life of competition legislation for liner shipping has been turbulent ever since the Community's political core, the Council, granted a generous block exemption for liner conferences.

Aside from the academic debate around the legality of the block exemption under the EC Treaty, the ECJ and Commission, the enforcers of Community Competition law, have been left to construe the provisions as narrowly as possible⁴. This brought the block exemption's effects, unlimited in time, closer to those envisaged by the Treaty. But it also highlighted the paradox the Community found itself in. Competition law is part of the Treaty because it is viewed as the best means of ensuring efficient markets, rationalisation, allocation of resources and the best possible deal for European consumers.⁵ The maritime transport industry, it is now agreed, is no different from other similar industries from a competition point of view. Yet liner conferences, hard core restrictions of competition law and cartels in a pure form, roamed freely in and out of European ports. It is no surprise that, as the Community has grown stronger and more independent the days of liner conferences have become numbered.

The momentum of the debate over the EC's treatment of liner shipping under competition law drew great clarity from an OECD report in 2002⁶. After various reports from the EU institutions and the customary back and forth of legislative drafts, the case for ending the special treatment of liner carriers reached terminal

⁴ See below at 3.0, EC policies towards liner shipping

⁵ Whish, *Competition Law*, Fifth Edition, (2003), p. 1

⁶ OECD Report (2002)

velocity. Carriers have put forward their own arguments in favour of maintaining the block exemption for liner conferences⁷, but even their own statistical evidence has been cited as evidence against their cause⁸.

Council Regulation 1419/2006 ends one chapter in the life of liner conferences and begins what is probably their final chapter in Europe⁹. The two year phase-out period will see some huge changes in the liner shipping world. Competitive conditions already exist in parts of the industry in Europe but it remains to be seen how it will function under fully competitive circumstances.

The competition regime has become, following Regulation 1419/2006, a patchwork of legislation. Nonetheless, the regime will be simpler than that which is being phased out. As stated above, the issue to be discussed here will be what agreements remain. There will be no conferences, but carriers may group themselves into consortia and alliances. Carriers have also suggested discussion groups and data exchange programmes as alternatives to what they saw as the benefits of the conference system¹⁰.

More specifically, carriers will no longer be allowed to fix prices to or from European ports. The extent to which they can make purely technical agreements will be of interest, as the specific ground for such arrangements was part of the now repealed Regulation 4056/86¹¹. Lastly, less explicit links between carriers, so-

⁷ European Liner Affairs Association at www.elaa.net (Last visited on 30th August 2007)

⁸ Dinger, page 157. Dinger cites the TSA submission to the OECD, (2001), exhibit 2 & 3; WSC submission to the OECD, (2001), page 13 f

⁹ Council Regulation 1419/2006, OJ (2006) L 269/1

¹⁰ *Supra*, note 7

¹¹ Article 2, Council Regulation 4056/86, OJ (1986) L 378/4

called tacit collusion, acquiescence and price leadership are areas that carriers need to be aware of to avoid falling foul of EC Competition law.

2 The Liner Shipping Industry

It might seem odd to give an account of the history of liner shipping with a focus on conferences, in a study that aims to examine what agreements are left in their absence. However I feel it is important to set the scene for the maritime transport industry. The liner conference has been one of the dominant organisational structures in liner shipping for the most part of the twentieth century. An introduction to their history allows an appreciation of their virtues and their weaknesses. Then the legal debate surrounding other agreements between carriers can be appreciated for what it achieves without the competitive restriction of price fixing. Thereby controversy surrounding EC maritime transport legislation will also be better understood.

In addition to an historical glance at conferences, the basic economics of supply and demand are clarified. It is important to understand why certain shipping agreements were deemed necessary by legislatures and why 'competition' as a theory is so important. In the final section of this part, the subject matter of the forthcoming legal analysis of EC shipping legislation 'after' conferences is closer in mind. Then consortia, alliances, discussion agreements and information exchange are outlined.

2.1 Liner shipping

The subject of this work is liner shipping and the companies, lines, which operate within that industry. Broadly speaking liner shipping is the transport of goods by sea internationally. But it can be distinguished from the various other forms of international maritime transport. Liner shipping operates on a regular basis. In other words, there is a timetable to be followed. This distinguishes 'liner' from 'tramp' shipping. There is no specific type of cargo transported by lines but some commentators have made the

distinction between bulk carriers and liner shipping companies in this way.¹²

The European Commission, hereafter ‘the Commission’, has defined liner shipping as follows:

“...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.”¹³

It is this sector of the maritime transport industry, and the effect that EC competition law has on it, that this work is concerned with.

2.2 Shipping before 1875

Many accounts of liner conferences begin by pointing out that the first liner conference came about in 1875. Before the late nineteenth century the shipping industry was characterised by the sailing ship¹⁴. Sailings were irregular and unreliable. Imbalances of cargo in the opposite directions of a given route and unpredictable cargo volumes dogged the business of carriers. The important link to be drawn from this era is that between new technology - steam - and a surplus of capacity.¹⁵ Steam improved not only the speed of vessels but also their predictability. Regular sailings were introduced and demand for transport increased as perishable and valuable goods could be carried long distances¹⁶. Carrying capacity was further

¹² Marx, *International Shipping Cartels*, (1953), pp. 7-9

¹³ Article 2(2), Commission Regulation 823/2000, OJ (2000) L 100/24

¹⁴ Marx, p. 26

¹⁵ Marx, p. 31

¹⁶ Marx, p. 26

increased by improved engine design and the move from coal to liquid fuels¹⁷. Freight rates tumbled in the face of rising demand.

However, this increase in demand was outstripped easily by an increase in supply. Steam ships were larger than sailing vessels anyway but had the added advantage of fitting in more sailings for a given period of time. The increase in international transport capacity was thereby heightened indirectly.

Some commentators have also attributed factors outside the increased efficiency of carriers to the rise of world shipping. Economics, improvements to the world's infrastructure and politics have all played their parts. Globalisation was beginning in earnest¹⁸. The world had woken up to the fact that commercial activity and services in far away places could affect their own work. By means of shipping services, these markets were now accessible. Furthermore, the Europe to Asia trade was eased by the opening of the Suez Canal in 1869, again meaning more sailings and an indirect increase in supply. Political factors played their part; the British Empire was in full economic swing and many governments of the recently industrialised nations were eager to put in place policies for protecting companies flying their flags and for improving their balance of payments. These factors culminated in a huge increase in demand for world shipping. But as stated above, this increase in demand did not match the capacity being supplied.

¹⁷ Deakin, 'Shipping Conferences', (1973), p. 211

¹⁸ Wickizer, 'Shipping and Freight Rates in the overseas Grain trade', *Wheat Studies of the Food Research Institute*, Vol. XV, No. 2 (1938), p. 49. Cited in Marx at p. 26

2.3 The economics of supply and demand and the emergence of liner conferences

Generally, the equality of supply and demand will produce stable prices. Assuming this is a competitive market, one in which firms compete and determine policies independently, an excess of supply over demand will cause prices to fall. They will continue to fall until supply again equals demand.¹⁹

The situation in which carriers found themselves in the early 1870s, and helped to create, was particularly severe²⁰. Supply, or the capacity of transport, exceeded demand by a long way. A recession in 1873 exacerbated this situation by further reducing demand²¹ and prices for international maritime transport declined quickly.²² This was a competitive market, so carriers were undercutting each others' rates. The outlook seemed to be instability until there were enough bankruptcies for capacity to drop and supply to eventually equal demand again. Prices could then stabilise to profitable levels and the process, one could presume, would start all over again.

Again generally, there are several ways for suppliers to halt losses due to price instability in a downward direction. At their heart they involve the end of effective competition and thus the proposition that equality in actual supply and demand will produce stable prices. One way to do this is via pinning prices at artificially high levels. This could be achieved by making only one price available to consumers – price fixing. The higher prices paid by consumers will make the operation profitable once more.

¹⁹ On the theory of competition generally, see Whish, p. 2

²⁰ Dinger, p. 22; Competition was described as “Cutthroat”

²¹ Dinger, p.22

²² Marx, p. 31

Alternatively it is done by changing the dynamics of the market. Suppliers cannot affect demand for a product. But supply is theirs to manipulate. By holding back supply, producers artificially equalise supply and demand. In accordance with the above proposition, prices should become stable. Both solutions require collusion between the producers or suppliers. Without collusion, prices will simply destabilise. Artificially high prices could easily be undercut by one carrier. Similarly, artificially held-back supply could be allocated to the market by one rogue supplier.

Carriers had to fix prices or reduce capacity, or both, to end the problems they found themselves in. Crucially, however, they had to do this together as suppliers. By presenting a united front to shippers they could demand higher prices for their services, maintaining healthy profits. To achieve just this, the first liner conference emerged in 1875.

2.4 The functioning of liner conferences

Conferences are agreements between international liner shipping companies under which prices and other conditions of carriage are agreed²³. The agreements stipulate various rights and obligations upon members but typically the individual companies maintain independence in a large number of areas including the offering of individual service contracts²⁴ and loyalty rebates.²⁵ A trend has

²³ Article 1 (3) (b), Council Regulation 4056/86

²⁴ See section 4.2.3 on individual service contracts, private arrangements between shippers and liner shipping companies for the provision of transport services outside any conference or consortium.

²⁵ Such arrangements concern rebates where the shipper agrees to use a particular line exclusively or for a minimum amount of cargo over an agreed period of time.

developed, particularly in the United States, to unrestrainedly offer transport to shippers based upon individual service contracts²⁶. This has to some extent ended the efficacy of conferences. Each conference has its own peculiarities and generalisation would be unhelpful in such a necessarily brief introduction²⁷.

2.5 Containerisation, consortia and alliances

The use of liner conferences continued through the first and second World Wars²⁸. But following the Second World War there was a new revolution afoot for liner shipping²⁹. In the mid-1960s break bulk transport began to be replaced by containerised transport. Nowadays it is estimated that just over half of all general cargo is transported by container, out of a possible 65% of general cargo suitable for containers³⁰. The sector is continuing to grow rapidly³¹.

The switch to containers makes perfect sense. Containers are easier to shift around. This reduces time spent in port and allows for more integrated multimodal transport – door to door services. Reduced port time means reduced port costs and more time spent at sea. As was the case with the introduction of steam vessels, transport capacity was increased because of bigger, faster vessels and more frequent sailings. Customers felt the benefits of faster transport to exactly where they wanted, with fewer packaging or security problems.

²⁶ Article 8(1)(c), section 5(c), Ocean Shipping Reform Act 1998, 112 Stat. 1902

²⁷ For a thorough analysis, see Herman, 'Shipping Conferences', (1983), p.15

²⁸ Marx, p. 6

²⁹ Herman, p.6

³⁰ Dinger, p.29

³¹ Dinger, p. 29

But the switch was an expensive one. Most operators could not afford the expensive new vessels that containerisation demanded³². The containers themselves could match the price of new vessels. Furthermore, new port facilities were necessary. Typically for the shipping industry, the solution was a collective one. Consortia are agreements that provide the framework for greater operational cooperation between carriers. Commission Regulation 823/2000, discussed in more detail below, states that consortia are agreements aiming to “...rationalise their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing”³³. In essence consortia allow liner shipping companies to afford space on container vessels, albeit not their own at times. They allow for access to container facilities in ports and an opportunity to compete in markets they might otherwise be priced out of. Liner shipping companies may be members of conferences and consortia contemporaneously.

Consortia agreements have been extended into what are called ‘alliances’.³⁴ Alliances appeared in the early 1990s and operate more integrated transport services around the globe, aimed at operational rationalisation³⁵. This is as opposed to operating on one trade lane or route, as consortia usually do. Neither consortia nor alliance agreements constitute mergers due to their undoubted temporary character and the individuality retained by the carriers.

³² Herman, p.6

³³ Article 2 (1), Commission Regulation 823/2000

³⁴ OECD Report at 2.7.2, <http://www.oecd.org/dataoecd/13/46/2553902.pdf> (last visited 30/08/2007)

³⁵ Dinger, pp. 30-34

2.6 Discussion agreements and information exchange

Carriers in the liner trade have developed discussion agreements as forms of cooperation that are not as competitively-restrictive as conferences. Typically a discussion agreement will include any operators on a route, conference members or not. Between them, these companies will agree to adopt the same market behaviour. This might be, amongst other things, agreeing capacity restrictions or various surcharges.

Information exchange arrangements have been proposed by liner conferences in the realisation that they might soon be unable to carry on as such.³⁶ Carriers would agree to divulge certain information to each other regularly under the proposed system.³⁷ This allows them to increase market transparency. Many commentators have been sceptical of information exchange for its potential abuse by carriers in coordinating market behaviour³⁸.

³⁶ *Supra*, note 7

³⁷ On information exchange, see Blanco, p. 590

³⁸ Furse, 'Competition Law of the EC and the UK', Fifth Edition, (2006), p.149; Furse makes the point that competition policy should 'make such information exchange risky.'

