Chapter 9
Development of Competition Policy and Its Historical Evolution

In the first part of this chapter, an examination is made of the investigations which took place into the conference system during the early years and also political actions at national, regional and international levels which helped shape that landscape. This is followed by a discussion on US and EU policies which were applied in the trans-Atlantic trade since the 1990s depicting a close focus for activity as the conference lines tried over a 10–15 year period to adapt their processes to the new era of increasingly intensive regulation. The second part of this chapter focuses on competition policy and legislation in the US and EU followed by developments in other jurisdictions including Australia, Canada, Japan and Singapore.

Early Inquiries and Investigations and Their Consequences

Royal Commission on Shipping Rings, 1909 (UK)

This was the first major inquiry into the liner conference system, its advantages and disadvantages, at a time when conferences had been in operation for little more than 25 years. It examined the system, its historical background, its operation in practice, including the level of freight rates charged and the justification for some tying arrangement with shippers, in particular the deferred rebate system. Its terms of reference required it to report on "whether liner conferences caused, or were likely to cause, damage to British or Colonial trade and, if so, what remedial action by legislation or in any other way should be taken".

A majority report accepted that conferences were subject to sufficient competition to avoid their being in a monopoly situation and that a tie with shippers, including the use of the deferred rebate system, was justified. A minority, however, were critical of the system, on the grounds particularly that the interests of shippers,

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the customers, were not sufficiently protected. This cry has been echoed over the years.

The important and interesting recommendations were that:

- While it was undesirable for the state to intervene in terms of legislation, shippers and merchants in a particular trade should form themselves into an association, registered with the Board (Ministry) of Trade, as a counterweight to the conference.
- Tariffs should be published.
- Conferences should deposit confidentially with the Board of Trade their basic agreements, rebate particulars and agreements with commodity groups or associations of merchants.
- The Board of Trade might possibly involve itself in the settlement of disputes.

The first and second of these recommendations were adopted not long afterwards in a few trades, but it was to be some 50 years before they were fully implemented.

The Alexander Committee Report, 1914 (US)

The House Merchant Marine and Fisheries Committee of the US Congress, under the chairmanship of Mr Joshua Alexander, held hearings and took evidence in much the same way as the 1909 Inquiry in the UK. Although it looked broadly into the nature of conferences and their effect, it paid particular attention to the following aspects, at least one being peculiar to the US trades:

- Deferred rebates which, while unlawful in US outward trades, were at that time accepted inbound (although this would later change).
- The role of fighting ships (i.e. charging very low rates) to drive away non-conference competition.
- The idea of quantity discounts for big shippers.
- Whether rate levels were reasonable.

The evidence supported the position that completely free and open competition could not be countenanced, largely because of the instability that would ensue (rate wars, bankruptcies and general uncertainty); but that, while the advantages of the conference system were recognised, conferences should nonetheless be brought under a measure of governmental control. This was a first step towards governmental regulation of conferences, albeit by one powerful nation alone.

The Recommendations of the Alexander Committee were subsequently enacted in the US Shipping Act 1916. Conferences in the US trades were thus brought under regulation in return for immunity from US antitrust laws which made combines or trusts unlawful if they monopolised or otherwise interfered with open-market forces.

US Shipping Act 1916

The new legislation brought conferences under the regulatory control of the Interstate Commerce Commission (ICC) among others, as to rates of freight, terms of contracts and other agreements. It also prohibited rebates or special discounts favouring or discriminating against a particular shipper or port; required equal rates for all shippers regardless of size; prohibited fighting ships; and made deferred rebates unlawful for outbound shipments.

The Interstate Commerce Commission was given authority:

- To disapprove agreements filed with it if they were found to be discriminatory or unfair or detrimental to the commerce of the United States.
- To investigate, on complaint, any rates which were alleged to be unfair or unreasonable and, if it thought fit, to disapprove the rate—but not to set a new rate.

This was a turning point for conferences and indeed for shipping. It was the first occasion on which a governmental authority had been empowered to intervene in basic commercial decisions concerning the charge for a shipping service and the conditions on which the service was offered.

Regulation of US liner trades, albeit in very different terms, rests today with the Federal Maritime Commission.

Imperial Shipping Conference, 1921

This further inquiry, instituted by British Commonwealth governments in 1921, covered much the same ground as the 1909 investigation but from the standpoint of the shipping requirements of the Commonwealth countries. The Committee:

- Accepted that some tying or loyalty arrangement with shippers was appropriate if conference lines were to maintain a regular service with sufficient tonnage to meet the ordinary requirements of the trade at stable freight rates and with no distinction between large shippers and small shippers;
- Did not condemn the deferred rebate system but suggested an alternative such as the contract system used in the South African trade;
- Recommended greater consultation with shippers before freight rates were altered and the setting-up of associations of shippers to represent the interests of shippers with respect to conferences.

US Congressional Inquiries 1958–1961

The *Isbrandtsen Case* in the 1950s was the catalyst for renewed US interest in the conference system. One of the main pillars of the conference system at that time was the ability of the conference lines to tie shippers through some loyalty arrangement. With the demise of the deferred rebate system as a result of the 1916 Shipping Act, the normal method used was the dual rate contract system. Contract shippers were given the lower of the two rates quoted by the conference: generally the discount was 10–15% below the normal rate. The *Isbrandtsen Case* decided that the dual rate system was contrary to the Act and therefore unlawful. At the same time doubts began to arise about the ability of the regulatory agency to provide conference lines with immunity from antitrust process merely by the approval, under section 15 of the Act, of agreements required to be filed.

Conference lines in Europe began to close ranks and established a pressure group, the Committee of European Shipowners (CES). At the same time, governments in Europe, both for themselves and at the behest of their liner conference members, began to take note. This led to the establishment of the Consultative Shipping Group of Governments (CSG).

In 1958, moratorium legislation was enacted by Congress in order to enable lines to continue, legally, to use the dual rate system pending hearings in Congress. The hearings were extensive and involved Congressmen travelling to Europe and both European shipowners and their governments putting forward views in Washington. The Congressional hearings were not just on the legality or otherwise of the dual rate system, but also on whether the objectives of the 1916 legislation were being met.

The Bonner Amendments, 1961

The subsequent Bonner Act, which amended the 1916 legislation, established a new regime, partly confirming previous principles, but also providing the Federal Maritime Commission (FMC) with increased regulatory teeth.

The broad purpose was, according to the preamble, “to authorise common carriers and conferences thereof serving the foreign commerce of the United States, to enter into effective and fair dual rate contracts with shippers and consignees and for other purposes”. It required, *inter alia*, that conferences to and from the USA must be open to all qualified operators as in the open conference system. It also required lines to file, and the FMC to approve, agreements which had to comply with US anti-trust legislation; and confirmed the longstanding position that the deferred rebate system should not be used. However, all agreements had to be in a standard FMC-prescribed format and the FMC was required to ensure that freight rates to and from the US were fair and non-discriminatory and not detrimental to US

commerce. These requirements, which were applied to agreements wherever concluded, were offensive to shipowners outside the USA and their governments.

The FMC approached its newly enhanced regulatory role with fervour, spurred on by the prevailing Congressional suspicion of the effect of conferences on US trade interests.

Over the next 3 years, the FMC implemented the provisions of the Bonner amendments. However, as well as seeking to regulate the detail of conference line operations, including agreements entered into outside the USA, demands were made for the production of documents, information, records, and notes of meetings from companies situated outside the United States. The purpose was to support investigations into allegations that rates of freight were set at levels which impeded US commerce.

Governments in Europe and Japan reacted to protect their shipowners and traders from this excess of regulatory zeal. The Consultative Shipping Group of Governments (CSG) emerged as an informal yet cohesive group. The UK Government enacted the Shipping Contracts and Commercial Documents Act 1964 to prohibit lines from giving information in the UK which was sought by the FMC in pursuance of its regulatory role on the grounds that its disclosure would not be in Britain's public interest. Other countries in Europe adopted similar defensive legislation.

Developments within the shipping industry pointed to the need for a representative body of national shipowner associations to discuss and formulate policies with governments and shippers' councils (which following an initiative by the International Chamber of Commerce were becoming increasingly influential). The Council of European and Japanese National Shipowners' Associations (CENSA) eventually emerged to fill this role. It was based in London and mirrored CSG nations on the government side.

