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WHITE PAPER

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

(presented by the Commission)

{SEC(2004) 1254}

1. INTRODUCTION

1.1. Purpose of this White Paper

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

1.2. Council Regulation 4056/86

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

1.3. The review

3. The review should be seen in its overall EU context. The Lisbon European Council in March 2000³ asked the Commission “*to speed up liberalisation in areas such as gas, electricity, postal services and transport*”. Furthermore, the review has also been inspired by a report of the OECD Secretariat that was published in April 2002 and that recommended to consider removing anti-trust exemption for price fixing and rate discussions.⁴
4. The main issue of the review is the present block exemption for certain restrictive practices by liner conferences, in particular price fixing and supply regulation. However, the review also covers some other provisions contained in Regulation 4056/86, that is the exclusion of certain maritime services (cabotage (that is national maritime services) and tramp (non-scheduled) services) from the competition implementing rules, a provision for technical agreements and a provision on conflict of laws.

5. In the 18 years since the adoption of Regulation 4056/86 the liner shipping market has changed. In particular, the role of carriers offering liner shipping services outside a conference (independent operators) on most routes to and from the EU has become more important. Furthermore, operational forms of co-operation between carriers (not involving price fixing), such as consortia and alliances have increased. What is more, there has been a substantial growth of individual confidential contracting between carriers and shippers, such as individual service contracts. These developments raise the question whether a block exemption for price fixing and capacity regulation by liner conferences is still justified under Article 81(3) of the Treaty.
6. It has been agreed with the Member States⁵ that the review is a three step process, consisting of: 1) fact finding, 2) a Commission paper and 3) a proposal for legislation. The review process started in March 2003, with the publication of a consultation paper (hereinafter: "Consultation Paper of 2003"), that is available at <http://europa.eu.int/comm/competition/antitrust/legislation/maritime/en.pdf>. In total 36 submissions were received, from providers of liner shipping services (carriers), transport users (shippers and freight forwarders), Member States, consumer associations and others. A team of economists from Erasmus University Rotterdam was commissioned to assist in processing the replies. The replies to the consultation paper and the final Erasmus report have been posted on the Commission's web-site. Following a public hearing that took place in December 2003, DG Competition has set out the outcome of the consultation process and its preliminary analysis in a discussion paper (hereinafter: "Discussion Paper"). The Discussion Paper served as a basis for a discussion with the Member States in May 2004 and was also published at <http://europa.eu.int/comm/competition/antitrust/others/>.

1.4. Issues

7. The review of Regulation 4056/86 raises basically the following issues:
 - (a) Is there, in the present market circumstances, still a justification under Article 81(3) of the Treaty for the block exemption for freight rate fixing, supply and market regulation by liner shipping conferences?
 - (b) If not, would it be necessary and appropriate to adopt other Community instruments (such as for instance another block exemption or a set of guidelines) covering any new business framework of cooperation between liner services operators on trades to and from the EU (in addition to already existing forms of cooperation such as consortia and alliances)?
 - (c) Is there still a justification for the exclusion of tramp services and cabotage from the competition implementing rules in Regulation 1/2003?
 - (d) Is there a valid reason to maintain the specific exception for purely technical agreements in Regulation 4056/86?
 - (e) Is there a valid reason to maintain the conflict of laws provision in Regulation 4056/86?

2. THE BLOCK EXEMPTION FOR LINER CONFERENCES

8. Regulation 4056/86 provides, under certain conditions and obligations, for a so-called block exemption for agreements, decisions and concerted practices of all or part of the members of one or more liner conferences, as defined in Article 1(3)(b) of Regulation 4056/86, that have as their objective the fixing of rates and conditions of carriage, and that, in addition, cover one or more of the following forms of co-operation:
- the co-ordination of shipping timetables, sailing dates or dates of calls;
 - the determination of the frequency of sailings or calls;
 - the co-ordination or allocation of sailings or calls among members of the conference;
 - the regulation of the carrying capacity offered by each member;
 - the allocation of cargo or revenue among members.
9. It follows from the Regulation itself, from the decisional practice of the Commission and the case law of the Court that Regulation 4056/86 contains a “*wholly exceptional*” block exemption⁶, because it exempts price fixing and capacity regulation, which are normally regarded as hard-core restrictions⁷, for an unlimited duration and does not contain any market share thresholds. Indeed, the Regulation can only be explained in its historical context.
10. Liner conferences have sought to interpret the block exemption in broad terms. In particular, liner conferences considered capacity non-utilization agreements⁸ and inland price fixing⁹ to be covered by the block exemption. This has however not been accepted by the Commission, nor by the Court. Indeed, the block exemption derogates from Article 81(1) of the Treaty and should therefore be interpreted narrowly¹⁰. Goals pursued by other Treaty provisions can be taken into account only to the extent that they can be subsumed under the four conditions of Article 81(3) of the Treaty.¹¹