3 Ec Policies towards Liner Shipping

This section has the aim of laying out the competition legislation so far adopted by the Community towards liner shipping. The purpose here is not to detail the provisions in any specific way; rather I wish to inform the reader of the thought process European legislators have followed in this area. In the same way that a description of the historical development of conferences was important, the following discussion should set the scene for an analysis of what future agreements are permissible under European Community competition law. The initial paragraphs are focused on liner conferences until the present day, and more recent 'conference' developments. Following this I will discuss other Community secondary legislation concerning the currently more important 'consortia' and the block exemptions granted in that sector.

The European Community did not gain a meaningful approach towards competition law in the maritime transport industry until 1986. The irony in this is the importance to the Community of shipping. However this importance may also go some way towards explaining the delayed action. Member States, particularly since the accession of Denmark, the United Kingdom and later Greece, are fairly guarded towards one of their most important industries. Pooling sovereignty in such an area is perhaps a difficult pill to swallow³⁹. For the Community, shipping's importance emerged after it stopped being only a large bloc of continental Europe and its outlook became increasingly international.

³⁹ Until the Single European Act of 1986, unanimity in the Council was required to legislate on maritime transport. From 1986 'qualified majority' was the rule.

3.1 The UNCTAD Code and Council Regulation 954/79

In various stages there was a shift from purely economic cooperation to a greater, social aim in Europe. Shipping straddles these two aims – it is a hugely important economic activity but also a public service. Thus it had been treated with some indecision. The distinction, however, became less important as Community competence grew. Regarding maritime transport and competition law, a transition started in the late 1970s, triggered by the emergence of the UNCTAD Code of Conduct for Liner conferences⁴⁰.

The UNCTAD Code is a model of behaviour for liner conferences. It is also an attempt to give developing countries access to shipping markets and the chance to develop merchant fleets of their own. It was a popular move in the eyes of many Member States of the European Community. However, signatures to the Code caused tension within the Community, particularly with regard to the EC Treaty. The Community reacted by passing Council Regulation 954/79 with the attempt of allowing developing countries fair market entry, whilst bringing Member States' involvement into line with the EC Treaty. Crucially, in doing so the Council effectively endorsed liner conferences as the Community's international maritime transport of choice.⁴¹

⁴⁰ UNCTAD Code of Conduct for Liner Conferences, (1974), <http://r0.unctad.org/ttl/ttl-docs-legal.htm> (Last visited 30/08/2007)

⁴¹ It is interesting to note that today the Code is not used in practice, and there have been no new accessions since the early 1990s. See Commission proposal for a Council Regulation repealing Regulation 4056/86, 2005/0264 (CNS)

3.2 Council Regulation 4056/86

This indirect legitimisation of liner conferences was legally on shaky ground, particularly in light of case law developments⁴². Cases before the ECJ had extended the Treaty's competition rules fully to the maritime sector. At the same time, the Community had ostensibly chosen liner conferences, price fixing cartels, to operate in this sector. This tension between the maritime sector and the EC Treaty needed to be addressed by the Community.

A crisis in community shipping and the legal paradox that had arisen were dealt with in a job-lot of regulations appearing in 1986. Of importance to this study is Council Regulation 4056/86⁴³. The regulation was intended to bring the maritime sector fully into the EC Treaty's focus for the first time. Liner conferences were granted, *inter alia*, a block exemption for price fixing, capacity management programmes, pooling arrangements and various technical agreements. It is interesting to note that the block exemption is generous in the extreme, granting a right to a hard-core restriction of competition for an unlimited period of time. The fact that it is a regulation from the Council, the most politicised institution of the Union, adds weight to earlier comments that EC shipping policy is controversial and heavily influenced by member states. A block exemption of this sort is the perfect tool for member states to retain sovereignty over of a nationally important industry.

⁴² See 3.3

⁴³ In spite of its huge importance over the past 21 years to European shipping, no details of the Regulation will be analysed. The Regulation has been repealed and it is the aim of this paper to look at what agreements lie ahead.

3.3 The applicability of the EC Treaty

Running parallel to the Commission and Council activity were rulings from the European Court of Justice. Several fundamental questions had arisen in relation to the EC Treaty itself. Fundamentally the questions consisted of asking what areas of the Treaty applied to maritime transport. If the Treaty did apply generally, it was further questioned whether Title VI on competition law applied. Finally, confirmation was sought that, although Article 82 EC applied directly, Article 81 EC required further explanatory legislation.

The answer to the first of these questions came in 1974. The Commission had taken action against France who, obliged under its Code du Travail, required a certain number of French sailors on board vessels flying its flag⁴⁴. The Commission asserted that this was contradictory to one of the four driving factors behind European economic integration – the free movement of workers. In response it was claimed that the EC Treaty did not apply generally to the transport sector. Only Title V on transport, it was claimed, contained the relevant provisions for that industry.

The ECJ analysed this claim in light of the provisions of Title V and in particular Article 80(2) EC. The Court was keen to avoid the label of ‘free movement of services’ to the actions of France. Maritime transport had been explicitly excluded from the free movement of services⁴⁵. The judges therefore adopted the phrase ‘free movement of sailors’ throughout, clearly bringing the case within the free movement of workers. No such exclusion existed there. Further, the Court addressed the claim that Title V on transport existed independently of the Treaty’s general provisions.

⁴⁴ Case 167/73, *Commission v France*, (1974), ECR, p.359

⁴⁵ Article 51(1) EC

It declared that Title V was actually intended to be as much subject to the Treaty's general provisions as other titles. Together, they gave effect to the fundamental aims of the Community in the transport sector. As such the existence of Title V does not restrict the application of the remainder of the EC Treaty to Community transport.

This general proposition was tested more specifically in 1986. The applicability of the Treaty's competition law provisions to maritime transport was examined in the *Nouvelles Frontières* decision from the ECJ⁴⁶. Title VI of the Treaty, regarding competition law, was declared to be fully applicable to the transport sector. Maritime transport and thus liner conferences were thereby subject to the competition provisions. It is interesting to note that in the same year the block exemption contained in Regulation 4056/86 was granted.

With the block exemption in place there were no immediate legal consequences to the detailed application of the competition rules in Article 81 EC for a large part of the maritime transport industry. Nonetheless, in 1989 the case of *Ahmed Saeed* came before the ECJ⁴⁷. Therein the Court stated that Article 82 EC was applicable without any need for further legislation. Article 81 EC, however, required such secondary legislation due to the possibility of block exemptions contained in Article 81(3) EC. Such detailed secondary

⁴⁶ Joint cases 209-213/84, '*Nouvelles Frontières*', (1986), ECR, p.1425

⁴⁷ *Ahmed Saeed Flugreisen and Silver Line Reissebuero GmbH v Zentrale zur Bekämpfung Unlauteren Wettbewerbs e. V.*, Case 66/86 [1989] ECR 803, [1990] 4 CMLR 102, ECJ

legislation has gained importance since the implementation of self-assessment under Council Regulation 1/2003.⁴⁸

In summary, the ECJ confirmed the competences of the Community, within the framework of the Treaty, by establishing that the transport sector fell under the general provisions of the Treaty. Liner shipping was thus declared to be subject to the Treaty, including its competition provisions.

3.4 Liner consortia

As indicated earlier, one of the major contrasts to the repeal of the conference block exemption is the continuing strength of liner consortia. In discussing the EC's legal regime for liner shipping, consortia have to be involved, particularly in light of their increasingly isolated position of being exempted from EC competition law. An analysis of the contents of that block exemption will be undertaken at a later stage.

The first block exemption for consortia came about in 1995⁴⁹ and has since been renewed twice⁵⁰. Regulation 611/2005 grants a further five years for liner consortia, the fundamental aspects of which have already been briefly outlined. It has been remarked that the controversy surrounding liner conferences is not apparent around the liner consortia. This manifests itself in the uncomplicated manner in which the Commission regulations grant them their status, containing few

⁴⁸ Council Regulation 1/2003, OJ (2003) L 1/1. As a result of this regulation, Article 81(3) EC is automatically applicable. Undertakings need not apply individually for an exemption from Article 81(1) EC. See discussion at section 5.4.8.

⁴⁹ Commission Regulation 870/1995, OJ (1995) L 89/7

⁵⁰ Commission Regulation 823/2000, OJ (2000) L 100/24 and Commission Regulation 611/2005, OJ (2005) L 101/10

recitals and clear, straight forward provisions. It seems that many lessons have been learned from the conference block exemption.

3.5 Recent developments

In comparison to the twenty year conference block exemption and the controversy that has surrounded it, recent developments have been swift. In 2002 the Organisation for Economic Cooperation and Development (OECD) published a report into the state of the liner shipping industry.⁵¹ The report was heavily critical of the prevalence of conferences in the liner shipping industry. Perhaps the most significant aspect of the report, however, was the assertion that the liner shipping industry is not unique.

Often, liner conferences have claimed ‘uniqueness’ as one justification for their existence in spite of competition law.⁵² Their industry, they say, lacks stability from within. High costs of market participation and ‘lumpy’ supply of capacity were pointed to in this regard. In addition, some commentators have discussed the so-called ‘theory of the empty core’ to explain the unique combination of market factors in liner shipping. Thereby, the instability of prices is explained by cycles of market players leaving while prices were unprofitable, only re-joining the market when their competitors’ remaining capacity, more suited to demand, had dragged prices up to being profitable again. The OECD’s report, however, has dismissed the uniqueness of liner shipping.

⁵¹ OECD Report on Competition Policy in Liner Shipping, Document DSTI/DOT (2002)2, available at: www.oecd.org/dataoecd/13/46/2553902.pdf (last visited 30/08/2007)

⁵² See: www.elaa.net (last visited 30/08/2007)

The OECD instead approved of a competitive market structure and recommended the abolition of conferences.⁵³ Cooperation in itself was not condemned and the report was approving of the use of consortia. In light of this and prior calls from shippers to end the use of liner conferences, the European Commission began its own review of the industry.

The culmination of the efforts of the European Institutions in this area was Council Regulation 1419/2006. Support for the abolition of the conference system seems to have come from many sides of the debate and, as mentioned earlier, even from the statistics produced by liner conferences. Regulation 1419/2006 is not a long regulation, signifying the simplicity of the changes it introduces. The ramifications of these changes will be discussed in the coming chapters. At its core the new legislation repeals the block exemption from EC competition law granted under Regulation 4056/86, following a two year phase-out for conferences already in existence.

3.6 Summary

Legislation in the area of maritime transport has been some of the most politically charged legislation under EC competition law. The 1986 block exemption was granted when reports, with the benefit of hindsight, have claimed that it probably should not have been. The repeal of that legislation has left in place various legal provisions concerning liner shipping that will be discussed in detail below. Chiefly, there is the liner consortia block exemption.

It will be necessary to establish what liner shipping companies can achieve within this legislation and where exactly its boundaries

⁵³ OECD Report Part 6, p. 74

lie. It will also be of interest, considering the aim of this paper, to establish what the maritime transport industry can achieve through consortia in the form of alliances and other arrangements. I will be concerned in this respect with agreements between liner shipping undertakings.

4 Agreements in Liner Shipping

4.1 Structure of discussion

In analysing liner shipping agreements under EC competition law, it is first necessary to look at what agreements are under consideration. Once we have established what liner shipping companies want to do through agreements with each other, we should look at the applicable law. In liner shipping this is a slightly more technical affair than in other industries. This is due to the secondary legislation produced by the Council and Commission to supplement the Treaty and to regulate the maritime sector.

The competition law assessment of agreements will fall under Article 81 EC – the prohibition itself through Article 81(1) EC and the individual exemption under Article 81(3) EC. More specifically, we can look to secondary legislation. It will be important to examine the effects of Regulation 1419/2006 to see what other legislation remains following the repeal of Regulation 4056/86. Of particular interest in this regard will be technical agreements that once fell under Article 2 of the repealed regulation. Lastly, specific secondary legislation for liner shipping agreements, already outlined above, will be discussed in detail. This analysis will stem from Regulation 611/2005, which extends Regulation 823/2000 on consortia.

The assimilation of the applicable law and those relevant agreements is not so straight forward. Many legal studies of liner shipping, notably those of liner conferences, have adopted a legal structure. That is to say, liner shipping is placed within the framework of the applicable legal provisions. To a great extent, this is a sensible approach. Good law is drafted in such a way as to fit the industry it is regulating. The approach also has the advantage of reaching suitable legal conclusions that can be considered in wider

bodies of law such as ‘commercial’, ‘private international’ or, more pertinently, ‘competition law’.

However, I feel drawn to approach this subject from another angle; to apply the relevant law to the structures that the liner shipping industry itself has adopted. An example might be: what are the various agreements that liner shipping companies can make in port? The obvious appeal of this approach is that meaningful conclusions are drawn on practical competition law problems in liner shipping. One drawback, however, is the scale of such an analysis. To take the law out of its natural habitat – the Treaty and regulations – and begin applying it to the numerous agreements that liner companies wish to make, would be lengthy to say the least. Such a study could also, without a careful structure, become clumsy and lethargic.

These problems are compounded by the fact that this is a master thesis. The proposed analysis would have a scale beyond that permissible. A detailed analysis would be of greater appeal than simply skimming the surface, but is not possible here. In addition to concerns of brevity, it would be sage to avoid a muddled and artificial structure. This could easily rear its head should the analysis lack sufficient depth. Because of these considerations, I have chosen to adopt an analysis of the area through examples of specific problems for liner shipping companies under four broad headings. These headings and problems are laid out below, outlining the agreements under consideration before detailing the applicable law.