CSG Ministers' Resolution, 1963

In a resolution adopted in 1963 (following a series of meetings to consider the US position and a growing worldwide tendency for governments to interfere with the free operation of international shipping in pursuit of purely national objectives), the CSG ministers reaffirmed the underling tenets of the conference system with self-policing rather than government controls. They further resolved to take steps to ensure that conferences of which the shipping companies in their countries were members provided a mechanism for discussing grievances and resolving disputes between lines and shippers or groups of shippers.

This was a further endorsement of the conference system by a powerful group of governments. At the same time, it made it clear that conferences seeking help in response to hostile actions must first put their own house in order.

European liner conference shipowners responded through CENSA with a memorandum to ministers dealing specifically with two aspects of their resolution.

On the first, during 1963, the lines drew up a note of understanding with the European Shippers' Councils which proposed that there should be regular discussion on matters of principle and broad issues of mutual interest; and improved machinery for dealing with grievances. This became the foundation stone for corporate consultations between CENSA and the European Shippers' Councils (although they subsequently faltered) and also for the explicit legal consultation requirement which was built into the UN Liner Code and other national and regional legislation.

On the second, the European lines pointed out that the inclusion in conference agreements of provisions dealing with malpractices (namely unfairness between one member line and another) was the rule rather than the exception. Nonetheless, they drew up—through CENSA—a list of suitable model clauses for inclusion in new or amended conference agreements.

Further Activity in the US

The growth of containerisation and the through movement of goods from inland points in the US to inland points elsewhere gave rise to new jurisdictional problems as well as to the purely commercial difficulty that the US laws prohibited conferences (but not individual lines) from quoting shippers a composite "through" rate.

Even more menacingly, two further legal decisions undermined what little degree of certainty existed: the *Carnation Case* (1966) and the *Svenska Case* (1968). The first decided that the antitrust immunity, which the FMC approval gave, was not universal—as had been thought—but only extended to actions that fell four square, and lawfully, within the terms of the approved agreement. Thus, there were fears that actions taken which were perfectly lawful under national law, or which were thought incorrectly to be covered by the agreement, could give rise to antitrust suits, both civil and criminal. These fears were subsequently proved to be only too well founded.

The *Svenska Case* introduced a new test which had to be satisfied if agreements were to be approved and thereby at least a measure of antitrust immunity achieved. This was that the carrier had to demonstrate that there was "a serious transportation need, necessary to secure important public benefits". This test was unclear and difficult to meet. The result was delay, expense and difficulty, especially under the US adversarial system whereby competing interests were only too ready to oppose approval on the basis of one of these criteria.

Rochdale Inquiry, 1967–1970 (UK)

The Rochdale Inquiry, set up following the 1966 seamen's strike, was asked to review the whole organisation and structure of the UK shipping industry. In an

examination of liner conferences, it concluded, on balance, that it would not be in the public interest to prevent liner companies banding themselves together in order to regulate and rationalise trade; and further that the closed conference was desirable for most deep-sea routes. Its assessment was that, on any other basis, there would be insufficient volume of traffic to make it economic for the shipowners to continue to provide efficient services to shippers with a reasonable profit. Nevertheless, it proposed a policy of greater openness on the part of conferences.

Rochdale recommended that conferences should accept a published code of practice covering provisions for admission; publication of tariffs; arrangements for freight rate negotiations; and consultations with shippers and governments. In practice, this devolved onto CENSA and the European Shippers' Councils.

While the recommendations were put forward in a national context, it was recognised that they would only be effective if developed subsequently on an international basis and then essentially as a self-regulatory code, and not one imposed unilaterally by government. The committee was fully aware of the problems induced by attempts at governmental level to regulate both inward and outward conferences. The British Government was accordingly urged to take an international initiative on the whole matter.

CENSA/ESC Code

Substantial progress had been made in the development of consultation machinery by shipowners and shippers since the 1963 CENSA/ESC note of understanding. By 1970 (when Rochdale reported), the rudiments of a code were in place through jointly agreed recommendations on a number of the points suggested.

A further meeting of CSG ministers was held in Tokyo in 1971 to consider a range of shipping developments including US policy and liner conferences (in the new light of containerisation). The ministers re-affirmed their support for the liner conference system. Shipowners, in consultation with shippers, were requested to elaborate the details of a code of practice for conferences, incorporating a number of the proposals put forward by Rochdale.

The CSG governments did not, in principle, wish to involve themselves in the commercial aspects of shipping although they wished to receive progress reports from time to time. In turn, shipowners and conferences would do their best to ensure that the code, when prepared, was properly implemented. Ministers clearly saw the early development and implementation of a code as a pre-emptive strike against those from the developing countries and elsewhere who were beginning to think along similar lines in the context of UNCTAD.

Intense consultation was undertaken between CENSA and the European Shippers' Councils. Because of the reasonable working relationship between these two bodies and because certain of the elements had already been agreed, it was possible to submit the code to governments by the end of 1971. In political terms, the stage was thus set for the forthcoming battles in UNCTAD.

United Nations Conference on Trade and Development

UNCTAD Shipping Committee, 1964–1974

One of the subjects discussed at the first UNCTAD Conference in 1964—for the first time on a world-wide basis—was liner conferences. These were seen by the developing countries as a key element of the shipping scene and were heavily criticised in relation to the fixing of freight rates; discriminatory practices; offering inadequate opportunities to lines from emerging nations; and maintaining private maritime law to the benefit of industrialised states.

Despite all this, the specialised working group to which shipping was remitted in 1964 did manage to reach, at least on the surface, certain areas of general agreement, embodied in the "Common Measure of Understanding on Shipping Questions". This understanding, which expressed general support for the conference system while at the same time acknowledging the issues of concern to the developing nations, was an important first milestone in the consideration of shipping questions in UNCTAD.

The criticisms voiced by developing countries and others subsequently culminated in the first international convention on liner shipping. This in turn would lay the ground for a far more precise regulation of the activities of conferences than ever before.

The UN Liner Code

The United Nations Convention on a Code of Conduct for Liner Conferences was adopted at a UN Diplomatic Conference in 1974. It is sometimes referred to—wrongly—as the "UNCTAD" Code because all the preparatory work was done in various groups under the aegis of UNCTAD.

At the same time as Rochdale in the UK was suggesting a code of practice, the UNCTAD secretariat was working on a much more detailed regulatory code, and various elements within the Group of 77 (developing nations) were also working out their own ideas. As expected, the subject proved controversial. The CENSA/ESC code, which reflected normal commercial conference practice and had been generally accepted by the CSG governments, was quickly brushed aside as not going nearly far enough for the Group of 77 who now put forward a unified text. Despite the wide gaps between the groups, and intense and difficult negotiations, general agreement was achieved on certain subjects to be included in a universally acceptable code. However, deadlock remained over the system of implementation. The Group of 77 wanted a legally binding instrument which could be enforced; the Group B (OECD) nations favoured less formal provisions which governments would use their best endeavours to see implemented.

Following a resolution at the UN General Assembly and after four, often difficult, preparatory sessions reflecting free-enterprise self-regulation versus governmental regulation, a Convention (somewhat loosely drafted because of the unusual absence of referral to a legal vetting group, thus rendering the content vague and often ambiguous) was eventually adopted, partly because of a split within the developed nations. The adoption of the Convention took place at the end of two conferences of plenipotentiaries in November/December 1973 and March/April 1974 chaired by none other than Mr. C.P. Srivastava of India who subsequently became Secretary General of the IMO. The UK and the USA were among the handful of States which voted against the Convention.

Although the CENSA/ESC code had been rejected at an early stage, some 70 % of the UN Liner Code was in fact based on its principles. The Code was also an endorsement of the conference system as such; and indeed of closed (as opposed to open) conferences.

The main elements of the Code covered conference membership; acceptance of loyalty arrangements; self-policing; consultation machinery; fixing and revision of freight rates; application of surcharges; and dispute resolution provisions. Arrangements for participation gave national lines of the two countries served equal rights to participate in the conference trade with third-country lines entitled to a significant share such as 20 %. This was the genesis of the so-called 40/40/20 rule. But, it was not a rigid rule; the share of national lines depended upon third-country participation, and then "unless otherwise mutually agreed". The principle of formula cargo shares did not exist in the CENSA/ESC code and was hotly contested by most Group B countries.

The Code eventually entered into force in 1983.