2.1. Assessment

11. The EU competition rules are modelled on the presumption that competition provides the best services to the consumer at the most affordable prices. For that reason, the starting point under the Treaty is that competition should not be distorted and that any exemption from that rule needs to be justified. Agreements which restrict competition within the meaning of Article 81(1) of the Treaty (such as price fixing and capacity regulation agreements) could only be exempted if they fulfil the four cumulative conditions laid down in Article 81(3) of the Treaty, namely:
- 1) the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress (efficiency),
 - 2) consumers must receive a fair share of the resulting benefits (pass-on),

- 3) the restrictions must be indispensable to the attainment of these objectives (indispensability), and finally
 - 4) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question (no elimination of competition).
12. The application of Article 81(3) of the Treaty to categories of agreements by way of a block exemption regulation is based on the presumption that restrictive agreements that fall within its scope fulfil each of the four conditions laid down in Article 81(3) of the Treaty.
13. The justification of the liner conference block exemption is provided for in recital 8 of the preamble of Regulation 4056/86, which in essence assumes that conferences bring stability, assuring reliable services which could not be achieved by less restrictive means. In this regard the Court of First Instance stated that “*the Council did not assert (and indeed could not have asserted) that stability is more important than competition*”.¹²
14. It should be noted that the justification in recital 8 of Regulation 4056/86 has not been based on experience of the Commission in applying Art 81(3) to liner conferences¹³. In this regard, the core question examined in the review process is whether, in light of the cumulative conditions of Article 81(3) of the Treaty, the justification for price fixing and supply regulation by liner conferences in Regulation 4056/86 could (still) be said to be valid in light of the present market circumstances. If not, there would no longer be a legal justification for the block exemption, which consequently would have to be either abolished or revised. To that end parties have been invited to provide factual evidence.
15. As is explained in further detail in the annex, it follows from the consultation that the four cumulative conditions to justify an exemption for liner conference price fixing, supply and market regulation would appear to be no longer fulfilled. There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified.

3. OTHER FORMS OF LINER SHIPPING CO-OPERATION

3.1. Introduction

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

3.2. Discussion agreements

17. Other forms of liner shipping co-operation than those already available on trades to and from the EU would for example be so-called discussion agreements. Discussion agreements exist in particular on US trades and on trades to and from Australia.¹⁴ A discussion agreement is a sort of framework agreement by virtue of which carriers which are members of conferences and outsiders are able to co-ordinate flexibly their competitive conduct on the market in relation to freight rates and other service conditions. The scope and content of such agreements may vary. Discussion agreements involve normally the exchange of sensitive business information between competitors and should therefore respect the settled case law of the Court on exchange of information. More importantly, as shown in the US, the inherent flexibility of discussion agreements makes them attractive to traditionally independent lines. In that respect, discussion agreements could in competition policy terms be worse than conferences, since they are liable to eliminate effective external competition to conferences.
18. Having said that, other forms of co-operation between ship-owners which would be in line with EC competition law are conceivable.

3.3. The ELAA proposal

19. European Liners Affairs Association (ELAA) has presented to the Commission a proposal for a new “regulatory structure” for liner shipping services operating to and from the EU¹⁵, which it believes could replace Regulation 4056/86.¹⁶ The Commission has taken note of this proposal and would like to stress that it is not the result of any negotiation or agreement with the Commission. The proposal merely reflects what the ELAA considers to be an appropriate business framework for liner shipping co-operation. In essence the ELAA proposal amounts to¹⁷:
- Exchange and discussion between lines of aggregated capacity utilization and market size data by trade and on a region/zone to region/zone basis (data with a month delay);
 - Exchange, discussion and evaluation of commodity developments by trade (based on data aggregated with a month delay);
 - Discussion and evaluation of aggregate supply and demand data by trade/commodity; forecasts of demand by trade and commodity would be published;
 - Lines will obtain their own market share by trade, by region and by port (data aggregated with a month delay);
 - Price index differentiated by type of equipment (e.g. reefer, dry) and/or trade (data aggregated with a quarterly delay). This information would be made publicly available;
 - Surcharges and ancillary charges based on publicly available and transparent formulae; the details of which would be discussed with shippers.