4.2 Liner shipping agreements

Liner shipping is largely a private industry. It therefore exists to pursue profits and its participants will be concerned to maintain healthy rewards for its efforts. Assuming the industry follows a competitive model which, under the Treaty, European liner

shipping will do in its entirety from October 2008, lines will be primarily concerned with maximising efficiency and cutting costs, thereby increasing their profits. Because of this economies of scale are very important.⁵⁴ Also, liner shipping is a heavily capital-intensive market.⁵⁵ Buying new vessels, equipping them with containers if needed and supplying the requisite port facilities is a mean logistical feat, and very expensive. Given these facts, collaboration amongst liner shipping companies seems necessary. This necessity is brought to light in the activities of liner shipping companies and the high costs involved. Some commentators have placed figures on the costs of vessels and containers to illumine the problem.⁵⁶ Wherever there is an operation with high start-up or running costs, it is likely that lines of all sizes will seek agreement with their competitors. Below, these agreements have been divided into four areas: Port, Deep-sea, Cargo and Other. It should be noted again that this discussion is focused on inter-line agreements and not agreements between lines and shippers, with the exception of individual service contracts.

4.2.1 Agreements in port

Liner shipping operates between ports and, importantly, *out of* ports. That is to say, the port is a base at which all of the real movement of the cargo happens. In an extreme version of events, liner companies would have to provide an entire port facility to make a transport operation possible. Setting aside the fact that this is really the responsibility of government, many different aspects of a port would have to be provided – and all are expensive. No

⁵⁴ Bull and Falkanger, *Scandinavian Maritime Law*, (2004) p.152

⁵⁵ Dinger, p. 27, using the example of containerisation

⁵⁶ Herman, p. 6

doubt, lines would look to collaborate at this level if they had to. We can assume that the basics are in place – the infrastructure is sound, the port dredged, any environmental impacts taken care of and any other matters settled.

However there is still a lot to be done before a line can operate out of a port. Indeed, deciding which ports are to be operated out of might be an agreement that needs to be settled in itself. After all, if two companies agree to share the cost and use of containers, but neither operates in the same ports, that agreement is almost futile. If the same port is served, facilities must be installed for various operations. Cargo must be stored somewhere where it is protected from the elements, thieves and saboteurs; any special treatment like refrigerated facilities, must be provided. Vessels need proper berths and docking facilities. All of these things also require a lot of equipment and spare parts, not to mention the containers and container-shifting tools. And, of course, the whole operation needs staffing. Ensuring a smooth running enterprise might also require an operations office, whether in the port itself or a regional centre.

In short, there are many ways to share costs within a port. In the same way that spreading the costs allows for better profits, agreement in the areas outlined above also enables better market access. Risks involved in a new venture, or in serving a new port, are greatly reduced if there are other liner shipping companies there to shoulder some of the burden. Further along the line consumers benefit from a well-served port and a choice of competitive lines.

The legal bases for agreements in port are found mainly in Regulation 611/2005. However, there are some technical agreements that were detailed in the now repealed regulation 4056/86 that could still be used today. After all, technical agreements in themselves do not prevent, restrict or distort competition. ‘Port agreement’ is an area of liner collaboration that is not particularly controversial and, as

such, will only be touched upon lightly, although a legal analysis of the character of article 2 regulation 4056/86 will be of interest.

4.2.2 Deep-sea/vessel agreements

Under this heading are agreements that affect vessel operation. There is one area of particular interest here – that of capacity management. This can be a necessary area for agreement in liner shipping for maintaining regularity and as a reaction to seasonal changes in volume of cargo. The economics of supply and demand, explained above, are affected by capacity management. In turn, they can affect prices.⁵⁷ As such, capacity management is potentially severely restrictive of competition. A strong legal ground for waiving the prohibition of Article 81(1) EC is essential. The details of such a ground, contained in the consortia block exemption, are discussed later. That analysis will include whether it would be sensible to revisit case law, now that liner conferences are no longer permissible, to expand the scope of capacity management.

Aside from capacity management, there are many ‘deep-sea’ agreements that might be best served by collaborative arrangements. Starting at as fundamental a position as in port agreements, lines may wish to coordinate their routes, although in actual fact this is nearly the same thing as agreeing which ports are to be served. Timetable coordination is another fairly basic form of ensuring the operation of a good service. Prima facie, coordination of lines in these ways does not contain any elements that are overbearingly restrictive of competition and both positively contribute to the deal gotten by shippers.

In terms of the vessels themselves, liner shipping companies will be interested in utilising as much transport capacity as is available,

⁵⁷ Dinger, p. 120

negating the need to run unprofitably empty vessels. In this regard, vessel pooling is an obvious solution. However the use of slot chartering, hiring capacity on collaborators' vessels, can mitigate losses through fully utilising capacity. It is true to say that slot chartering effectively allows lines to temporarily increase their own capacity and thus business opportunities. All this is done without the expensive and permanent outlay involved in buying a ship and the less flexible alternative of a charter party.

Aiding any system aimed at flexible capacity and vessel pooling might be agreements on how vessel capacity should, if at all, be chartered outside the carriers' agreement. Exclusive use of tonnage by the collaborators, as well as the compulsory use of 'agreement tonnage' and not that of third parties, will serve to strengthen the full use of capacity of any member lines to the capacity programmes described above.

Lastly, as under port agreements, technical agreements have a part to play in vessel and deep-sea arrangements. Of interest in this manner are vessel type agreements. Under such an arrangement only certain categories of vessels may be used by members. The origin of such agreements, legally speaking, lay in Article 2 of the liner conference block exemption. As such vessel type agreements will form part of the analysis of that article in light of the block exemption's repeal in 2006. Capacity management agreements are also discussed in greater detail below. The other aforementioned 'deep-sea' agreements have reasonably strong legal bases and as such will not need a great deal of further consideration.

4.2.3 Cargo agreements

Some types of collaboration useful in relation to cargo have been indicated already. But 'cargo agreements' is a wider category than simply logistical rationalisation. It includes commercial arrangements and agreements made by liner shipping companies inter se and with

shippers, such as individual service contracts. Cargo cooperation concerns, at its most simplistic, cargo handling and storage facilities. This includes certain port facilities and containers. There is obviously overlap in this area with ‘port agreements’ above. They are further means of achieving economies of scale. Not being overly controversial, it will be sufficient later to briefly outline these agreements’ legal grounds.

Of a more complex nature are cargo sharing agreements. Under such arrangements cargo is pooled, and assigned to the different carrier-members on pre-defined rules. This is an area that would warrant further discussion given the opportunity. For the reasons stated above, this is not possible. Cargo pools clearly form an area that demands attention in light of EC competition law. However, that area has too solid an exemption from that law⁵⁸, and is too flagrant a breach of it without the exemption, to be discussed further. Whilst this oversight is unfortunate, it will allow for the requisite attention to be paid to other agreements in the area of cargo, such as individual service contracts.

An individual service contract, or ‘service arrangement’, is described in Community legislation as:

‘a contractual arrangement concluded between one or more transport users and an individual member of a consortium or a consortium itself under which, in return for an undertaking, to commission the transport of a certain quantity of goods over a given period of time, a user receives an individual undertaking from the consortium member or the consortium to provide an individualised service which is of a given quality and specially tailored to its needs’.⁵⁹

So agreements with shippers, by a consortium or its members, may be made in pursuit of better-tailored service and a guarantee of

⁵⁸ Article 3(2)(d), Regulation 823/2000

⁵⁹ Article 2(3), Regulation 823/2000

stability for both the shipper and carriers. Individual service contracts, although grounded solidly within the consortia block exemption⁶⁰, are perhaps most representative of this category of agreements. Amongst other reasons, this is because of the breadth of the scope of these agreements. They will be examined in light of the EC's competition provisions later on, in so far as agreements between liner shipping companies may be made to offer individual service contracts to shippers.

4.2.4 Other cooperation in liner shipping

Considering the above categories, there are some agreements that do not fit neatly into one or the other. Some of them have a commercial aspect to them that does not lend itself to being placed into 'port', 'deep-sea' or 'cargo'. Others straddle all three categories and are therefore equally unsuitable for such categories. This overlap is unsurprising given that the entire liner shipping operation revolves around cargo. Feasibly, all agreements could be placed under 'cargo'. The 'other' category encompasses four agreements that lines could wish to make. Price fixing is a notable exception from this, and all other, categories for the simple reason that such a hard core restriction of competition has been shown not to satisfy the requirements of article 81(3) EC, the exception to 81(1) EC.⁶¹

The overlap noted above is particularly apparent where lines might want to agree on data exchange systems. Such systems will be important to other agreements, right across the three other categories. Logistics generally rely on complex data and this has become no less true in the age of the container. Cargo sharing and

⁶⁰ Article 8 (a), Regulation 823/2000

⁶¹ See Dinger at pages 164 and 189-92, Blanco at chapter 4, Regulation 1419/2006 at recitals 1-8. See discussion at section 5.4.8.

slot chartering complicate those processes further, and agreements concerning the joint issuing of documentation, such as bills of lading, will be eased through streamlined systems.

Of those agreements in this category to which there is a commercial character are seen revenue pooling and joint sales and marketing. Joint sales and marketing are understandable advantages to carriers who are engaged in such close-knit activities as, say, consortia. It is an extension of their ability to compete in their chosen market. Revenue pools, however, could theoretically attain a political charge close to that of liner conferences. Under such a scheme, the cargo carried by a line is irrelevant, all the revenue being pooled and split between members on a pre-defined set of rules.⁶²

Although under a study of liner conferences, Dinger states that it is in fact the *purpose* of revenue pools to eliminate competition between member lines.⁶³ Herman submits that liner conferences were formed in response to market conditions and that pools take this collaborative effort one step further.⁶⁴ In light of the fact that conferences themselves are now much criticised, are pools not also to be criticised? Like individual service contracts under 'cargo', it will be interesting to examine the specific legal provisions allowing for revenue pooling in spite of what is, as will be shown, a solid legal base under the consortia block exemption.

But revenue pools are not the only potential agreements in the current category that are capable of drumming up a debate and warrant further discussion. Multimodal transport is a topic that has

⁶² Gombrii, 'Shipping Pools' from Bull & Stemshaug 'EC Shipping Policy' (1996), p.183 et seq.

⁶³ Dinger, p. 51

⁶⁴ Herman, p. 24

split even the European Community institutions⁶⁵. The wish on behalf of carriers to offer door-to-door services, beyond the main shipping routes sailed, is understandably strong. Shippers, it must be presumed, want such services. For carriers, agreements of this kind would open up markets more quickly, expand their potential customer base and allow them to offer a more complete transport package at a reduced cost and risk to themselves. As of yet there does not appear to be a Community policy on multimodal transport. Along with revenue pools, multimodal transport will be examined in greater detail later.

4.3 Summary

In summary, the four categories will be examined through five examples. These are:

- a. Technical agreements following the repeal of regulation 4056/86, including vessel type agreements;
- b. Capacity management programmes in light of the Community case law and the repeal of regulation 4056/86;
- c. Individual service contracts as offered by groups of liner shipping companies;
- d. Revenue pooling; and
- e. Multimodal transport.

In addition to the above, it is to be borne in mind that explicit agreements are by no means the only possible restriction to competition under EC competition law. Concerted practices, including tacit collusion, lend themselves nicely to markets

⁶⁵ Commission proposal for an enabling regulation for consortia (OJ (1990), C-167/9) contained a clause on multimodal transport. The Parliament removed this provision, stating that a cross-industry and Community approach would be better.

dominated by a few firms. Such markets are given the economic label 'oligopolistic markets', the effects of which will be discussed later on in the context of liner shipping.

At this point it should be pointed out that the adopted categorisation is only truly useful in a full discussion. Any redundancy of the categories that may appear from the foregoing discussion is down to limitations placed on this study. Reaching out at a few of the 'meaningful conclusions' mentioned above is what this paper sets out to do.

5 The Applicable Law – Article 81 Ec and the Community’s Maritime Regime after Regulation 1419/2006

As indicated, this study diverges from the traditional structure of a legal paper, as it follows the agreements or joint ventures that liner shipping companies make. The relevant law, to be established below, will be applied based on that structure. The maritime transport sector is not one in which a straight forward application of Article 81 EC is the correct approach. The specialised secondary legislation outlined above includes a block exemption for agreements conforming to the definition of liner consortia in Regulation 823/2000, provided certain obligations are met. Furthermore another piece of recent secondary legislation, Regulation 1419/2006, has revealed a temporary patchwork of legislation for Community maritime transport. The effects of this regulation and the legislation that it leaves behind will be examined below. Following that will be an analysis of the block exemption for liner consortia.

The last relevant legal provision to be looked at will be the Treaty itself - Article 81 EC. The reason for discussing this last out of the legal provisions is simplicity. Having adopted an unorthodox structure the focus has been placed on the structure of liner shipping. If specialised secondary legislation can be applied to those agreements, as is more likely than not, Article 81 EC need not be considered. Those agreements will have been exempted from its scope. As such, the legal landscape for this work is dominated by the specialised secondary legislation, reinforced by the prohibition in Article 81(1) EC and, importantly, the possibility of an individual exemption under Article 81(3) EC.