It is questionable whether the Code has ever really been implemented in practice. It has been prayed in aid by some developing countries in the justification of national legislation, usually restricting access to cargoes for non-national lines. However, by 1983 the nature of the liner industry had changed significantly with the growth of containerisation and consortia and the fact that lines operating outside conferences were carrying an increasing share of liner cargo in many trades.

The Brussels Package, 1979 (EC Regulation 954/79)

Many of the Code's critics were intrinsically opposed to any government interference in liner shipping. However, when the dust began to settle, it was seen that it was not as inflexible as had originally been believed and many of its principles began to seep into liner conference operations world-wide.

France, Belgium, the then Federal Republic of Germany and Japan had voted with the developing countries to adopt the Convention. The three EU nations considered that, despite the Code's imperfections, it was politically and commercially expedient to take steps to ratify and begin the process of implementation at national level. However, the European Commission said that all EU countries had

to act together on such issues and threatened legal proceedings to restrain any action by individual Member States. The Commission was also concerned, as were others, about the protectionist nature of the 40/40/20 principle.

However, shipowners in other EU States began to come round to the views of the three supportive countries. British lines remained unhappy with the Code but they, too, eventually had to accept the need to find ways with governments to overcome the more offensive elements.

This resulted in EU Regulation (954/79) known as the "Brussels Package" which was designed to enable all member states to proceed towards implementation on the basis of a common reservation at the time of the deposit of instruments of ratification. This was based on the "disapplication" or "redefinition" of certain principles which would otherwise have applied to EU lines (or those of like-minded OECD countries) at the European end of liner trades. There was also a growing acceptance of the idea that the Code might help to contain some of the worst excesses of cargo reservation practised by developing countries and others.

A significant factor in the Brussels Package was the disapplication of the conference cargo sharing (40/40/20) provision between EU nations and between like-minded OECD nations who agreed to join the arrangement on a reciprocal basis. Shares would continue to be determined on the basis of commercial principles. As a result, the EU effectively succeeded in excluding the application of the most objectionable aspects of the Code from about 70 % of the world's liner trades.

However, repeal of Regulation 4056/86, removing the liner conference block exemption, meant that EU Member States could no longer fully comply with their obligations under the Code. As a result, Regulation 954/79 became inapplicable and was repealed with effect from 18th October 2008 when conferences ceased to be lawful in European trades. It seems that while Member States were not automatically required to denounce the Code since participation in conferences in third party trades should be unaffected, there are arguably treaty law implications surrounding partial application. The UK has denounced the Code.

Reviews and the Future of the Liner Code

To date, 79 nations have ratified. However, the USA remains implacably opposed arguing that the protectionist nature of the 40/40/20 principle, the acceptance of the closed conference system and other elements are not compatible with the US Shipping Acts. Elsewhere, specific agreements to circumvent the content mean that the Code is rarely applied as written. These facts—together with the lack of progress at the two review conferences in 1988 and 1991, the failure to arrange subsequent review conferences, the decreasing protectionist tendencies in some developing countries, the reducing role of UNCTAD in shipping issues and, most recently, the EU's decision to abolish the conference block exemption, all call into question the Code and its future relevance.

Development of Competition Policy in the USA and the European Union

General

The evolution of US antitrust policy concerning sea transport and the parallel development of the EU's competition policy during the 1980s and 1990s is set out in chapters 8 and this chapter. This section provides further detail on how these were applied in the trans-Atlantic trade, which was a close focus for activity as the conference lines tried over a 10–15 year period to adapt their processes to the new era of increasingly intensive regulation.

The North Atlantic Saga

The North Atlantic trade is third in size after the trans-Pacific and Europe/Far East trades. In 1984, the then nine conferences were replaced by the North Europe–USA Rate Agreement (Neusara) and USA–North Europe Rate Agreement (Usarera) for westbound and eastbound traffic respectively. The agreements were based on traditional principles of published tariff rates, service contracts between the conference and individual shippers and, reflecting the US Shipping Act 1984, conference members' right to take independent rate action. However, rates, which had been in general decline since 1980, continued to fall and in 1985 the Eurocorde and Gulfway agreements were concluded as non-binding arrangements for facilitating discussions with the main independent carriers on rates, tariffs and conditions of carriage.

Faced with continuing weak rates a new mechanism, known as the Trans-Atlantic Agreement (TAA), was established as a means of restoring stability and enabling freight rates to be raised. TAA members comprised the former Neusara and Usarera members and the major independent operators. There were 15 operators at the time.

The key elements were:

- Fixing in common tariffs applicable to the maritime sector and inland carriage, with restrictions on independent rate action;
- Arrangements for service contracts; and
- A capacity management programme (CMP).

Membership recognised a difference between former conference members, where more highly disciplined actions, including a prohibition on entering into individual service contracts, were regulated by committee; and the greater flexibility granted to former independent operators.

TAA was notified to the European Commission in August 1992. It was subsequently examined by the Commission pursuant to Council Regulation 4056/86 regarding maritime transport and in accordance with Regulation 1017/68 in the application of the Competition Rules to inland transport. Complaints were also lodged by port, shipper and forwarding interests.

In a decision (94/980/EC) dated 19 October 1994, the Commission concluded that TAA was not a liner conference agreement contemplated by Article 3 of Regulation 4056/86 because:

- It established at least two rate levels; and
- It provided for non-utilisation of capacity.

In its detailed analysis, the Commission rejected TAA's interpretation that carriers could jointly, i.e. in common, agree differentiated rates between themselves but categories of carrier must uniformly apply their agreed rate level to shippers. The Commission took the view that "The real purpose of the introduction of differentiated rates... such as that of the TAA is to bring independents inside the agreement" (Recital 341) and "This type of agreement seeks to disguise as a conference what is really an agreement with outsiders, independents wishing to maintain price flexibility. This is not a genuine liner conference ..." (Recital 343).

The Commission was equally critical of the CMP noting that the regulation of carrying capacity permitted under Article 3(d) of Regulation 4056/86 must be incidental to conference price-fixing and not intended to change freight rates substantially. The CMP was not a capacity regulating tool but, rather, "intended primarily for suspending unused capacity so that it can be artificially maintained, and the trade and prices for European exports artificially increased" (Recital 370).

Inland price fixing was also examined. TAA argued that Article 5(3) and (4), relating to conditions and charges for services not covered by freight charges, applied the block exemption to multi-modal transport organised by a liner conference. This was rejected by the Commission on the grounds that "the scope of the block exemption cannot be wider than the scope of Regulation (EEC) 4056/86 itself. According to Article 1(2) of the Regulation 'it shall apply only to international maritime transport services from or to one or more Community ports'" (Recital 373). This was a significant conclusion in the Commission's restrictive approach to the block exemption, a line followed in subsequent cases and generally upheld by the Courts.

It was not, therefore, surprising that the Commission rejected an individual exemption for the maritime sectors arguing that there was insufficient outside competition and that TAA provided its members with considerable power to eliminate competition. An application for an individual exemption under Regulation 1017/68 for inland haulage price-fixing was equally refused. Carriers had argued that this was necessary to ensure stability of multi-modal transport provided in conjunction with conference price arrangements which might otherwise be undermined. However, the Commission was not persuaded, questioning how quality and stability could be improved when carriers bought-in haulage on individually negotiated terms but resold the services at uniform rates.

As well as taking immediate action to end the infringements, and refrain from further similar activities, the 15 TAA members were instructed to offer their customers the opportunity to renegotiate or terminate existing contracts or other TAA agreements.

The lines appealed. However, it was not until February 2002 that the Court of First Instance delivered its judgment, together with similar issues arising from the subsequent TACA case and the Commission's findings regarding the FEFC.

Trans-Atlantic Conference Agreement (TACA)

In 1994, a new Agreement at that time comprising 17 lines—TACA—was notified to the Commission to come into force from October that year. The parties maintained that this was a liner conference falling within the block exemption in Regulation 4056/86. In the alternative, the parties applied for an individual exemption. The number of participants varied over the years, eventually and after various mergers settling at 14 companies; and TACA itself was modified from time to time.

Significantly, TACA abandoned the TAA's capacity management programme; eliminated the different categories of membership and two-tier tariff structure and withdrew from membership of the Gulfway and Eurocorde Discussion Agreements.

The principal features of TACA were:

- The price agreement relating to maritime transport;
- The price agreement relating to inland transport as part of a multi-modal (carrier haulage) service to shippers;
- Agreement between the carriers concerning terms and conditions for offering service contracts to shippers; and
- Agreement between the carriers regulating maximum levels of freight forwarder compensation.