3.4. Preliminary comments on the ELAA Proposal

20. The Commission welcomes the willingness of carriers to think about a future organisation of liner shipping, other than the current conference system. The industry itself has in fact suggested that certain carriers today are not always particularly interested in the activities exempted in Regulation 4056/86 (that is to say notably price fixing and supply and market regulation), but rather in the “discussion process” surrounding it. This goes without saying that any newly proposed co-operation framework between liner shippers will have to be carefully scrutinized as to its compatibility of the EC competition rules.
21. The Commission is well aware that conference carriers have been used to carrying out activities that in any other economic sector would normally have been prohibited under the EC competition rules. This privileged position of conference carriers might make it difficult for some of them to adapt to a situation in which they will have to comply with the normal EC competition rules like any other industry. In this light it is also understandable that, from a business point of view, carriers might seek for a “fading out” of the current regime or at least for an alternative regime that is close to the present regime and in which their perceived specific position is reflected best. It should however be kept in mind that any continued different treatment under the EC competition rules of the liner shipping industry compared to other capital-intensive industries with high fixed costs and fluctuations in demand (like for example air transport), should be convincingly motivated. Furthermore, the impact of any alternative system on the *overall* liner shipping industry should be taken into account; not only the interests of conference carriers but also the interests of their competitors (independent operators), customers (shippers) and final consumers should be considered. ELAA has emphasized that its proposal is good for the whole liner shipping industry, not just for carriers but also for their customers. In this light, the Commission would explicitly welcome the views of all interested parties, notably shippers, associations like the ESC as well as individual shippers, on the various elements of the proposal.

3.5. Conclusion

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

4. CABOTAGE AND TRAMP SERVICES

24. International tramp vessel services as defined in Article 1(3)(a) of Regulation 4056/86 and maritime transport services that take place exclusively between ports in one and the same Member State (cabotage) as foreseen in Article 1(2) of Regulation 4056/86 are currently excluded from the Community competition implementing rules pursuant to Article 32 (a) and (b) of Regulation 1/2003.^{19,20}
25. As is explained in further detail in the annex, no credible consideration has been put forward to justify why these services need to benefit from different enforcement rules than those which the Council has decided should apply to all other sectors of the economy. It has also not been explained what legitimate negative consequences such procedural changes could have for the industry. On that basis, the Commission proposes to bring maritime cabotage and tramp vessel services within the scope of the general enforcement rules of Regulation 1/2003. In order to help the tramp industry to correctly assess notably their “pool agreements”, however, the Commission will consider issuing some form of guidance in a manner that is to be determined.

5. TECHNICAL AGREEMENTS

26. Article 2 of Regulation 4056/86 allows maritime transport providers to conclude agreements which have the sole object and effect to achieve technical improvements or cooperation. Such agreements are not caught by Article 81(1) of the Treaty. The provision contains certain examples, such as standards or types in respect of vessels and equipment and the coordination of transport timetables for connecting routes.
27. As is explained in further detail in the annex this specific exception for technical agreements, as confirmed by the European Court of Justice, is merely declaratory and the paper therefore proposes to repeal this provision, like it was repealed by the Council in the air transport sector earlier this year.

6. CONFLICT OF LAWS

28. Article 9 of Regulation 4056/86 provides for a procedure which should be followed in case the application of the Regulation would amount to a conflict with the law of a third country. In that case the Commission should consult the relevant authorities in third countries and ask the Council to authorize it to open negotiations, if needed. The ratio of including this provision in Regulation 4056/86 at the time was apparently that it was felt that, in view of the characteristics of international maritime transport, the application of Regulation 4056/86 might lead to a conflict with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests (recital 15 of Regulation 4056/86).
29. As is explained in further detail in the annex, a conflict of law has not arisen in the past and is unlikely to arise, even if the liner conference block exemption is fully repealed. Therefore there would appear to be no justification for maintaining this provision.