5.1 The legal landscape post - Regulation 1419/2006

Following an uncharacteristically brief assessment of the Community's maritime sector, the Council adopted a regulation that embodied the changes deemed necessary. In short, Council regulation 1419/2006 repeals the liner conference block exemption over a two year transitional period. Furthermore, tramp and cabotage operations are brought under the ambit of Regulation 1/2003, the 'Modernisation Regulation'. For our purposes, whilst the latter regulation will be important, the repeal of Regulation 4056/86 is more significant.

The efforts of liner conferences in Europe, through the European Liner Affairs Association,⁶⁶ were to some extent seen as putting off the inevitable. Certainly the repeal of the block exemption for liner conferences reflects this by allowing for a two year phase out period. This will end on 18 October 2008. The provisions of Regulation 4056/86 left in place during this period include Articles 3 to 7, Article 8(2) and Article 26. These provisions only apply to conferences in place at the date of the repeal. They permit the block exemption and conditions relating thereto for two years. Furthermore, the ability of the Commission to withdraw the exemption is maintained, as is the ability of the Commission to alter the scope of the obligation to communicate awards at arbitration and recommendations to it.

⁶⁶ The European Liner Affairs Association, or ELAA, was a body established as a united front, representing the interests of liner shipping undertakings operating in Europe. The body has invested great effort in maintaining the conference system in Europe.

5.2 Technical agreements in Article 2, Regulation 4056/86

The repeal of the conference block exemption seems unsurprising given the weight of academic criticism against the regime. Even less surprising is the repeal, in particular, of Article 2 of that regulation. It is rare to find provisions such as Article 2 in legislation of the importance of Regulation 4056/86 for the reason that it has been correctly described as ‘merely declaratory’.⁶⁷ In being so, it failed to clarify the position of ship owners and has been accused of causing a good deal of confusion.

5.2.1 The legal quality of the exception for technical agreements

The origins of the Article are found in Article 3 of Regulation 1017/68.⁶⁸ The spirit of the latter article is maintained throughout Article 2, Regulation 4056/86. Its purpose was to except technical agreements in Community rail, road and inland waterway transport from the applicability of EC competition law. The exact meaning of Article 3, Regulation 1017/68 was found to be in doubt following the French Seamen case, discussed above. With the applicability of article 81 EC to areas regulated by the Treaty previously argued to be outside its scope, an exception contained in a piece of secondary legislation could not attain its purpose – Article 81(1) EC was applicable and only ceased to be so if Article 81(3) EC was satisfied.

Article 3 of Regulation 1017/68 therefore came to be interpreted as a declaration of agreements that are not, by their nature, restrictive of competition. Reading Regulation 4056/86, in force

⁶⁷ Blanco, p. 187

⁶⁸ Greaves, ‘European Transport Law’, page 141

twelve years after the French Seamen case, this is certainly hinted at in the text and the same conclusion, that it is not an exemption from Article 81(1) EC, can be drawn regarding Article 2 thereof. The seventh recital of the 1986 regulation states that the exclusion of technical agreements from the Treaty prohibition is granted because such agreements do not restrict competition. One could question the necessity of stating that collaboration that does not restrict competition is exempt from the prohibition of competitively restrictive collaboration.⁶⁹

5.2.2 Justifications for Article 2, Regulation 4056/86

That said, the inclusion of the provision could be justified on the grounds of certainty. Stating explicitly the types of agreements that are in mind throughout the liner conference block exemption could be wise. Such an approach could set clear boundaries and allows ship owners and liner shipping companies the opportunity to see what they can do under the legislation. Support for this view might be the fact that Regulation 1/2003 was not to emerge for another seventeen years.

Regulation 1/2003, allowing as it does for the direct applicability of the EC competition rules and Article 81(3) in particular, ended the need for the Commission to consider the permissibility of many minor competitive infringements. Prior to this, undertakings uncertain of the status of their agreements under Article 81 EC would have to approach the Commission. Self assessment and ‘compliance until told otherwise’ was not available in 1986. So it could be submitted that the seemingly exorbitant Article 2, Regulation 4056/86

⁶⁹ The Commission did so in its proposal to repeal Regulation 4056/86 in 2005 at paragraph 21, 2005/0264 (CNS)

was a necessary time-saving device instigated by the Council on behalf of the Commission.

A final comment on the character of the exclusion of technical agreements turns on the wording of the article itself. Such agreements, it is stated, are permissible provided that it is their “...*sole object and effect* to achieve technical improvements or cooperation...”⁷⁰ This seems to be a reminder that liner shipping companies complying with the block exemption’s requirements, can make technical agreements provided that is all they are – technical. In furtherance of the need to state this in the legislation is the content of the article itself, which at times looks suspiciously anti-competitive in its effects, if not objects. Explicit guidance in such a manner reinforces the seventh recital’s point that in mind here are agreements that do not generally restrict competition.

Speaking generally, competition law is often a Delphic topic. To ship owners not versed in the law it must seem incomprehensible that agreements, even those that are not really agreements but coordinated market behaviour or other tacit collusion, can give rise to large fines. Article 2 of Regulation 4056/86 did not help matters in this regard. It looked on its surface to be an exemption from competition law when in fact it is not. It also looked on its surface to be a list of agreements that are permissible under EC law. In fact it is not.⁷¹ For this reason, in spite of the possible justifications above, the provision did not clarify the law or create legal certainty for liner shipping companies.⁷² As much the Commission has

⁷⁰ Article 2, Regulation 4056/86 (Italics added)

⁷¹ See, for example, Letter (f), Article 2, Regulation 4056/86 – this is clearly a potential restriction of competition if read without restrictions to its application, which go without mention in the provision.

⁷² See Commission decision in *FETTSCA*, (2000), OJ (2000), L 268/1

admitted itself.⁷³ Commentators have instead cited it as a weakness in the liner conference block exemption.⁷⁴

5.2.3 Other elements in the application of Article 2, Regulation 4056/86

Having established that Article 2 was ‘merely declaratory’ whilst the agreements listed therein were potentially restrictive of competition, one could question whether it was wise to attempt to use the exception for technical agreements at all without knowing what further considerations under the Article, perhaps not stated therein, it was advisable to comply with. The answer to this problem is important in assessing under which conditions the spirit of Article 2, regulation 4056/86 lives on after Regulation 1419/2006. In determining this it will be possible to see what guidance can be drawn from the now-repealed provision on technical agreements.

As an example of such ‘further considerations’ we could take an agreement between firms that do not actually or potentially compete. Agreements between firms operating in different markets are not caught by the prohibition contained in Article 81(1) EC.⁷⁵ It follows that agreements that would have fallen under Article 2 of Regulation 4056/86, even if they contained some commercial element, would not be prohibited under the Treaty.⁷⁶ Regardless of Article 2, such agreements are not a competitive concern. With this

⁷³ Proposal for a Council regulation repealing Regulation No 4056/86... 2005/0264 (CNS) paragraph 20

⁷⁴ Dinger, p. 102; Blanco, p. 187

⁷⁵ For example, see the Commission’s decision in *Cegetel*, (1999), OJ L 218/14

⁷⁶ Furse notes caution due to the tendency of the Commission to find Article 81(1) EC applicable and then granting an exemption, page 170

in mind the provision simply looks like a useful list of examples of technical agreements that non-competing firms could make.

The logic of this example could equally be applied to any agreement that falls outside Article 81(1) EC, for whatever reason. But, for other undertakings such as actual or potential competitors, agreements in the areas listed in Article 2 of Regulation 4056/86 that are not purely technical should be flagged-up as more likely than not to fall foul of Article 81(1) EC. It will then be for the undertakings involved to apply for an individual exemption under 81(3) EC. This process will become clearer below, under the discussion of the Treaty.

5.2.4 Summary

Article 2 of Regulation 4056/86 was declaratory while that regulation was in force. Upon repeal of the provision without a transitional period, the legal effects are minimal. After all, Article 2 contained examples of agreements that were not meant to be restrictive of competition in the first place. Now, the main reference for a liner shipping company seeking legal clarity will be Article 81 EC. Avoiding Article 81(1) EC or complying with 81(3) EC will mean that there will be no competition problems. For example, if the agreement under consideration is truly technical or is not between actual or potential competitors, the analysis would not even get as far as individual exemptions because 81(1) EC would not be applicable. In this light Article 2 of Regulation 4056/86 is nothing more than what it was before being repealed – a useful list of agreements in the technical sphere. Perhaps now it is gone, this provision will not be relied upon by liner shipping companies as it was in the FETTSCA case, to their bemused detriment.

5.3 The liner consortia block exemption

The consortia block exemption comes from the Commission on authority from the Council through Regulation 479/92. The Commission being a less political institution within the Union and consortia being less controversial than their price-fixing counterpart of liner conferences, there has not been so much heated debate surrounding the block exemption originally contained in Commission Regulation 870/95. Indeed, that regulation has been only marginally amended in twelve years, and looks, following its second ‘renewal’ in 2005, to be set to stay as a feature of Community regulation in the maritime sector.

The consortia block exemption’s substantive provisions are contained in Regulation 823/2000, as amended by Regulations 611/2005 and, earlier, 463/2004. Having set down the basics of liner consortia above in ‘The liner shipping industry’⁷⁷, the substantive provisions of Regulation 823/2000 will be discussed here by first detailing the Regulation’s scope. The substantive provisions of the block exemption will be outlined before going on to discuss what effects, if any, the repeal of Regulation 4056/86 has had on liner consortia.

5.3.1 The scope of the liner consortia block exemption

The application of Regulation 823/2000 depends on four main criteria. Broadly speaking, these four may be grouped into two categories of ‘territorial’ and ‘personal’. In addition, one could establish a third category by pointing to the temporal aspect of the block exemption as, unlike Regulation 4056/86, consortia have a limited life span of five years from the start of the exemption.

⁷⁷ See 2.5, ‘Containerisation, consortia and alliances’

Article 1 of Regulation 4056/86, entitled 'Scope', details these two main categories.

5.3.2 Personal scope of Regulation 823/2000

In terms of the legislation's personal scope, the relevant terms are 'consortia' and 'liner transport services'. These concepts are defined in the following provision, Article 2, in paragraphs one and two respectively. These definitions reveal an overlap as the definition of consortium, broad almost to an extreme⁷⁸, includes the phrase "...vessel-operating carriers which provide international liner shipping services..." It could therefore be said that a consortium by its very nature offers liner transport services. But the definition in Article 2 refers not to the consortia themselves but rather the liner-members thereof – "*vessel-operating carriers* which provide liner transport services".

Thus, to be a member of a consortium the undertaking must offer liner transport services. The benefit of the block exemption, under Article 1, applies "only in so far as" the consortium itself offers liner transport services. This is the personal scope of the block exemption – groups of liner shipping companies offering liner shipping services. Such services are defined, as stated, in Article 2, paragraph two of regulation 823/2000. The relevance of that definition crucially prevents tramp shipping services and the transport of passengers benefiting from the block exemption.

It has already been indicated that membership of a conference and a consortium contemporaneously is a possibility.⁷⁹ However so-

⁷⁸ Dinger, p. 128

⁷⁹ Recital 8, Commission Regulation 823/2000; Articles 5 and 6 thereof are also evidence of this

called ‘tolerated outsider’ agreements are not a possibility.⁸⁰ ‘Tolerated outsider’ agreements are those between consortia and between consortia and other liner shipping companies. Disallowing them is perhaps to ensure competition outside the consortia involved, and perhaps to make consortia the framework agreement of choice for liner shipping companies.⁸¹

5.3.3 Territorial scope of Regulation 823/2000

In considering the territorial scope of the block exemption the noteworthy phrases from Article 1 are ‘international’ and ‘from or to one or more Community ports’. To my mind the interpretation of ‘international’ is straight forward. Goods that go from one country to another country have been transported internationally. This is not the same as merely crossing an international boundary during a journey. Because there are many independent nations within the European Community, even transport between those states is international and thus falls under the liner consortia block exemption from EC competition law. Cabotage, transport within one state, is thus not included, although part of a journey within a country could constitute part of an international transport of goods so long as the goods are not being loaded and discharged in the same state. An example of this might be taking goods along the River Rhine before taking the vessel out to sea and on to, say, France.

That is the general position. The extent to which multimodal transport is covered by the Regulation will be discussed below under the assimilation of the law with the agreements made by liner shipping companies inter se.

⁸⁰ Recital 21, Commission Regulation 823/2000

⁸¹ Dinger, p. 103

‘From or to one or more Community ports’ presents a different problem regarding interpretation. Community ports do need to be defined. However the remainder of the quote has two parts that can be split-up and discussed separately. The same two parts – ‘from or to’ and ‘one or more’ also appear in the liner conference block exemption, Regulation 4056/86. Reference to that Regulation’s interpretation may therefore offer some guidance here.