The application was scrutinised over the next 3 years. Contrary to the understanding that notification would provide immunity from fines until a decision was taken, in November 1996 the Commission removed the TACA parties' immunity in relation to inland rate-fixing in the Community. A decision (case number IV/35.134) was issued in September 1998. Once again, this reflected the Commission's policy of narrowly construing the scope of exemption arrangements. The Commission separated Article 85(1)—subsequently Article 81(1) and now Article 101—agreements between maritime transport services under Regulation 4056/86, which covered only the maritime sector and a limited number of other ancillary activities, out from inland transport services under Regulation 1017/68. It argued that, where an agreement covered maritime and inland transport, it must be dealt with under both regulations, while non-transport services fell to be determined under the procedural provisions of Regulation 17 [Recital 285]. Accordingly, the agreements under the last three bullets above fell outside the block exemption provided in Regulation 4056/86.

The main conclusions of the Commission's detailed decision were that:

- The price agreement for inland transport services under the tariff (and despite the existence since November 1995 of arrangements to facilitate the inland positioning of empty containers) supplied within the Community to shippers as part of a multi-modal operation, did not lead to an improvement in the quality of these services, did not allow shippers a fair share of the resulting benefits and contained restrictions of competition which were not indispensable. The conditions for an individual exemption under Regulation 1017/68 did not, therefore, appear to be fulfilled (Recital 424);
- While, as the result of separate discussions with the FMC, TACA had been modified from 1996 to remove the prohibition on individual service contracts (prior to that, only conference service agreements had been permitted), the contract was still required to comply with certain conference imposed conditions (Recital 502);
- As with the tariff rates, inland price setting for carrier haulage under a service agreement fell outside of the liner conference block exemption and was, by the same criteria, incapable of individual exemption (Recitals 503/4); and
- The agreement to regulate freight forwarders' conditions was a restriction of competition which fell to be determined under Regulation 17 and not Regulation 4056/86 or Regulation 1017/68. However, the agreement did not fulfil the conditions for an individual exemption (Recitals 509/510 and 518).

Issues connected with a dominant position under Article 86 were then examined. The Commission asked whether the TACA parties were capable of being jointly dominant and whether they were in fact dominant in the relevant markets. An analysis looked at the theory of dominance where the TACA parties had a share of up to 70 % of some market sectors, giving rise to a "strong presumption of a dominant position". The discriminatory price structure, whereby rates are based on cargo value with a fivefold difference between high- and low-value commodities, was questioned. This, it was argued, was a means of maximising revenue where an undertaking had "a substantial degree of market power" (Recital 535).

However, it is not clear what alternative system might have been advocated by the Commission. A single rate would deter the transport of low-value commodities. The result would be to distort trade either through the unavailability of goods no longer entering trade or the inappropriate use of resources to manufacture goods which would previously have been traded.

The Commission was particularly concerned about TACA members' agreement to place restrictions on the availability and contents of service contracts. This, it was argued, deprived shippers of additional services which individual TACA parties might have been able to offer. Concern was also expressed that arrangements for potential competitors to enter the market as TACA parties had distorted the competitive structure of the market to reinforce TACA's dominant position.

The TACA parties were instructed to put an immediate end to the infringements relating to inland pricing, fixing freight forwarder remuneration and setting freight rates and conditions for service contracts with shippers. At this stage, fines were not

imposed for inland rate-fixing pending a court ruling on the scope of Regulation 4056/86.

However, abuse of a dominant position is prohibited per se. On the objective evidence, the TACA parties were found to have infringed Article 86. In a very critical commentary on the TACA parties' actions, the Commission rejected any basis for mitigation and imposed (then) record fines totalling Euro 273 million based on turnover and ranging from Euro 6.88 million for the smallest company to Euro 27.5 million for AP Møller-Maersk Line and Sea-Land Service Inc. P&O Containers and Nedlloyd, which as separate companies would each have each been fined Euro 23.6 million, had by that time merged their operations and were required to pay the combined amount of Euro 41.26 million.

Finally, the parties were required to offer their customers the opportunity to renegotiate or terminate forthwith existing joint service contracts.

The TACA parties appealed.

The Court of First Instance delivered a series of inter-connected judgements in 2002.

The first case (T-18/97) related both to the TAA and to similar TACA appeals regarding the Commission's withdrawal of immunity from fines for inland price-fixing arrangements. The Court noted that Regulation 17 and Regulation 4056/86 each contained provisions whereby fines for infringements could not be imposed in respect of acts taking place after notification to the Commission and before the Commission's decision allowing or refusing an application under Article 85(3), now Article 81(3). However, there was no similar immunity in Regulation 1017/68 and the Court declined, in the absence of such express provision, a right of immunity as a general principle of Community law. The appeal was dismissed.

The second case (T-395/94) requested the Court to annul the original TAA decision. In the alternative, the Court was asked to annul the provisions prohibiting inland rate-setting as part of inter-modal transport and annul the requirement to offer shippers the opportunity to renegotiate service contracts.

Once again, the carrier case was dismissed, almost in its entirety. The Court upheld the Commission's findings that TAA restricted competition for the purposes of Article 85(1). Moreover, TAA was not a liner conference under Regulation 4056/86 because it established at least two rate levels through the differentiated tariff scheme for the two categories of members and did not apply uniform or common freight rates applicable to all (Recital 176). At the same time, the capacity management programme was considered to be an activity outside the scope of the liner conference block exemption. The Court then examined, but rejected, the TAA request for individual exemption. However, the applicants' case for annulment of the requirement to renegotiate existing service agreements was upheld on a technicality.

Multi-modal Rates: FEFC Case

In parallel with the TAA/TACA appeals, the Court of First Instance also ruled (Case T-86/95) on an appeal concerning similar issues brought by the Far Eastern Freight Conference (FEFC). The conference tariff, which had taken effect from 1990, included collectively set prices for inland carriage covering door-to-door container transport. German shipper representatives had lodged a complaint arguing that only the sea transport sector fell within the block exemption in Regulation 4056/86 and that inland carriage must be considered under Regulation 1017/68.

In a decision (94/985/EC) issued in December 1994, the Commission had agreed that FEFC had infringed Article 85 and the conditions for an exemption under Regulation 1017/68 had not been fulfilled. The Conference was ordered to put an end to the infringement with token fines of ECU 10,000 levied on each of the 14 members.

The issues were explored in detail by the Court. Significantly, the Court supported (Recital 345) the Commission's view in the original decision that the advantages of intermodal transport in general were not in dispute. However, the argument centred on the legality, under the Competition Rules, of collectively fixing the price of inland services in multi-modal transport.

Relying on the *travaux préparatoires*, general rules of interpretation and the wording of Regulation 4056/86, the Court dismissed the applicants' case that such Conference activities fell within the liner block exemption. The Court also rejected the application for an individual exemption under Regulation 1017/68.

In this connection, the Court (as in the TAA decision) noted that FEFC members bought in inland transport services individually to be resold at a collectively agreed rate, in contradiction to similar services individually offered by independent lines and freight forwarders. Collective inland price-fixing was not therefore indispensable to the supply of inland transport services (Recital 380).

While issues of principle had been lost by the lines, the Court annulled the Commission's original, albeit token, fines.

More Developments Concerning TACA

In 2003, the Court of First Instance upheld the substantive provisions of the Commission's findings that TACA had infringed the Competition Rules (because the service contract restrictions constituted an abuse) and the Commission's refusal to grant an individual exemption for the TACA arrangements. However, the Court:

- Set aside the fines of Euros 273 million imposed for the abuse of a collective dominant position, partly owing to lack of evidence and infringement of the rights of the defence and partly because of immunity conferred by notification to the Commission; and

- Set aside, owing to lack of evidence and infringement of the rights of the defence, the Commission's decision concerning measures inducing competitors to join the conference.

The Commission did not appeal the Court's decision.

Following the Commission's rejection of the original TACA in 1998, and in the light of discussions with the Commission on the principles of future arrangements, a Revised Trans-Atlantic Conference Agreement (TACA 2) came into existence and was notified in 1999. It comprised eight member shipping companies. The main features were:

- Rate-setting only within the provisions of Article 3 of Regulation 4056/86;
- Complete freedom for carriers and shippers to agree the content of individual service agreements;
- Provisions covering conference and multi-carrier service agreements;
- No inland price-fixing but an agreement for carriers not to charge less than their out-of-pocket expenses (the "not below cost" rule); and
- Arrangements, with appropriate safeguards, for compiling and exchanging information.