7. CONCLUSIONS

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

- (a) *Is there, in the present market circumstances, still a justification under Article 81(3) of the Treaty for the block exemption for price fixing and supply and market regulation by liner shipping conferences?* There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified. On that basis, the Commission considers proposing to repeal the present block exemption for liner shipping conferences.
- (b) *If not, would the Commission propose to replace the block exemption by a different legal instrument for liner shipping services applicable to trades to and from the EU?* The Commission will assess the relevant suggestions from the industry and comments from stakeholders with a view to taking a position, by means of an appropriate legal instrument, on an alternative co-operation framework among liners. ELAA has already put forward concrete ideas about such a framework. Before taking a position on those ideas, the Commission would like to invite interested third parties to submit their comments, as well as to provide alternative options.
- (c) *Is there still a justification for the exclusion of tramp services and cabotage (i.e. national maritime services) from the competition implementing rules of Regulation 1/2003?* No credible consideration has been put forward to justify why these services would need to benefit from different enforcement rules than those which the Council has decided should apply to all sectors. It has also not been explained what legitimate negative consequences such procedural changes could have for the industry. On that basis, the Commission considers bringing maritime cabotage and tramp vessel services within the scope of Regulation 1/2003. The Commission will provide the tramp industry with some guidance on the implementation of competition rules to this sector.
- (d) *Is there a valid reason to maintain the specific exception for purely technical agreements?* The provision on technical agreements laid down by Article 2 of Regulation 4056/86, as confirmed by the Court, is merely declaratory and the Commission considers proposing to repeal this provision, like it was repealed by the Council in the air transport sector earlier this year.
- (e) *Is there a valid reason to maintain the conflict of laws provision in Regulation 4056/86?* A conflict of laws has not arisen in the past and there would appear to be no justification for maintaining Article 9 of Regulation 4056/86. However, before taking a position on this the Commission would like to invite interested parties, notably its

international counter-parts, to submit their views on the need of a conflict of laws provision.

8. PROPOSED ACTION

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

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

9. INVITATION TO SUBMIT COMMENTS

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

By post, to the following address:

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

By electronic mail, to the following address:

COMP-D2-REVIEW4056@cec.eu.int

Enclosure: Background paper

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- ¹ Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 24, as amended by Council Regulation 1/2003 of 16 December 2002 (OJ L 1 of 4.1.2003, p. 1).
- ² Council Regulation 1/2003 of 16 December 2002 (OJ L 1 of 4.1.2003, p. 1).
- ³ SN 100/1/100.
- ⁴ OECD Secretariat report of April 2002, Competition policy in liner shipping, p. 74-80, available at <http://www.oecd.org/dataoecd/13/46/2553902.pdf>.
- ⁵ *Ad hoc* Advisory Committee of 25 March 2002.
- ⁶ See e.g. Case T-86/95, *Companie Générale Maritime*, [2002] ECR II-1011, para 254, 393 and 484.
- ⁷ Hard-core restrictions are generally considered as restrictions of competition by object caught by Article 81(1) of the Treaty, which generally do not fulfil the conditions for an exemption under Article 81(3) of the Treaty.
- ⁸ See TAA, EATA, Revised TACA decisions of 14 November 2002 (OJ L 26 of 31.01.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.
- ⁹ See TAA, FEFC, TACA, Rev TACA decisions of 14 November 2002 (OJ L 26 of 31.1.2003, p. 53) and Commission press release of 14.11.2022, IP/02/1677.
- ¹⁰ Joined Cases T-191/98 and T-212/98 to T-214/98 *TACA* [2003] ECR –not yet reported, para 568.
- ¹¹ See to that effect implicitly para 139 of Case T-17/93, *Matra*, ECR [1994] II-595 and Case 26/76, *Metro (I)*, [1977] ECR 1875, para 43.
- ¹² Case T-395/94, *TAA* [2002] ECR II-00875, para 261.
- ¹³ To compare, see for example Regulation 823/2000 on Consortia (OJ L 100 of 20.4.2000 p. 24), Regulation 1400/2002 on motor vehicles and Regulation 2790/1999 on vertical agreements (OJ L 336 of 29.12.1999, p. 21), in which the Commission explicitly referred to the experience acquired in the sector concerned which enabled it to define categories of agreements which could be regarded as normally satisfying the conditions laid down in Article 81(3).
- ¹⁴ See for a further description of the situation in those jurisdictions the annex to this paper.
- ¹⁵ Liner shipping services are defined by ELAA in its Proposal as "the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment, and ancillary activities" (compare Article 2(2) of Regulation 823/2000).
- ¹⁶ ELAA Final Proposal of 6 August 2004, available at http://europa.eu.int/comm/competition/antitrust/others/maritime/elaa_proposal/elaa_proposal_6_august_2004_en.pdf.
- ¹⁷ For a more detailed description of the ELAA proposal reference is made to the annex.
- ¹⁸ At least a liner conference in the sense of a group of two or more vessel-operating carriers providing liner services under uniform or common freight rates (compare the definition of a liner conferences in Article 1(3)(b) of Regulation 4056/86).

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

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