Firstly, the block exemption applies ‘from or to’ the Community. Consortia, therefore, benefit from the block exemption on all journeys beginning in and ending in the Community. This is advantageous to both importers and exporters who benefit from lower rates. It clearly excludes non-Community transport. To all of the carriers in the Community, this could be termed cross-trading outside the European Community.⁸²

The second part, ‘one or more’ is included to clarify the position of the block exemption towards consortia operating extensive logistics networks across the Community. Operating out of several ports does not prevent the block exemption applying. This echoes the position described above, that liner shipping in consortia operating between member states maintains the block exemption benefit. It also expands the point made in the preceding paragraph that the regulation covers journeys beginning and ending in the Community – it also covers the journeys forward from those ports and within the community that satisfy the requirement that that transport is international.

⁸² Whether or not this position could be affected by the doctrine of effects is doubtful. On that doctrine under Article 81 EC, see Whish, p. 106 et seq.

5.3.4 Main features of the consortia block exemption

After the provisions related to scope and definitions in Regulation 823/2000 comes the exemption itself and the conditions related to it. They are built upon the broad brush strokes of Article 81(3) EC. The exemption is in the form of an exhaustive list of agreements that liner consortia members may make between themselves in letters (a) to (g).

Some of the daily operations of liner shipping consortia appear in the list in Article 3(2)(a) of Regulation 823/2000. The use of the word “solely” at the start of this provision indicates a restriction on liner shipping companies. If a consortium agreement is to make use of the block exemption, agreements on its day to day joint operation are restricted to the list therein. Letters (b) to (f) contain other arrangements that might form a liner consortium agreement. Notable amongst these are temporary capacity management programmes in letter (b) and the possibility of forming cargo and revenue pools in letter (d). Consortia may also operate port terminals jointly (letter (c)), vote in conferences as a block (letter (e)), operate joint marketing structures and issue joint bills of lading (letter (f)).

Lastly, via letter (g) of Article 3(2), any agreements necessary for achieving the agreements in the preceding six letters are permissible. In this regard, two specific examples are mentioned in Article 3(3). Thereby, consortia might agree that extra tonnage requirements may only be chartered in from amongst the member lines unless clearance is granted to agree otherwise. Tonnage might also be chartered out with the express agreement of a consortium itself.

The exemption is built upon by Article 4 with regard to capacity management programmes. Thereby, no percentage reductions of capacity may be adopted. The consequence of this is that if capacity is to be reduced, this may only be done by a reduction of vessel

numbers or the number of sailings. Recital seven of the regulation seems to put this down to proportionality – only allowing that which is necessary to achieve an agreement’s ends. It states that capacity management by percentage “is not an essential feature of consortia.” However, some commentators have explained this provision, with great supporting evidence from the Commission, by citing consistency with the approach taken towards Regulation 4056/86. This inconsistency, particularly in light of the repeal of Regulation 4056/86, indicates the need for further discussion of this topic. This is done through the final part of this work.

Article 5 of Regulation 823/2000 closely reflects part of Article 81(3) EC, which will be discussed below. Liner consortia are permitted to operate on a market, provided there is effective competition. The purpose of this is to prevent a consortium becoming the only player on a given market, acting effectively as a monopoly. For consortia within conferences there must be competition, within the conference, on either price or the quality of services offered. Consortia outside conferences must be subject to actual or potential competition from outside lines.

Maintaining this effective competition pursuant to Article 81(3) EC are two further provisions. Firstly, it is only through the consortia structure that the benefits of the block exemption may be obtained. That is to say, no outsiders can make agreements with consortia or their members and thereby avoid Article 81(1) EC.⁸³ Secondly, Article six limits the benefit of the block exemption to consortia with market shares under a certain amount.

⁸³ This objective, set out in recital 21 of the regulation, is achieved through the definition of consortia and the absence of any provisions regarding ‘outsider’ lines.

Articles 8 and 9 of Regulation 823/2000 set down conditions and obligations that are somewhat more procedural in their nature.⁸⁴ These include the rights to withdraw from a consortium, to market independently and holding consultations between shippers and consortia. Service arrangements, commonly known as individual service contracts, are permitted through Article 8(a) and the principle of non-discrimination, pursuant to recital 13, is contained in Article 8(d).

The last aspect of relevance from Regulation 823/2000 is Article 10. This allows for agreements to be made between transport users and consortia so long as they are adopted through the consultation process provided for through Article 9 and concern the conditions and quality of liner shipping services.

5.3.5 A note on alliances

Alliances are not regulated under EC competition law. They are sometimes formed through the use of the consortia block exemption, though often they utilise far more complex structures. There is consensus amongst many academics that 'global strategic alliances' do not create any competition law problems. In this light, it seems unlikely that any regime will be forthcoming.⁸⁵

5.3.6 Summary

Regulation 823/2000 is a clear piece of legislation. It looks to achieve a workable block exemption with the use of checks and

⁸⁴ Article 7 was deleted by Regulation 463/2004 and is not discussed here

⁸⁵ OECD Report, pp. 37 & 55-56; see also Kreis, 'Liner Services: The Block exemption and Inter-modal Transport', from Bull and Stemshaug, 'EC Shipping policy', (1996), p. 129

balances. These aim to ensure that the regulation's base⁸⁶ in the Treaty, Article 81(3) EC, is abided by. The Treaty will be discussed in the following section.

Consortia have not been affected a great deal by the repeal of the conference block exemption. This is helped in part by Regulation 1/2003, which did much to clear the way for Regulation 1419/2006 and the removal of liner conferences. For example, consortia looking for individual exemptions under Article 81(3) EC were presumed compliant with EC competition law unless told otherwise because that is what Regulation 1/2003 dictated should happen. This saved them from looking to the then-repealed Article 12, Regulation 4056/86. The effect of the repeal of the remainder of the latter regulation was therefore already greatly diminished, even as the Community institutions began to discuss the viability of liner conferences.⁸⁷

As indicated, the next section will set out briefly the source of EC Competition law regarding agreements between liner shipping companies, Article 81 EC. Following that, some of the already established agreements that lines would like to make between themselves are analysed in light of the EC liner shipping regime.

5.4 Article 81 EC

5.4.1 Introduction

In the first section of Title VI to the Treaty of the European Community appear several articles forming the body of law

⁸⁶ By this is meant the regulation's inspiration – not the legal provision that allows the Council and Commission to pass such block exemptions.

⁸⁷ A discussion of the end of the notifications for individual exemptions is found in Whish, p. 164

commonly known as EC competition law. The focus here is on Article 81 EC.

EC competition law was intended to be one means of counteracting divisions within the Community. That intention remains strongly reflected in case law and Commission decisions.⁸⁸ Article 81 EC is designed to catch any collaborative arrangements, whether explicit or not, that at least aim to prevent, restrict or distort competition within the common market. There must be an effect on trade between member states. The list of agreements, (a) to (e), are considered to be competitively restrictive as a rule. Agreements within this general ambit are void with direct effect. Certain conduct may be exempted from the prohibition through Article 81(3) EC because of the benefits it produces.

5.4.2 “Undertakings” within Article 81(1) EC

Loosely, undertakings under EC competition law include ‘every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed’.⁸⁹ Although liner shipping companies undoubtedly fall within this definition, two further points remain that can alter the basic position.⁹⁰ Some discussion has revolved around the status of two or more companies actually being one ‘undertaking. It seems that undertakings forming one single economic entity are to be considered as such within competition law – agreements, for example, between parent and subsidiary companies, therefore lack the necessary collaborative element required for Article

⁸⁸ This is particularly true when considering unilateral actions by undertakings

⁸⁹ Per the ECJ in *Hoefner and Elsner v Macrotron GmbH*, Case C – 41/90 [1991] ECR I-1979

⁹⁰ See Whish p. 80, Jones and Sufrin p. 107 and Furuse p. 21-24

81 EC to apply. Another talking point has been undertakings related by succession. Such undertakings may inherit the competition law liabilities of their predecessors.⁹¹

5.4.3 Agreements, decisions, concerted practices and categories thereof

Article 81(1) EC has been drafted to be as broad as possible. So it is not just explicit agreements that come within its scope. Undertakings may have formed themselves into groups or associations. Decisions by such associations may have a harmful effect on competition between its members. Equally, concerted practices, the most subtle form of collaboration in EC Competition law, could harm competition by affecting the manner in which independent undertakings behave on a given market in relation to one another. Thus it is not only collaboration that is legally enforceable that is under consideration. The secrecy involved in breaches of competition law often leads to evidential problems for the Commission and Community Courts. A wide approach no doubt helps to mitigate these problems.

An agreement is a broad concept under EC competition law. Gentlemen's agreements and oral understandings fall within its scope. Parties to negotiations may also be found to have made agreements, even where it is only one of the parties that has revealed its intentions. The more complex agreements become, the more likely it is that they are written down. Heightened complexity is not mitigated by the existence of written agreement and it has brought several new problems to the enforcement of Article 81 EC. Over time, complex agreements may vary, both in their terms and their membership. In response to this, the authorities have

⁹¹ Whish, page 90

determined that there is no need to distinguish between categories of agreements and concerted practices, although they remain separate conceptually. It has also been declared that single, overall agreements count for the purposes of Article 81 EC. This is in spite of there actually being a complex network of agreements that have changed over time. Undertakings with only periphery involvement in the agreement may still be liable.

The second category of prohibited arrangements is 'decisions by associations of undertakings'. Associations are usually formed when larger numbers of participants take part in the prohibited activity. The category is actually entitled in a misleadingly narrow way as 'decisions' might include agreements made by the association, recommendations to its members (including non-binding recommendations) and even the association's constitution. Associations may sometimes behave as an association and at other times, for example, as a servant of government. The effects on competition of associations of undertakings are considered under this heading.

The final category of competitively restrictive collaboration is concerted practices. These have been described as loose arrangements, not qualifying as agreements within Article 81(1) EC. Through the case law of the ECJ, upholding the decisions of the Commission, it could be said that concerted practices involve direct or indirect mental consensus between undertakings to behave in a certain way. Further, there must be some form of reciprocity, as the term 'consensus' implies. A concerted practice does not, by definition, require there to have been effects on the market. There is a presumption that the conduct putting into effect the contents of the mental consensus will follow.

Concerted practices present a special difficulty for competition authorities. This is because certain conditions may lead to market behaviour that looks similar to a concerted practice. Oligopolistic markets, dominated by only a few firms, may lead firms to making

similar decisions at similar times. This is perhaps why the ECJ has insisted that, where the evidence submitted by the Commission is circumstantial, the presence of any other explanation for the conduct in question will result in the setting aside of the Commission's decision. This, a rather more economic aspect of competition law, is mentioned later with regard to liner shipping companies.

5.4.4 The object or effect of the prevention, restriction or distortion of competition

Article 81(1) EC has as its focus only those arrangements that aim to be, or are, significantly harmful, directly or indirectly, to actual or potential competition. Many commentators do not attempt to define "prevention", "restriction" or "distortion". Rather, their characteristics are displayed through case examples. Often a distinction is not drawn between the three adverse effects on competition. "Restriction" is used as a blanket term. In this work, there is not enough space to list examples of the types of arrangements in mind. I have therefore taken the more important aspects of this part of Article 81 EC, to display the provision's application. This section also adopts the phrase 'restriction' as the focus of the provision.

Article 81 EC has clearly been drafted in the broadest possible manner. Within its scope fall arrangements that have as their 'object or effect' the restriction of competition. These two concepts should be considered separately. They are "alternative, not cumulative requirements".⁹² If the arrangement has a competitively harmful object, there is no need to look at its effects. There are not many such arrangements whose objects are considered to be *per se* restrictive of competition. Examples include price fixing and market sharing, as noted in Article 81(1) EC itself. Falling within this

⁹² Jones and Sufrin, p. 187

category does not exclude the possibility of individual exemption under Article 81(3) EC. If it cannot be said that the object of the agreement, decision or concerted practice is to restrict competition, its effect must be examined. This requires an economic analysis of the arrangements under consideration and the undertakings involved.⁹³

Restrictive agreements, decisions and concerted practices include not just those between undertakings at the same level of the market, such as 'suppliers' or 'retailers'. These are known as horizontal arrangements. Vertical arrangements occur between undertakings operating at different levels of the market and, controversially, have been brought within the scope of the Community's competition provisions.⁹⁴ Parents and subsidiaries sometimes fall to be considered here, as do suppliers and distributors. For both horizontal and vertical arrangements, there are block exemptions for certain categories and detailed guidelines issued by the Commission.

The Commission's approach to restriction of competition has been much criticised for being too formalistic and lacking a sufficient grasp of the underlying economic factors. There can be no doubt that it has positively reacted to this criticism and has adopted a more 'realistic' approach. Worthy of mention regarding the Commission's general approach is also the broadening of the block exemptions, particularly for vertical arrangements, for economically beneficial activities. Some activities, even without a block or individual exemption, are simply necessary in pursuing certain

⁹³ Whish, p. 111

⁹⁴ *Consten v Commission*, Case 56/64 [1966] ECR 299; *Grundig v Commission*, Case 58/64 [1966] CMLR 418

legitimate commercial purposes.⁹⁵ Such activities fall outside Article 81(1) EC.