The "not below cost" rule was approved in August of that year, although a complaint was subsequently lodged with the Court of First Instance by the European Shippers' Councils. However, the Commission expressed reservations about the information exchange arrangements and the competitive effects on individual service contracts.

It was to be more than 3 years before TACA 2 eventually received Commission clearance in 2002. The final agreement included strict limits on the nature of information exchanges with the Commission monitoring aspects of the arrangements. Tightly defined provisions were also agreed to ensure that freight rates could not be increased in response to any temporary withdrawal of vessel capacity.

By the time of the TACA 2 clearance, discussions between the Commission and carriers had defined the scope and limited extent of acceptable provisions in conference agreements. An essential feature was that there could be no restriction on conference members' rights to agree confidential service contracts with individual shippers. Individual service contracts became the rule with only a very small percentage of cargo moving under the published conference tariff. Nevertheless, conference rates continued to have a value as they provided a benchmark starting point for rate negotiations.

TACA 2 represented the end of a chapter, but not the end of the story. The outcome of the Commission's review of Regulation 4056/86 has resulted in far-reaching changes.

Far East Trade, Tariff Charges and Surcharges Agreement (FETTSCA)

FETTSCA was drawn up in 1991 as a means of introducing greater transparency in relation to maritime charges and surcharges. Details were provided to the Commission but the arrangements were not formally notified (which would have conferred immunity) because the parties believed it to be a technical agreement benefiting from Article 2 of Regulation 4056/86. In its later Statement of Objections, the Commission admitted that the scope of Article 2 had been unclear at the time and it was only subsequent legal advice which paved the way for the Commission to impose fines in the absence of non-notification.

FETTSCA was short-lived with only three meetings, the last in 1992. The Agreement was terminated in 1994, shortly after receiving the Statement of Objections. Attempts to settle the case were made, with the lines offering to agree a set of legal principles to meet the concerns expressed. Nevertheless, in May 2000, the Commission imposed fines, based on the individual turnover of the 15 member companies, totalling Euro 6.8 million. Fourteen of the companies subsequently appealed on substantive grounds and on the grounds that even if there had been an infringement (which was denied), the fines were excessive and disproportionate to the facts. In 2003, the Court of First Instance annulled the fines because of the length of time between the proposal to act and the decision to impose monetary sanctions. The Commission appealed for the fines to be re-imposed but this was rejected by the European Court of Justice.

The United States

US Shipping Act 1984

Against the somewhat torrid background to US policy towards conferences, set out above, this section focuses on developments after the flurry of antitrust suits in the 1970s and early 1980s against European and other lines and their individual shipping company executives. These resulted in very heavy damages as well as fines, even the threat of imprisonment. This arose, not out of negligence or wilfulness on the part of the lines or their executives, but as a result of continuing uncertainty about the scope of antitrust immunity afforded by the Bonner amendments to the 1916 Shipping Act, following the *Carnation* and *Svenska* cases, and the general mood of strict antitrust enforcement.

This uncertainty, together with the general policy of deregulation and an acknowledgement in particular that co-operation was after all necessary to facilitate intermodal or door-to-door services, led to improvements in the previously strained

relationship between the US and Consultative Shipping Group (CSG) governments and proposals for new shipping legislation.

This was finally enacted as the US Shipping Act 1984 and resulted in:

- Clarification of the antitrust position of lines.
- A new approach to the establishment of joint ventures and other methods of rationalisation.
- A shift away from the "presumptive illegality" of agreements.
- Authority to approve intermodal conference agreements and new forms of contracts with shippers.
- Conferences being enabled to quote a through rate, inland point in the US to inland point abroad, but not to negotiate the inland rate. This could only be done by individual lines.
- Conferences being required to permit any conference member to take independent action on any rate or service on 10 days' notice, after which that new level or agreed item would become available to other shippers also.
- The authorisation of service contracts with individual shippers or shippers' associations, subject to the filing of their essential terms, which would then also become available to other, similarly situated shippers.
- Streamlined procedures for the approval of agreements.
- The establishment of procedures to maintain access to foreign trades for US carriers.

Apart from the provisions on independent rate action and service contracts, both of which tended to weaken the position and coherence of the conference in regard to rate-making, the contents of the 1984 Act were encouraging. They confirmed more clearly than ever before in the US the validity of liner conferences, including their overall rate-making role; and they endorsed explicitly for the first time, the intermodal, door-to-door concept.

At this time, a Presidential Advisory Commission was established to review the working of the Act after 5 years and to consider whether to continue, revise or eliminate conference antitrust immunity; whether open or closed conferences were to be preferred; tariff-filing and service contracts arrangements; and conference relationships with shippers and non-vessel-operating common carriers (NVOCCs).

The review was protracted, with participation by foreign and US lines, evidence from more than 100 witnesses and testimony from in-depth interviews with 120 industry and government representatives.

The Commission finally reported in 1992 that no meaningful consensus could be reached on the main issues. Consequently, no changes were recommended.

As stated, the governments covered by the US/CSG Dialogue had agreed to consult in future on each other's regulatory practices; they had also undertaken to maintain the ability of commercially operated non-conference lines to compete freely. The Dialogue was undoubtedly helpful in preparing the ground for the rapprochement between the thinking in the US and in Europe on competition policy in the 1984 Act.

Nevertheless, further changes just over the horizon would lead to a fundamental review of the conference system resulting in even greater individualism in the relationship between carriers and shippers.

Deregulation was the mantra when the Republicans took control of Congress in 1994. This provided a focus for continuing shipper opposition to the liner conference system giving rise to far-reaching proposals by the National Industrial Transportation (NIT) League for ending carrier anti-trust immunity and abolishing the Federal Maritime Commission (FMC).

Initial opposition to the Republican-backed shipper proposals, co-ordinated through a carrier coalition, was moderated after the NIT League agreed not to press for abolishing anti-trust immunity in July 1995. It took a further 2 years of discussions before proposals were put forward as a final Senate compromise in March 1998. Despite strong objections from non-vessel-operating common carriers (NVOCCs) aggrieved that they remained unable to enter into confidential service contracts with shippers (but this has now changed—see below), the reform legislation was passed by the Senate and the House of Representatives. The outcome was seen as a broadly acceptable compromise which:

- Retained anti-trust immunity and maintained the FMC;
- Prohibited conferences and other agreements from banning the negotiation of individual service contracts by any of their members;
- Allowed conferences to have voluntary Guidelines relating to the terms of individual service agreements;
- Eliminated tariff filing with FMC but required carriers and conferences to make tariffs and essential terms publicly available;
- Required only minimum information to be made available (either publicly or to other members) for service contracts covering: origin and destination port ranges, commodity(ies), minimum volume and duration of the contract;
- Reduced the notice period required for individual conference members to take independent rate action from 10 to 5 days; and
- Allowed groups of ocean carriers to negotiate with non-ocean carriers for rates and services for inland transportation, provided that there was no conflict with US anti-trust laws.

Ocean Shipping Reform Act 1998

The *Ocean Shipping Reform Act 1998* (OSRA) came into force in May 1999.

The workings of OSRA were examined by FMC 2 years later, described as a “sufficient period of time for those in the industry to begin to adjust to the new regulatory environment and for the FMC to make an initial candid assessment of how the impact of the legislation appears to be unfolding”. Responses to the FMC’s Notice of Inquiry were described as voluminous. FMC also conducted a

comprehensive examination of pricing and service behaviour based on random samples of filed service contracts. The findings were published in September 2001.

The Report concluded that OSRA's objective for promoting a more market-driven and efficient liner shipping industry had generally been achieved.

OSRA's most enduring change was to provide carriers and shippers with the right to conclude individual and confidential service contracts. The 1984 Act had given conferences control over their members' use of independent service agreements. Even where they were permitted by a conference, the main provisions had to be made publicly available with similarly situated shippers able to demand the same "me too" rate. Only limited information was now required to be made publicly available and Conferences or Agreements could no longer impose restrictions on or dictate the content of their members' individual contracts. Carrier rights for setting a separate rate independently of the conference tariff had also been relaxed.

The result has been a significant shift away from the traditional conference tariff to upwards of 80 % of cargo moving under service contracts. Anti-trust immunity is now centred on discussion agreements with non-binding rate authority and members' adoption of voluntary, but non-enforceable, service contract Guidelines.