5.4.5 The de minimis doctrine

Economic analyses of arrangements inevitably bring the question of the de minimis doctrine into mind.⁹⁶ Under this doctrine, there must be “an appreciable impact either on competition or on inter-state trade” for Article 81 EC to become applicable.⁹⁷ Significance is measured not only in terms of the impact that a restriction has economically. The market power of the undertakings involved will also determine whether or not there is a competition law concern. Because of the nature of these activities, informal settlements are usually made by the Commission. As such, there is not a great deal of case law or decisional practice to draw from. A guidance paper in 2001, ‘Commission Notice on Agreements of Minor Importance’ sheds light on the matter, however. It should be noted that this document is not legally binding.

5.4.6 Effect on trade between Member States

“Trade” is construed broadly to include many activities with a commercial character. Sales, services, transport and even ‘energy’ are considered here⁹⁸. This part of Article 81(1) EC has been stated to be a ‘jurisdictional’ issue.⁹⁹ The Commission and Courts do not

⁹⁵ Whish, p. 119

⁹⁶ First formulated by the ECJ in *Volk v Vervaecke*, Case 5/69 [1969] ECR 295, [1969] CMLR 273

⁹⁷ Whish, p. 132

⁹⁸ ‘Energy’ refers to the transfer of electricity and other commodities

⁹⁹ *Consten & Grundig*, *supra*, note 91; Whish, page 138

have jurisdiction over matters affecting only one Member State.¹⁰⁰ Nonetheless, two undertakings from the same state, or an arrangement only implemented in one Member State, can still feasibly affect trade between Member States. The effect on trade can be actual or potential, direct or indirect.¹⁰¹ Thus, the broad scope of Article 81 EC is maintained here.¹⁰²

Exactly how broad the provision is begs an important question – in an increasingly globalised world, particularly in the last quarter century, how far will EC law extend to activities not occurring in its territory and not involving undertakings established or having subsidiaries therein? It is understandably difficult to establish jurisdiction where the activity concerned is between two third party countries. Jurisdiction in competition law issues is traditionally decided by the economic entity theory¹⁰³ or the principle of territoriality.¹⁰⁴ However, the ECJ has refrained from commenting on the potential use of the doctrine of effects to expand its use of EC competition law. This is despite the Commission and a number of advocates general being openly enthusiastic for its adoption.¹⁰⁵ The doctrine of effects allows for the jurisdiction of a court to be

¹⁰⁰ Hugin Kassaregister AB v Commission, Case 22/78, [1979] ECR 1869

¹⁰¹ Whish, pp. 138-40

¹⁰² Generally, see Commission Notice, 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', OJ C 101/81

¹⁰³ In other words, where an undertaking is based or has some legal foundation like a subsidiary, in the Community. See, for example, Commission Decision in Dyestuffs, 96/243/EEC, 24th July 1969, OJ 1964, L 195/11

¹⁰⁴ Typically, where the arrangement has been implemented within the Community between undertakings outside it

¹⁰⁵ Commission decision in Wood Pulp, (1984), OJ 1985, L – 85/1

established where the activity concerned has an impact that is prohibited within its borders.¹⁰⁶

This issue is of pertinence to the liner shipping industry. Territoriality and economic entity theories can only be useful to the Community courts up to a point. I disagree that it is unlikely that the doctrine of effects will come to be used.¹⁰⁷ Europe has countries on its doorstep, such as Morocco, Russia and Turkey, through which goods are taken into the Union. Price fixing, for example, on routes to these countries from third parties, and subsequent transport to Member States, could potentially do harm to the Community. However, this conduct is caught only by the doctrine of effects. Without a doubt, controls and measures would have to be included in any adoption of such a practice, lest the long arm of Community competition policy begin to look uncomfortably American. In my opinion there has to be some room for the doctrine of effects within EC competition law, taking into account the political implications of such a step. For now, no such stance has been taken and the doctrine is firmly outside the law. Perhaps Kreis sums up the position best while discussing potential conflicts of laws: “Although the Commission’s jurisdiction to apply its competition laws is governed by the territoriality principle it cannot entirely stop at the EU water’s edge...”¹⁰⁸

5.4.7 Article 81(2) EC

Arrangements falling within Article 81(1) EC, as well as possibly attracting a fine, are void without any further decision being required, by virtue of Article 81(2) EC. The agreement, decision or

¹⁰⁶ Whish, p. 431

¹⁰⁷ Whish, p. 437

¹⁰⁸ Kreis, in Bull and Stemshaug at p. 160

concerted practice is simply void, unless it falls within Article 81(3) EC, to be discussed below. This takes effect from the date of conclusion of the agreement or on the coming into effect of Article 81(1) EC, whichever occurred latest.¹⁰⁹ The arrangement is void in its entirety only if the offending clauses or sections cannot be removed from the arrangement without removing the essence of the arrangement.¹¹⁰ In national courts, severability is to be decided according to the customary national rules.¹¹¹

5.4.8 Article 81(3) EC

The last part of Article 81 EC contains the legal exception to the prohibition. As a preliminary note of interest, this exception is now directly applicable. From 1st May 2004 undertakings were able to assess their own agreements for compliance with Article 81(3) EC. If questioned, the burden of proof lies on that undertaking to show that it has complied with the four requirements of the exception. As well as easing the workload of the Commission, this change has necessitated clear guidance to aid in undertakings' self assessments. The Commission issued guidelines on this area of the law, but firms may also draw on guidance from block exemptions granted under the framework¹¹² of Article 81(3) EC and case law from the Commission and Community Courts.

Article 81(3) EC is an interesting arm of Community competition law in that it provides a broad margin of flexibility to the Commission, Courts and National Competition Authorities to

¹⁰⁹ Furse, p. 188

¹¹⁰ Furse, p. 188

¹¹¹ Whish, p. 289

¹¹² And Article 83 EC. Note also the use of the word "categories" in Article 81(3) EC. It lays the ground for block exemptions.

decide where the limits of competition law lie. The fact that, as Whish emphasises¹¹³, all agreements, regardless of their terms, are in theory capable of fulfilling the requirements of Article 81(3) EC, demonstrates the importance of this flexibility. The extent to which legal certainty and predictability are sacrificed is open to debate. Despite being exempted from Article 81(1) EC, arrangements satisfying Article 81(3) EC remain subject to Article 82 EC regarding abuses of dominant positions.¹¹⁴

There are four criteria for the satisfaction of Article 81(3) EC. They are cumulative and exhaustive.¹¹⁵ If one is not fulfilled, there can be no legal exception through the provision. Each criterion is laid out below.

5.4.8.1 Gains in efficiency

The Treaty does not use the words ‘gains in efficiency’ but this is broadly what it is referring to. It is helpful to look as widely as possible at the phrase “which contributes to improving the production or distribution of goods or to promoting technical or economic progress”. Commentators note that there is a tendency by the institutions to interpret Article 81(3) EC as broadly as possible. Considerations look towards the greater aims of the Community – economic integration and the common market, the four freedoms, social aims and even environmental policy. Suffice it to say, whatever the gains, they must be demonstrable and a clear link to the arrangement should be apparent.

¹¹³ Whish, p. 150

¹¹⁴ Whish, p. 161

¹¹⁵ Furse, p. 193

5.4.8.2 A fair share of the benefits should go to consumers

The benefits that gains in efficiency produce are, as could be inferred from the diversity in the types of gains in mind, not just cheaper goods or services. Greater regularity of services is a benefit, as is choice or an increase in the volumes available¹¹⁶. Indeed in the Reims II judgment, even a form of price fixing was held to improve the intra-Community postal system.¹¹⁷ Sometimes, commentators have stated, a benefit can be presumed where the market is a competitive one.¹¹⁸

It is “consumers” to whom these benefits must be passed. A consumer is any person, legal or natural, acquiring goods in the course of trade.¹¹⁹ As such, it is not necessarily the public that should be able to take advantage of lower prices or greater stability and regularity of services. The last part of this criterion, the “fair share”, affords flexibility to the Community institutions, as it has not been defined.¹²⁰ Suffice it to say that it will usually be apparent when the competitive restrictions of an agreement outweigh the benefits felt lower down the economic chain.

5.4.8.3 The arrangement must not contain any dispensable restrictions to competition

This arm of Article 81(3) EC is a manifestation of the principle of proportionality. If there is going to be an exception from the prohibition, the exception will only allow what is necessary. Which

¹¹⁶ Metro-SB-Grossmarkte GmbH & Co. KG v Commission, Case 26/76, [1978] 2 CMLR 1

¹¹⁷ Reims II, OJ L275, [2000] 4 CMLR 704

¹¹⁸ Furse, p. 193

¹¹⁹ Whish, p. 156

¹²⁰ Ibid.

points to the block exemptions for examples of what sort of elements are considered unnecessary.¹²¹ It seems clear to me that a restrictive element, so long as it can be objectively justified on strong economic or commercial grounds, will be allowed. For example, high charges for a service could be justified, as they were in the Visa International case.¹²² Exclusivity might be considered indispensable despite its clear impact on competition, particularly in matters concerning intellectual property or distribution agreements.

5.4.8.4 The elimination of competition

The last element of Article 81(3) EC is a negative requirement. Undertakings should not be allowed to eliminate competition on a substantial part of the market in question. This being the last of four cumulative criteria, commentators have noted that the elimination of competition is sometimes the neglected head under Article 81(3) EC. Large undertakings will inevitably find it more difficult to avoid eliminating competition than their smaller rivals as their market shares are presumably larger. Nonetheless, there is a suggestion that the Community authorities have been lenient in this respect, to keep the Community competitive 'abroad'. Because of the economic analysis here, the relevant market must be defined. In doing so, actual and potential competition must be considered. Allowing market access to potential competitors is therefore of importance.

¹²¹ Whish, p. 157

¹²² OJ [2002] L 318/17, [2003] 4 CMLR 283

5.4.8.5 Summary

Article 81 EC is as broad a provision as one will find amongst competition regimes. It allows for most forms of economic collaboration to fall within its ambit, and declares those that restrict competition void with direct effect of Article 81(2) EC. The Commission's approach has focused more on the economic realities of competitively restrictive arrangements in recent years and Its work load has been lightened by the 'Modernisation Regulation' in 2003. The ECJ and CFI continue to be the sole interpreters of the Treaty.

Avoiding the prohibition has undergone considerable change as a result of Regulation 1/2003, Article 81(3) EC now being directly applicable. The Commission has retained the right to rule on novel cases but national competition authorities are greatly empowered under the new regime. Block exemptions remain unchanged for undertakings within their scope.

Liner shipping as an industry will need to be fully aware of Article 81 EC's terms. In light of the direct applicability of the individual legal exception, lines are afforded great freedom to make agreements and act in concert where they might be restricting competition. This is so long as they assess their actions correctly under the legal exception. Of course lines may also satisfy the criteria for the most important block exemption in liner shipping, that for liner consortia.

6 Categories of Liner Shipping Agreements under Ec Competition Law

In the previous chapters the agreements that will be taken as examples for agreements in different areas of liner shipping have been laid out, as have the most relevant legal provisions. This chapter aims to assimilate that information. The purpose is to place the legal frameworks around the agreements to establish what arrangements might be reached between liner carriers in the four areas of potential agreement – port, deep-sea, cargo and ‘other’. In each area finding the legal limits on those agreements and outlining the main caveats for liner shipping undertakings will be a priority. Because of the limits placed on this paper, noted above, the four main areas are looked at through examples. It is to be stressed again that this is not an economics paper. As such, economic analyses of undertakings’ agreements would be out of place here.

6.1 Technical agreements; Article 2, Regulation 4056/86 and vessel type agreements

It has been established that the effects of the repeal of Article 2 of Regulation 4056/86 are minimal. The Article was declaratory. The agreements contained therein were not restrictive to competition according to the conference block exemption’s recitals.¹²³ Its repeal was eased by the so called ‘Modernisation Regulation’; Regulation 1/2003, from its coming into force, ensured the direct applicability of Article 81(3) EC.¹²⁴ This meant that undertakings were no longer required to notify the Commission of agreements that could restrict

¹²³ Recital 8, Regulation 4056/86

¹²⁴ Article 1(2), Regulation 1/2003

competition but might be exempted.¹²⁵ The agreements in Article 2 of Regulation 4056/86, although *prima facie* not restrictive of competition, would have had to be notified to the Commission in numerous cases. Their inclusion in a block exemption saved the Commission's time in making legal exceptions for such agreements individually.

Under the conference system, members could agree that only certain types or standards of vessel were to be used.¹²⁶ Agreements on vessel types ensure that all of the undertakings involved can operate a streamlined service. The vessels would all be capable of calling at the same ports, perhaps where cargo lifting equipment needs to be on board the vessel because port facilities are lacking in that respect. The vessels, chiefly container vessels within any consortia operation, could all carry the same cargo. Logistically this makes life a great deal easier for liner shipping companies. And if that is so, life is usually easier for shippers. Within a consortium it is understandable that vessel type agreements might be made. It is highly unlikely that such an agreement might be made in isolation. This type of agreement is ancillary, one could say, to other arrangements.

Article 2 of Regulation 4056/86 having now been repealed, lines in a consortium could look elsewhere for legal certainty. The primary block exemption from competition law for liner shipping – the consortia block exemption – provides a possibility for vessel type agreements, albeit without stating so explicitly. Under Article 3(2)(g) of Regulation 823/2000 activities that are ancillary and necessary to agreements in the other exempted areas are allowed. An example of where vessel type agreements might be ancillary could be the pooling of vessels under Article 3(2)(a)(iii). It would

¹²⁵ Furse, p. 48

¹²⁶ Article 2 (1) (a), Regulation 4056/86

seem sensible to have a common type of vessel in the pool to ease logistics. Equally, under a cargo pool a consortium would require vessels that are capable of sharing the cargo. Of course, it could be difficult to argue for the necessity of an agreement but one could ask if lines even need to look to a block exemption. Vessel type agreements have come from Article 2, Regulation 4056/86. As such these are technical agreements and therefore prima facie not restrictive of competition. It could be that the only advantage of a justification under the block exemption rather than self assessment under Article 81 of the Treaty is legal certainty. The same could be said for technical agreements generally.¹²⁷

6.2 Deep sea/vessel agreements; capacity management programmes

Capacity management programmes are perhaps most exemplary of the liner shipping industry's manipulation of its key assets - vessels - to suit market conditions. Capacity management, as hinted at above, involves the restriction of space on vessels by a group of carriers. Their hope will be to bring about greater ratios of demand: supply, justifying higher prices than those that a wholly competitive market would dictate.

The rationale for this action by lines is, at its most fundamental, to ensure the stability of prices and thus profits. The necessity for this arises because of seasonal fluctuations and temporary directional differences in demand on any given route. In using capacity management, lines create supra-competitive rates; a competition law issue is abundantly clear. In the wording of Article 81(1) EC, capacity management programmes have 'the object or effect' of restricting

¹²⁷ See discussion above at 5.2

competition. In actual fact such collaboration aims to and does affect competition.

The legal response of the Community has been through two block exemptions – those for conferences and consortia. Details of the responses differ in form but the effect is the same. Under both regimes, the Community allowed capacity management programmes but required that no percentage adjustments are made – only reductions in sailings or vessel numbers were adequate. The conference system, after much debate, was restricted in this respect by case law.¹²⁸ The block exemption for consortia, the Commission having learned its lesson, contained such terms from the outset.¹²⁹ In addition, consortia capacity adjustments had to be temporary in nature.

6.2.1 Percentage adjustments of vessel capacity

It has been stated that the exclusion of percentage changes from the scope of the consortia block exemption from the outset was to keep uniformity with the counterpart exemption for conferences.¹³⁰ This, it was said, would prevent conferences from making percentage adjustment agreements under their ‘consortia arms’. However the conference block exemption is now repealed, albeit in a transitional stage. The question then arises as to whether the consortia block exemption should still exclude percentage capacity adjustments to prevent abuses from a regime that is no longer relevant.

¹²⁸ Commission Decision in ‘Trans-Atlantic Agreement (TAA)’ 94/980/EC, OJ 1994 L 376/1; Commission Decision in ‘Trans-Atlantic Conference Agreement (TACA)’, 1999/485/EC, OJ 1999 L 193/23

¹²⁹ Article 3(2)(b), Regulation 870/95

¹³⁰ Dinger, p. 135

Consortia on the whole aim to pursue technical and other activities, often unrestrictive of competition, in operating liner services. They do not fix prices. Given the fact that price fixing combined with restriction of supply, such as capacity management, has been said to be possibly the most effective way to restrict competition¹³¹, it could be argued that consortia are not to be considered in the same breath as conferences, much less to take the lead from the conference legal regime. A consortium's capacity management is considerably less restrictive than the actions legally sanctioned for conferences under Regulation 4056/86. It could secondly be argued that percentage adjustments allow for a more precise industry reaction to seasonal and economic fluctuations.

For the first argument, that capacity management programmes through consortia are, by comparison to the now redundant provisions for liner conferences, far less restrictive of competition, it can be added that change cannot be justified because greater detrimental impacts to competition were felt under a different regime. Percentage capacity adjustments cannot be allowed simply because price fixing is not. Furthermore, the consortia block exemption as we recognise it today¹³² has the added restriction that capacity management must be temporary. So in actual fact the legislature has toughened its stance in this area. Any positive responses to percentage capacity adjustments under the consortia block exemption are unlikely. Such agreements, as the second argument could be said to imply, would place a great deal of control, without adequate restrictions, over actions that are highly restrictive of competition.

¹³¹ Dinger, p. 121

¹³² In other words, Regulation 823/2000

For both of the above arguments, however, the most important answer is fundamental to liner shipping economics and underlines the importance of Article 81(3) EC in the granting of any block exemption. That answer is that percentage changes of vessel carrying capacity do not produce any savings for the carriers. They still have to run the same vessels with similar, if not identical, costs. By contrast reductions in sailings or vessel numbers remove costs from liner shipping companies. Therefore, there is at least the possibility that transport users could benefit from a saving somewhere, as required by Article 81(3) EC. The same could not be true of percentage adjustments.

6.2.2 Capacity management outside consortia

Outside consortia, capacity management agreements between liner shipping companies are, as under vessel type arrangements, unlikely. That is unless such an arrangement is complimentary to other collaboration. An example might be in alliance structures or other joint ventures. There can be no doubt that such agreements or concerted practices would fall under Article 81(1) EC. This, of course, presumes that ‘ordinary’ liner shipping companies are involved - free from state obligations or other factors that would cause an entity to cease being an undertaking under the competition provisions of the Treaty. Capacity management, as stated above, aims to and does restrict competition. Despite liner shipping being a predominantly international business, there must be a demonstrable effect on trade between Member States, and that effect must be over and above the requirements of the *de minimis* doctrine.¹³⁵

¹³⁵ See section 5.4.5

Article 81(2) EC would therefore make such agreements void from their conclusion unless an individual exception could be made via Article 81(3) EC. Capacity management leads to no clear gains in efficiency, as required by that provision, as carriers are only really pursuing their own profits. But it could be argued that liner shippers, by restricting supply, allow for the stability of rates and thus services. The smooth running of services has been held to be a benefit sufficient to trigger Article 81(3) EC, as discussed above.¹³⁴ In addition, any capacity management programmes outside consortia, whilst not having to fulfil the criteria imposed on consortia through the block exemption, would have to show that the arrangement included only indispensable terms and that these terms did not enable the to eliminate competition in relation to a substantial part of the products in question. These two requirements will depend on an economic and contractual/contextual analysis of the exact agreement or concerted practices in question.

6.2.3 Summary

Within consortia the use of capacity management is allowed provided that certain limits are respected. These limits find their contents reflected by the broader terms of Article 81(3) EC. This is particularly true of the exclusion of percentage capacity adjustments, which ensures that the benefits of savings from not using entire vessels or sailings are passed onto consumers.

Outside consortia Article 81(1) EC looks to be generally applicable and, depending on the exact circumstances, so is Article 81(3) EC. Thus such arrangements may be exempted from Community competition law. This is unsurprising, given that

¹³⁴ Supra, note 117

capacity management finds itself excluded from Article 81(1) EC through a block exemption based upon Article 81(3) EC. This would not be the case, however, for agreements or concerted practices involving percentage adjustments of capacity – the benefits of these arrangements are unlikely to be passed on to consumers as no actual gains in efficiency are made by the liner shipping companies. It seems that the repeal of Regulation 4056/86 has had no effect on the Community’s legal approach to capacity management programmes, excepting that towards liner conferences.

6.3 Cargo; individual service contracts

The title ‘cargo agreements’ amongst liner shipping companies could be representative of all agreements in liner shipping – cargo is the focus of the industry. But under this title here, the arrangements in mind are those that directly address cargo. Individual service contracts do just this and have been chosen as an example of agreements related to cargo. The scope for such contracts is so broad that every feasible agreement concerning cargo can fall within it. This section concerns individual service contracts as they are made between liner shipping companies as groups and transport users.

6.3.1 The Community’s response to individual service contracts

The opening of a good deal of controversy regarding the use of individual service contracts came through Regulation 4056/86 and liner conferences. The liner conference block exemption contained no mention of individual service contracts in its main derogation from Article 81(1) EC, Article 3. However in Article 6 of the same regulation, conferences were explicitly allowed to enter into such contracts, offering transport users specially tailored transport

services in return for certain quantities of goods over certain periods of time. Both parties gained predictability.

Members of conferences soon began to offer these specially tailored services outside the conference structure, and thus outside the conference tariff. Often they would undercut the tariff. Conferences responded by restricting the right of their members to make such arrangements. The controversy was only settled when the Commission and CFI ruled, in two linked cases, that any restrictions on the rights of conference members to enter into individual service contracts was invalid.¹³⁵

So the position under conferences stemmed not only from the block exemption but from the decisional practice of the Commission and the case law of the CFI. Conference members could agree amongst themselves to offer specially tailored services to shippers, as could their members on an individual basis.

6.3.2 Liner consortia and ‘service arrangements’

This position was maintained in Article 2(3) of Regulation 823/2000. The block exemption for consortia explicitly mentions ‘service arrangements’ throughout. At recital 11 the ground is laid for such agreements. The substantive provisions appear in the definition at Article 2(3) and the condition in Article 8(a) that each consortium allows members the opportunity to offer individual services. This explicit use of service arrangements by consortia and their members avoids the discussion that arose in relation to liner conferences.

¹³⁵ TAA and TACA decisions, *supra*, note 128

6.3.3 Summary

Individual service arrangements perhaps represent the aim of the Treaty competition provisions. Undertakings are free to offer services on an independent basis, free of restrictions. Where restrictions to competition are necessary or have particular benefits to the economy, the undertakings involved in those restrictions should remain free to operate independently if they wish.

Conferences and consortia restrict competition by allowing liner shipping companies to operate services together, restrict capacity and, in the case of liner conferences, agree on what prices are to be charged for their services. The Community has, regarding conferences, attempted to interpret the block exemption as narrowly as possible. In doing so they managed to keep liner conferences as close as possible to the building blocks of the block exemption, Article 81(3) EC. This was especially important in the face of a politicised Council regulation that could not realistically be argued to conform to the Treaty.

Both consortia and conferences are obliged to allow for individual members to make agreements with transport users and, importantly for this paper, their members are allowed to agree with one another that specifically tailored transport services are to be offered. This makes for the maintenance of effective competition outside the conference or consortia¹⁵⁶, while recognising that the economies of scale brought about by those structures, might also be attractive to transport users.

¹⁵⁶ In accordance with Article 81(3) EC's final, negative requirement that undertakings are not afforded the possibility of eliminating effective competition on the market in question

6.4 ‘Other agreements’; revenue pooling

Revenue pooling in liner shipping represents a greater integration between undertakings in the liner sector. Taking the revenue of all the member undertakings and distributing that on a pre-defined set of rules makes for a severe restriction of competition. But it also makes for logistical ease. A line can carry any type of cargo on any of the routes it serves and still be able to easily predict its revenue. Lines are therefore less concerned, in any collaborative arrangement that involves revenue pooling, with securing the easiest or most profitable cargoes. Members of a revenue pool can also use that status to boost their purchasing power and perhaps bargaining position, collectively and individually.

Liner conferences included the opportunity for revenue pools but, that regime having just one year left and without the possibility of new conference members, the focus here will be on consortia. Through Article 3(2)(d) of Regulation 823/2000 the Treaty competition rules are not applicable to ‘the participation in one or more of the following pools: cargo, revenue or net revenue’. There can be no doubting the need for a block exemption if these sorts of activities are to be allowed – pooling of most kinds is severely restrictive to the market freedom of the undertakings involved and is therefore in direct contradiction to Article 81(1) EC. Outside consortia or conferences, pools are so restrictive to competition that in my opinion their appearance is unlikely. Being paid on a pre-defined basis makes for scant dedication to outdoing expectations or delivering better services. Given this, one could question whether the spirit of Article 81(3) EC has been maintained through Article 3(2)(d) of Regulation 823/2000.

6.4.1 Article 81(3) EC and Article 3(2)(d) of Regulation 823/2000

The first requirement of Article 81(3) EC is that there is a contribution to “improving the production or distribution of goods or to promoting technical or economic progress”. This has been interpreted above as ‘gains in efficiency’ and a broad interpretation has emerged within the enforcers of Community competition law. Revenue pools create predictability for members. This might allow members to budget better for the coming year or take greater risks in other areas of business. This is in addition to greater logistical ease and increases in purchasing and bargaining power already mentioned. These gains must be demonstrable and clearly linked to the revenue pooling arrangement.

Secondly, the flexible amount of a ‘fair share’ of benefits should be passed on to consumers – transport users. Revenue pools, in increasing the predictability of a line’s operations, could be said to enhance the regularity of services. This is a benefit which, through decisional practice, the Commission has stated satisfies Article 81(3) EC.¹³⁷ It has been stated in the opening to this section that revenue pools make the type of cargo less important to lines – that their income is calculated on a pre-defined set of rules. For less desirable cargoes, the benefits are presumably substantial. Their cargo competes for space on vessels on a more even footing with all other cargo. Needless to say, factors like physical ease of carriage would decrease the allure of such cargo. But the mere fact that low freight rates are customary for such cargoes would no longer be a factor. Demonstrating these benefits to transport users and convincing any enforcement authority of their worthiness, given the potentially severe restriction to competition imbued by revenue

¹³⁷ Supra, note 117

pools, would be a tough, though not impossible task in the absence of the consortia block exemption.