A review of the FMC analysis suggests that, although not necessarily in equal measure, carriers and cargo have obtained advantages, particularly the ability to tailor contracts to individual circumstances. However, there are shipper concerns that discussion agreements can be used to undermine contract confidentiality provisions while carriers point out that their competitors' rate quotes are used by some shippers as a bargaining tool.

Carriers thus regard the ability to exchange information as essential to promoting stability and avoiding a return to the destructive competition of the pre-conference era. Stability is aided by bench-mark rates where the market knows the price as a starting point for discussions.

The reformed US system is of direct benefit to large and multi-national shippers whose market power can be brought to bear during contract negotiations. It remains to be seen whether small- and medium-sized enterprises will be able to secure a similar competitive advantage through a suggested resurgence of shipper associations and their buying power.

An interesting, but possibly unplanned, side-effect of the new confidentiality regime has been the demand by some shippers for terms requiring the carrier to reduce or surrender traditional contract defences and accept increased liability levels. Voluntary erosion of internationally agreed provisions abrogates liability cover and carriers accepting such demands incur higher costs to cover the uninsured risks.

Two groups did not welcome the changes and were opposed to OSRA. Congressman Henry Hyde, Chairman of the House Judiciary Committee, made subsequent efforts to remove anti-trust immunity from carrier agreements—arguing that OSRA placed NVOCCs, freight forwarders and smaller shippers at a disadvantage. Non-vessel-operating common carriers, who at one point during the OSRA legislative process expected change, had remained prohibited from entering into

service contracts with shippers, although they could agree such contracts with ocean common carriers. As a result of subsequent efforts, these strictures were later relaxed as explained below.

Under the United States regulatory scheme, both NVOCCs and forwarders, defined as "Ocean Transportation Intermediaries" under OSRA, were subject to certain licensing and financial responsibility requirements. As mentioned above, NVOCCs were prohibited from offering "service contract" rates to shippers. Eight petitions were filed with the FMC in 2003–2004, relating to NVOCC Service Contracts by Third-Party Logistics Providers. The petitioners included UPS, FedEx, BAX Global, and DHL-Danzas, each calling for service contract authority or reform of tariff publication requirements. In conjunction with these petitions, the NVOCCs stressed that authority to contract was a major issue for the international shipping community. They called on the FMC to further the deregulatory spirit of OSRA by extending confidential contracting authority to intermediaries. The NVOCCs stressed that such authority was necessary to meet the demands of their shipper-clients, the continuing integration of logistics services across all modes, and to respond to the age-old demand for confidentiality of ocean rates.

In response to these petitions, the FMC accepted a staff recommendation that NVOCCs should be allowed to enter into confidential service contracts and decided in October 2004 to authorize "service arrangements" for NVOCCs to provide parity with service contracts. The so-called NVOCC Service Arrangement (NSA) rule thus provided "service contract parity" to NVOCCs acting as carriers, when dealing with their shipper-customers. The NSA rule was allowed under section 16 of the Shipping Act and is still in effect. It exempts NVOCCs from tariff publication and adherence to the enforcement requirements of the Shipping Act, subject to certain filing and publication requirements. In contrast to the service contract rules, the NSA rule prohibits shippers' associations which include NVOCCs as members from entering into an NSA. This restriction is similar to another aspect of the NSA rule which prohibits NVOCC-to-NVOCC NSAs, where one NVOCC acts as carrier and the other as shipper. In each instance, the FMC determines whether permitting such behaviour might eventually lead to anti-competitive activities on the part of the NVOCCs without any effective regulatory oversight by either the FMC or other United States federal agencies such as the Department of Justice.

The NSA rule represents one of those rare occasions when the regulated and the regulator understood the significance of an issue and came together to address it effectively. The FMC has commented that "[t]he [NSA] rulemaking will provide shippers with a broader range of service options, and greater opportunities for integrated supply chain solutions... [A]s the use of NSAs develops over time they will ultimately lead to greater competition and a more efficient shipping industry." Some shippers' associations have pointed out the NSA rule's prohibition on NVOCC-to-NVOCC arrangements is unnecessary and counter-productive.

Until recently, NVOCCs had to additionally publish and maintain a tariff. The critics of the NSA rule were long emphasising that the real issue involved tariff publication and enforcement. In a decision of the FMC issued orally on 18 February 2010, the Commission ruled that NVOCCs would not have to publish tariffs.

The 3-1 decision largely approved a petition submitted by the National Customs Brokers and Forwarders Association, Inc. (NBBFAA) that sought an exemption from the Commission under the Shipping Act of 1984 as amended that would exempt rate tariffs from being published. This is a major development with respect to NVOCCs, as it will make it considerably easier for them to operate and respond to market conditions. It makes it even more likely that such companies will be able to serve their function of providing the benefits of competition to smaller shippers.

In its decision the Commission said it would issue a rule within 30 days to the public that would permit licensed NVOCCs to be exempt from the requirement and associated costs of publishing rates under the Shipping Act. The rule will be issued pursuant to the Commission's authority under the Act and is based on the Commission's finding that granting the exemption within certain parameters and conditions will not result in substantial reduction in competition or be detrimental to commerce. In taking this action, the Commission noted that the exemption is voluntary in that NVOCCs may choose whether to utilize the exemption which only applies to licensed NVOCCs; and the exemption which is limited to rates as tariff rules must continue to be published.

For those NVOCCs that choose to use the rate tariff exemption, the following conditions would apply:

- Notice of the rate exemption must be published in a permanent place with the rules tariff that the NVOCC has chosen to operate under the exemption and opt out of publishing tariff rates;
- Public access to the rules tariff must be granted free of charge. In lieu of free public access, an NVOCC may provide a copy of the rules tariff with each of its rate quotes or proposals; and,
- Unpublished rate agreements must be agreed to and noted in writing, including the applicable rate for each shipment, by the date the cargo is received by the common carrier or its agent.

Inland hauliers (teamsters) were also unhappy, alleging that carrier immunity in rate-setting discussions had been used to the disadvantage of drivers whose salaries and conditions had been adversely affected.

Nevertheless, in overall terms, OSRA has achieved the strategy of combining free market conditions with limited controls over that freedom. This, therefore, provides a generally workable solution acceptable to carriers and cargo. It remains to be seen whether similar elements will be embraced in liner conference reviews taking place in other jurisdictions.

Europe

***Note**: Articles 85 and 86 providing the framework mechanism for application of the EU's competition rules in the original Treaty of Rome, were subsequently renumbered Articles 81 and 82 respectively, as a result of amendments to the*

Treaty. Another revision was put into place through the Treaty of Functioning of the European Union of 2009 (TFEU) and the renumbered articles are 101 and 102 respectively. The article numbers in the text below are the current ones.

EU Competition Policy: Liner Conferences

After a European Court decision in 1974 which confirmed that the general articles of the Treaty of Rome applied to sea and air transport, it became evident that liner conferences were strictly unlawful under the EU competition (or antitrust) rules. Article 101 of the Treaty contains a general prohibition of concerted practices which may affect trade between member states and which have as their object or effect, the prevention, restriction or distortion of competition. Article 102 prohibits abuses of a dominant position, generally defined in case law and in interpretations of the position of shore-based businesses as a share upwards of about 25–40 % of the market in which the undertaking is trading, depending on the specific case.

A specific regulation was, therefore needed to apply the Treaty principles to sea and air transport, the only sectors to which they did not yet formally apply.

Action on this imperative had been deferred during the evolution of the EU's overall competition policy through a series of instruments adopted by the Council of Ministers. First, transport as a whole had been exempted from the regulation applying Articles 101 and 102 generally to business activity (Regulation 17/62) by Regulation 141/62. Then sea and air transport had been excluded from the regulation applying them to rail, road and inland waterway transport (Regulation 1017/68). The 1974 Court decision, once digested, meant that direct application to liner conferences was only a matter of time.

Conferences, if they were to continue to be lawful, had therefore to be given an exemption under the competition (or antitrust) articles of the Treaty of Rome. The matter had to be regularised through a formal exemption from the general ban on cartel activity under Article 101 (there is no corresponding possibility of exemption from Article 102). There were also other issues which needed to be addressed.

Following consultations, the European Commission put forward formal proposals in March 1985. They were part of a wider package of proposals for what became known as the first stage of the Common Shipping Policy, themselves in turn part of a comprehensive set of proposals for the development of a common transport policy as requested by the European Parliament.