Of course, the benefits felt by shippers would depend on the exact details of the revenue pool in question. If the money pooled is only a fraction of profits to cover, say, port facilities, the restriction to competition is minimal and the benefits to transport users greater. So, any general position has to bear in mind the high level of diversity in liner shipping revenue pools. This consideration also rings true for the two negative requirements of Article 81(3) EC. Only by examining a particular revenue pool agreement or consortia agreement could one say if it contained any dispensable requirements. If so, an exemption for the agreement would not be available. The market conditions, as well as the terms of the agreement, would dictate whether or not a substantial elimination of competition would occur. The economic analysis would have to be detailed enough to examine what actual, potential, direct or indirect competition there is. There is no general reason why revenue pools cannot fulfil the two negative requirements of Article 81(3) EC.

The consortia block exemption as a whole represents a benefit to transport users, of that there can be no doubt. And revenue pools play a role within consortia as means to ends. Without pooling revenue, lines might find it difficult to offer other services jointly, as allowed under Chapter II of Regulation 823/2000. The benefits because of consortia are the reason why the block exemption exists. Revenue pools themselves, as an integral part in offering these benefits, need not demonstrate them explicitly.

But for all of the checks and balances that Article 81(3) EC would place on revenue pools if applied directly, Article 3(2)(d) of Regulation 823/2000 merely states that revenue pools may be participated in. However, the qualifications to the block exemption appear later – particularly in Articles 5 and 6. Where Article 81(3)

EC requires that the agreement does not allow the possibility of competition being eliminated, Articles 5 of Regulation 823/2000 requires that effective competition is maintained, within or without conferences. In furtherance of this aim, Article 6 stipulates certain percentage market shares that consortia must remain within. Even is there is some doubt as to the ‘effectiveness’ of the competition under Article 5, Article 6 demands that such competition still accounts for a large part of the market. Thus competition on a market in which a consortium operates, is maintained and the last requirement of Article 81(3) EC is satisfied. The requirement that revenue pools do not contain dispensable restrictions to competition can only be determined by looking at the terms of the pool under the consortium arrangement.

Finally, consortia are bound to allow their members to offer transport users individual service contracts.¹⁵⁸ They are also bound to consult shippers on a regular basis.¹⁵⁹ The framework within which consortia operate is thus very much in the interests of shippers. The practical consequence of this is that revenue pooling actually can affect shippers only very little. Despite the restriction of competition and the effects that pooling revenue might have on the quality of service, transport users still have the opportunity to demand certain levels of service and individually tailored arrangements through individual service contracts and consultations.

6.4.2 Summary

The pooling of revenue is highly restrictive of competition. Despite this fact, such agreements may fall within Article 81(3) EC. This is

¹⁵⁸ Article 8(a), Regulation 823/2000

¹⁵⁹ Article 9, Regulation 823/2000

true to say both in general and for the block exemption they are afforded under Regulation 823/2000. Consortia must conform to conditions and obligations that make sure the fundamental aspects of Article 81(3) EC are respected. The block exemption has to be viewed as a whole. In this way, the practice of revenue pooling itself becomes part of the larger picture of consortia: the benefits passed on to consumers are probably unaffected by what liner shipping companies do with their revenue but without that function, the more direct benefits they feel – the lower prices and regular services – might not happen at all.

6.5 Multimodal transport

Perhaps one of the most striking aspects of containerisation, notwithstanding the vessel changes discussed early on, is the ease with which fully integrated transport operations could then be carried out using two or more forms of transport. If liner shipping companies could agree to offer so-called ‘door to door’ transport services, the economies of scale seen under consortia could be taken advantage of over the whole transport operation. The better deal for transport operators is already felt through individual companies offering transport services between almost any two places. Such operations by individual transport companies lack the collaboration necessary under Article 81(1) EC to be prohibited – they are not problematic from a competition law point of view. But collaboration between liner shipping companies, keen to expand their customer base and product range, does present such a problem.

If liner shipping companies wished to enter the multimodal transport market together, any agreements would probably include similar provisions to that of a liner consortium. Joint facilities, coordination of services, pooling of vehicles, etc, would all be necessary. For the same reason that liner consortia needed a block

exemption, collaborative multimodal transport operations would require an exemption, individual or en masse, through Article 81(3) EC. Aspects of liner shipping that have fallen foul of competition law in recent years, such as price fixing, would be highly unlikely to be tolerated on land, despite arguments that tolerance should be extended that far.¹⁴⁰

6.5.1 Exclusion from Regulation 823/2000

The scope of Regulation 823/2000 appears in strict terms. Article 1 states that the block exemption applies only to consortia that operate “liner transport services from or to one or more Community ports.” This clearly places multimodal transport outside the Regulation on two counts – “ports” are where the journeys start and finish, and the mode of transport in mind is the liner vessel. The important connection between the scope of the Council’s enabling regulation, Regulation 479/92 and the liner consortia block exemption should also be made.¹⁴¹ Only “maritime transport services” are covered.¹⁴² The scope of the liner consortia block exemption cannot therefore include land transport.

Dinger notes the European Parliament’s involvement in the first consortia block exemption, where that institution opined that a general, cross industry approach towards multimodal transport was the best way forward.¹⁴³ But this cross-industry approach, having had the effect of removing multimodal transport from the Commission’s draft legislation on consortia, has not emerged as of

¹⁴⁰ Kreis, p.129

¹⁴¹ Dinger, p. 134

¹⁴² Article 1, Regulation 479/92

¹⁴³ Dinger, p. 134

yet. Lacking such a block exemption, multimodal services could be offered with an individual assessment under Article 81(3) EC.

6.5.2 Consortia style multimodal transport under Article 81(3) EC

Agreeing to offer multimodal services through cooperation similar to consortia is a clear restriction of competition, in the same way that consortia are. But they might be excused of that fact should Article 81(3) EC be satisfied. The process to an individual exemption is more appealing than prior to Regulation 1/2003 and the advent of self assessment under Article 81(3) EC.

The benefits of multimodal services, like the benefits of consortia, are clear. And that those benefits are passed on to consumers is also clear...potentially. In the absence of controls and checks on the ability of liner shipping companies to restrict competition, one might presume that they would do so. Any undertakings could be tempted to restrict competition further if offering services similar to multimodal transport, so integrated as they are. But liner shipping has shown a particular fondness of competitive restrictions. Being treated in an according manner would be justifiable.

As has been said before, the two negative requirements in Article 81(3) EC can only be discussed in individual cases. Liner shipping companies agreeing to offer rail, road or air transport in addition to maritime services would have to make sure that their collaboration does not contain elements beyond what is necessary. It would also be required that it is not possible that competition be eliminated from the market.

Agreements between liner shipping undertakings could satisfy Article 81(3) EC, but only after presuming that certain details are present, such as the elimination of competition, controls over market share or the indispensability of restrictions. In the absence of guidance from the Commission in the form of a block

exemption, any attempt to agree to offer door to door services would be a high risk from a competition law perspective.

6.5.3 Other arguments related to granting multimodal transport a block exemption

In addition to the possibility that multimodal transport services possible fall within Article 81(3) EC, one could argue that liner shipping companies might already be operating such services. The very nature of liner consortia, operating as they sometimes do out of joint port facilities, lends itself nicely to competition law infringements.¹⁴⁴ Goods going in and out of the same warehouses might easily be packed onto the same heavy goods vehicles by employees who have agreed, at some of the very lowest levels, that such an arrangement would be beneficial. It would be logical to bring such infringements under a regulated exemption.

Furthermore, although tenuously, consortia could argue that they are treated unfairly. Many undertakings outside the maritime sector can easily offer multimodal services. Yet Recital 16 of Regulation 823/2000 states that the markets in which consortia operate include, “where appropriate”,¹⁴⁵ other modes of transport. This argument loses momentum, of course, when the words “where appropriate” are considered – any transport to places outside the hinterland to a given port is probably not part of the same market. Besides this, maritime transport brings a whole different set of economic considerations to bear that probably mean it does not compete with road, rail or air transport in the majority of cases.¹⁴⁶

¹⁴⁴ DLA Shipping and Offshore seminar, Oslo, 18/04/07 (refer to bibliography)

¹⁴⁵ Recital 16, Regulation 823/2000

¹⁴⁶ Dinger, p. 36 et seq.

One such example might be the volume of goods that can be carried, an equivalent of which is simply not possible in air transport.

6.5.4 Summary

Multimodal transport operations potentially satisfy the requirements of Article 81(3) EC. But clear guidelines from the Commission would be required prior to undertakings from all sectors feeling able to pursue such a strategy.

In my opinion, multimodal services should be included in a block exemption with a cross-industry approach. Placing such an exemption within the consortia block exemption is one possibility. This approach could be said to be unfair to other forms of transport because that legislation is shipping-focused. But placing it with consortia would have the advantage of keeping the maritime sector at least in the same regulation, and also keeping the same control mechanisms that are there for consortia, for multimodal transport. One also has to consider who the likely operators of truly integrated multimodal transport services are going to be. The power of liner shipping companies relative to, for example, road hauliers, is huge and perhaps justifies attention on their activities.

Needless to say, to follow this approach would require a re-working of the consortia block exemption. This could prove to be a complicated task if the proposal is to offer an exemption to all operators of transport services to agree to offer multimodal transport. Such complications might indicate that an entirely separate block exemption for multimodal services is needed. Whatever the Community's response is, the European Parliament most likely gauged the problem correctly in requesting that the approach taken be cross-industry.

7 Concluding Remarks

Competition law in the European Community as it applies to collaboration in liner shipping is currently made up of a patchwork of legislation. Article 81 of the Treaty, interpreted through case law and decisional practice, is fully applicable to maritime transport. The conference and consortia block exemption have each been in place for many years and contain detailed rules on the regulation of the maritime transport sector. However, from October 2008, only the consortia block exemption will remain. The way cleared by Regulation 1/2003, the 'modernisation regulation', will ease the application of Article 81 EC to liner shipping. But, in the introduction of self assessment, that legislation has made it important that liner shipping undertakings are fully aware of their obligations, to ensure compliance.

The overriding message through this assessment of liner shipping under Article 81 EC has been the importance of Article 81(3) EC. Following October 2008, and in the wake of Regulation 1419/2006, a simpler system of Community competition law will emerge with regard to maritime transport. This system will have a focus on economies of scale and the greater use of technical agreements. Undertakings can ensure compliance through attention paid to the block exemptions and, in particular, Article 81(3) EC. Block exemptions being based thereon, following its provisions will leave little doubt as to the validity of any agreements that are potentially restrictive of competition.

The simpler regime will also be a more realistic one than what has gone before under liner conferences. The days of price fixing had been numbered for a long time and the repeal of Council Regulation 4056/86 demonstrates the fundamental nature of Article 81(3) EC. Conferences never really attained compliance with that provision. That agreements in liner shipping have at their centre Article 81(3) has been demonstrated through the analysis in this

paper. Capacity management agreements and service arrangements between groups of lines and transport users are only available within the frameworks of consortia and conferences. The same is true for revenue pooling arrangements. This appears to be because of the checks and balances that appear in the block exemptions for consortia and conferences. The conditions and obligations contained in Regulation 4056/86 and Regulation 823/2000 reflect Article 81(3) EC. The most visible example of that seen in this paper could be the limits on market shares of consortia, ensuring that “effective competition” remains on the markets in which they operate, thereby observing Article 81(3) EC.

Of course, agreements, decisions and concerted practices sometimes do not need exempting at all. In such situations, Article 81(3) EC is redundant because Article 81(1) EC is not applicable. This is the case with many technical agreements, representative perhaps of many agreements made between lines in ports. So long as Article 81(1) EC is not applicable, lines will have ensured competition law compliance be it regarding port, vessel, cargo or other arrangements. But there may be borderline cases and then guidance from the Commission and enforcement authorities is important. This might be the case with regard to agreements to offer multimodal transport. There is not yet a regime regulating such operations but perhaps should be for clarity's sake.

It will be interesting to note whether conferences find a means to live on, perhaps maintaining their impact on the Community through nearby jurisdiction with more lenient approaches to their activities. The international community has many different regimes, many allowing conferences to operate freely. The extent to which other jurisdictions follow suit with the EC in banning conferences and price fixing or, like the USA, simply make them less appealing than the alternatives, remains to be seen. Perhaps in the coming years, shifts in the Community's stance towards consortia will also

occur. It might even be that in the absence of conferences some provisions, that ensure continuity between them and consortia, are unnecessary.

The dangers that are presented to liner shipping undertakings by Article 81 EC are profound. Compliance now, more than, ever, has to be a priority as self assessment is mixed with a perceived stronger enforcement approach by the Commission.¹⁴⁷ It will be important for lines to observe Article 81(3) EC with great attention, a job that will be helped by Commission guidelines, expected some time this year.

¹⁴⁷ DLA Shipping and Offshore seminar, Oslo, 18/04/2007

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