The period up to the adoption of these proposals was one of intense activity by governments, the Commission, the shipping industry and shipper (now named "transport-user") interests within the then ten Member States. The leading voice for the shipping industry was the Comité des Associations d'Armateurs des Communautés Européennes (CAACE)—since renamed the European Community Shipowners' Associations (ECSA). Differences of view persisted right up to the last minute when compromises had to be struck, not just within the competition proposal itself but also across the other shipping policy proposals.

Regulation 4056/86

The so-called "competition regulation" was adopted in December 1986 laying down detailed rules for the application of Articles 101 and 102 of the Treaty to maritime transport. It was very detailed and laid down the conditions and obligations under which liner conferences might continue to operate.

The final version of the regulation met with disquiet from both sides of industry. There was reluctant acceptance of the principle with concern about what it would mean in practice because, as in the US trades, the price for immunity from process was a measure of regulation. This was an important feature in that a number of member states, including the UK, effectively exchanged very wide-ranging exemptions in their national legislation for a much more explicitly defined exemption under EU law which was directly applicable in their countries. No-one then saw the EU regime as being intended to be as bureaucratic as that administered by the US Federal Maritime Commission. Indeed, both government and industry representatives frequently stressed that one of their objectives was to avoid creating a European FMC. However, later events were to change that perception.

Regulation 4056/86 was—although it took some time for the shipping industry to acknowledge it—a unique regulation in the context of EU competition law, for four reasons. First, it enacted a "block" or "group" (i.e. sector-wide, as opposed to individual) exemption for horizontal price-setting agreements—which had never been done before (and has not been done since). Price-setting is considered one of the most objectionable anti-competitive practices. Second, the exemption was established directly in the implementing regulation adopted by the Council of Ministers, rather than through the normal channel of a Commission regulation. Third, unusually, the regulation was based not just on the competition articles of the Treaty of Rome, but also on the then Article 84(2)—now 100(2) of TFEU—which dealt with how transport policy issues should be applied to sea transport. This emphasised the instruction to take account of the distinctive characteristics of maritime transport. Fourth, the exemption was not time-limited. The norm is for exemptions, group or individual, to terminate or be reviewed after a fixed period, usually 5 years.

The regulation built on the basic philosophy underlying the UN Liner Code, albeit in the context of an instrument which had a more focused antitrust, regulatory intent. The preambular clauses made clear the EU governments' support at that time for the concept of liner conferences and their recognition of the wider social benefits they brought.

The main elements of the regulation were as follows:

- *Scope*. It applied to "international maritime transport services to or from a Community port". The question of inland carriage would be an issue in later Commission decisions.
- *Coverage*. The regulation specifically excluded tramp vessel services. This was consistent with the general contention of bulk operators that their markets were open and free. Any regulation of bulk shipping was therefore effectively left to

national authorities and courts. However, the Commission subsequently also referred in decisions to an undefined specialist sector.

- *Liner conferences*. A group exemption was enacted for "agreements, decisions and concerted practices of all or part of the members of one or more liner conferences" which operated on the basis of "common or uniform rates" and also engaged in one or more joint activities such as scheduling of sailings and the regulation of the carrying capacity offered by the member lines.
- *Condition*. The exemption was subject to one condition not to discriminate between ports, transport-users and other relevant parties unless the action can be economically justified. Failure to comply with a condition means that the agreement is deemed to have been void *ab initio*.
- *Other requirements*. Attaching to the exemption were a series of obligations which were interesting in the context of earlier examinations of the liner conference system and laws (for example, in the US). Non-compliance with an obligation only gives rise to sanction if and from the time the offender is instructed to terminate an infringement. The next four elements listed the main obligations:

  – *Consultation*. There had to be "consultation" (not "negotiation") on matters of general principle between providers and users on rates, conditions and quality of scheduled services.
  – *Loyalty*. Arrangements based on the contract or other lawful system were to be permitted, subject to consultation and other detailed rules. These could extend to cover 100 % of cargoes, but such coverage could not be unilaterally imposed. Deferred rebates were permitted, but in that case shippers had to be offered a choice between immediate and deferred rebates.
  – *Tariffs*. Tariff rates, related conditions, regulations and the like had to be made available to users. They also had to set out all the conditions concerning loading and discharge including the exact extent of the services covered by the freight charge, showing the proportions for the sea leg and the land leg, and by any other charge made by the lines.
  – *Inland haulage*. On the land leg of a multimodal movement, users had to be offered a free choice of whether to use haulage arranged by the shipping line (carrier haulage) or arranged by themselves (merchant haulage).

- *Agreements between conferences and transport-users*. A further group exemption was enacted for certain agreements concerning rates and conditions of service.
- *Enforcement and penalties*. Detailed provisions were made, including, most importantly, for a staged imposition of warnings and sanctions and for proportionality. As in other sectors, the maximum penalties were potentially very high, rising to 10 % of the total turnover of the company in question (not just that generated by shipping activities).
- *Entry into force*: a 6-month transitional period was envisaged until July 1987, by which time conferences were expected to have adjusted their arrangements in line with the requirements of the regulation.

Because of the difficulty of reaching full agreement both on this regulation between governments, the transport directorate and the competition directorate, and on the shipping policy package as a whole (mainly between the individual governments), all recognised from the start that the regulation was imperfect, but it broke new ground at least in Europe. Continuing the approach of the individual member states, it appeared on the face of it to be largely self-regulatory, intentionally relying for its enforcement not on tariff-filing as in the US, but on transparency of behavioural requirements.

It had been hoped that a period of relative stability would follow the adoption of Regulation 4056/86, but it was not to last more than a few years. Soon, the Commission was to begin chipping away at the exemption through a number of cases which arose as a result of complaints. In time, some of these would challenge certain of the fundamental precepts upon which the exemption had been based.

Application of EU Implementing Rules

Before turning to the review of Regulation 4056/86 and the events which led to it, it is appropriate to pause and note a further development in the EU affecting, in particular, non-liner shipping, i.e. bulk and specialist trades.

Article 101 of the TFEU sets out general rules applicable to restrictive practices. Paragraph 1 prohibits all agreements between undertakings designed to prevent, restrict or distort competition between member states. All such agreements are automatically void. However, in accordance with paragraph 3, where an otherwise prohibited agreement contributes to an improvement in the production or distribution of goods or promotes technical or economic progress while allowing consumers a fair share of the resulting benefits, and does not impose indispensable restrictions on the undertaking or substantially eliminate competition, the provisions of paragraph 1 may be declared inapplicable.

Article 102 prohibits, *per se*, any abuse by undertakings of a dominant position. This includes the imposition of unfair purchase or selling prices or trading conditions; limiting production, market or technical development to the detriment of consumers; and discriminatory practices.

Article 103 empowers the Council to give effect to the principles laid down in Articles 101 and 102 through appropriate regulations or directives.

Regulation 17, adopted by the Council in 1962, was the first implementing provision, laying down a centralised system of supervision and enforcement procedures. The Commission and national authorities could all declare a practice prohibited under Article 101(1) but only the Commission could grant an exemption under paragraph (3). Applications for exemption of prohibited practices had to be notified to the Commission under Regulation 17, where Article 15(5) provided immunity from fines from the time of notification until any decision by the Commission found that the activities were not capable of exemption. The system

of notification and immunity was an important safeguard for industry and undertakings.

However, given efforts to establish a common transport policy, Regulation 141 of 1962 disapplied Regulation 17 to agreements, decisions or concerted practices in the transport sector having as their objective or effect "the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position within the meaning of Article 102 of the Treaty...".

Transport by rail, road and inland waterway was subsequently brought back within implementing provisions through Regulation 1017/68. Significantly, and unlike the provisions of Regulation No 17 and Article 19 of Regulation 4056/86, Regulation 1017/68 did not confer immunity from fines from the date of notification of a prohibited practice. As discussed elsewhere, this had implications for the respondent undertakings in the TACA case.

As part of a package connected with EU trade and treaty commitments, including the UN Liner Code of Conduct, Regulation 4056/86 applied competition implementing rules to "international maritime services ... other than tramp vessels". This created the block exemption allowing liner conferences to jointly agree tariffs.

The block exemption was developed to reduce the number of individual exemptions being notified as a means of securing immunity. A block exemption was also later granted to liner companies working together in consortia (see below).

In 1999, the Commission put forward proposals for reform arguing that, after some forty years' experience, the original objective of establishing and harmonising competition provisions throughout the Community had largely been achieved. The Commission's responsibility for considering exemptions had led to large numbers of notifications being submitted. This was creating severe administrative delays, which would become even more acute when accession states joined the European Union in 2004, and detracted from the Commission's efforts to eradicate hard core cartels.

Streamlined arrangements were therefore proposed and developed as Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition, laid down in Articles 101 and 102 of the Treaty. The main provisions:

- Replaced the system of notification (and its accompanying immunity from fines) with directly applicable "self assessment" exception arrangements;
- Abolished the Commission's sole preserve in overseeing implementation of the competition rules by empowering national competition authorities to apply Article 101(3) provisions;
- Allowed the grant of block exemptions to continue under the Commission's exclusive competence ***but*** with national competition authorities empowered to withdraw the benefit in their territory;

- Devolved powers back to national authorities to apply Articles 101–102 as a whole, together with arrangements to ensure the uniform application of Community competition law;
- Replaced the industry-specific Advisory Committee on Agreements and Dominant Positions in Maritime Transport with a General Advisory Committee on Restrictive Practices and Dominant Positions;
- Expressly excluded the application of the Regulation to international tramp vessel services and cabotage services; and
- Repealed Regulations 17 and 141 and introduced consequential amendments, *inter alia,* to Regulation 1017/68 (Inland Transport) and Regulation 4056/86 (Liner Conferences).

It is submitted that rather than removing an administrative burden, abolition of the notification system will potentially create uncertainty for business undertakings. A view (no matter how carefully considered), which concludes that a prohibited practice is capable of an exemption, might be contradicted at a later stage by regulators who might view the practice as an infringement, which should not benefit from the protection of immunity from fines. It remains to be seen whether guidance issued by the Commission on the methodology for the application of Article 101(3) will provide the degree of confidence essential to the smooth functioning of businesses.

OECD Activity

As part of an examination of regulatory regimes across the whole spectrum of member countries' activities, an OECD secretariat report on Regulatory Reform in Maritime Transport was issued in 1999. The Report is examined at this juncture because of its place in the chronology of developments and its eventual impact on the evolution of EU policy. Its central thesis argued for reassessment of anti-trust protection and, controversially, suggested replacing automatic immunity for setting common rates with specific approval to be given against a "public benefit" test. It also argued for outlawing discussion and capacity stabilisation agreements.

Carriers were critical of the content arguing that it was devoid of any meaningful economic analysis; overlooked regulatory changes, such as confidential contracting; did not appreciate that normal competition regulations were inappropriate to the unique conditions of liner shipping; and failed to recognise that block exemptions and immunity were balanced by tightly regulated and enforced obligations. Timing was also unfortunate because recent changes in a number of jurisdictions, where the underlying principles of immunity had been reaffirmed, meant that there were now settled arrangements for conferences after a long period of uncertainty. It was not, therefore, unreasonable for carriers to expect an era of calm whereas change, or the prospect of change, would be likely to create yet further legal uncertainty.

Not surprisingly, shipper representatives welcomed the proposals.

An OECD workshop was held in Paris in May 2000 when none of the governments present showed any enthusiasm for the report. Several, including representatives from the USA, Japan and on behalf of the European Union, made it clear that they did not wish to change the position at that time.

The report was remitted for further work. A second report, issued in advance of a subsequent workshop in December 2001, maintained the abolitionist stance and suggested a "second best" way forward, using as a basis the arrangements in the USA under the Ocean Shipping Reform Act, 1998. Carriers again criticised the content for its paucity of data, the assumptions made, and the analysis used to reach the conclusions.

Predictable positions were taken by industry representatives at the workshop. The USA, Australia and, in particular, Japan, repeated their opposition to change. However, this time the European Union representative noted that the secretariat report would be seen as a point of departure for further work by the EU. This comment was to have far-reaching implications, unleashing a review of Council Regulation 4056/86.

The final report, with the conclusions unchanged, was issued in May 2002. This remained a secretariat publication and was not official policy agreed by OECD member states. Unfortunately, this important distinction was not universally recognised.

Review of Regulation 4056/86

Liner Shipping

It has been mentioned that, over the years, the Commission sought to restrict the interpretation of what was viewed as a very generous provision in relation to liner shipping conferences. We have also seen that, in the 18 months between the two OECD workshops, the Commission's position shifted from one of taking no immediate action to a pro-active review.

The review process started with a consultation paper issued in 2003. This reached the preliminary conclusion that the regulation needed to be brought up to date. It suggested that the liner block exemption (described as controversial) appeared open to challenge and questioned the continuing exclusion of tramp services and cabotage from competition implementing regulations. The practical value of the provisions covering technical agreements and conflicts of law were also questioned.

Despite carrier views to the contrary, the Commission attempted to place the burden of proving the continuing need for a maritime regime squarely on carriers. This is not to say that carriers were on the defensive but it was less than satisfactory that cargo interests were not called upon to prove their case for removing the block exemption. There was also some surprise when, despite the Commission's

indication that it had an open mind on future arrangements, the then Competition Commissioner, Professor Monti, ruled out US-style discussion agreements before the opening consultation period had expired.

ECSA co-ordinated the views of its constituent members based in the European Union and Norway, and worked closely with national associations outside Europe, particularly the Japanese Shipowners' Association, and with other international shipping organisations including the International Chamber of Shipping (ICS), BIMCO, Intertanko and Intercargo. Nevertheless, as liner aspects dominated the first part of the review, the major liner companies came together to form the European Liner Affairs Association (ELAA) with an original membership of 24 lines world-wide which had interests in conference trades to and from Europe.

Responses to the consultation paper were divided along partisan lines. Carriers argued that the block exemption was a necessary means of providing stability in an inherently unstable market, bedevilled by the unpredictability of trade levels and chronic imbalances according to seasonal and directional demands and the varying economic health of countries served. Yet, despite everything, liners always provided regular services meeting advertised sailing schedules. The European Shippers' Council (ESC) expressed a contrary view, repeating their members' longstanding call for repeal of the block exemption and a totally deregulated market for freight rates.

A mixture of views came from forwarder interests with, in general, qualified support for the value of the conference system but concerns expressed about the lack of consultation on surcharges and capacity changes. However, UK and Swedish organisations reflected shipper arguments for total abolition.

The majority of governments that responded favoured the principle of liner shipping exemptions with some calls for simplification. One state noted the need for consistency with other regimes such as in the USA, while others questioned the need for exemption arrangements.

A public hearing was hosted by the European Commission in December 2003. This provided industry with an opportunity to put forward views on the conference system and, particularly, on the pre-announced themes of stability of prices, reliability of services and indispensability of the arrangements. Presentations by the different interest groups were followed by general exchanges and the opportunity for member states to put forward questions. Few, if any, new arguments emerged on that occasion. An offer by carrier representatives to work with shippers, freight forwarders and the Commission, under appropriate legal privilege, to try to agree terms of reference for collecting empirical data of actual prices, was not taken up. Shipper representatives questioned the objectives of price stability arguing that competition, or yield management, were preferable to price administration within opaque tariffs and short-notice changes. They argued that rates should be left for individual agreement to reflect more closely carrier cost levels and indicated that they could live with the resulting consequences of supply and demand.

In response to calls for alternative arrangements to Regulation 4056/86, ELAA put forward a set of proposals in August 2004, emphasising that its membership remained of the view that changes were neither necessary nor justified. It offered an

alternative basis for liner co-operation to preserve stability in the supply of services to users. The proposals were predicated on a new legal instrument allowing: the collection and dissemination of aggregated and historic information between lines on trade, capacity utilisation, commodity developments and forecasts; a publicly available past price index; and the development of formulae for surcharges and ancillary charges. Significantly, there would be no reference to collective rate-setting or capacity regulation.

ELAA's proposals were set out in some detail in a White Paper issued by the Commission in October 2004.

Tramp and "Specialist" Shipping

It is now necessary to take a step backwards and focus specifically on the issue of tramp shipping services. While subject to Community competition rules, tramp shipping remained outside the competition implementing rules. As a result, operators using bulk shipping pools and carriers working together in dedicated trades for the carriage of, for example, cars, chemicals and liquid gases, could not protect themselves under the former notification arrangements. The exclusion, which might have been seen as casting carriers into a legal wilderness, was also deemed a protection in that the Commission had no power to demand information or take enforcement action in the event of alleged irregularities. The exclusion continued under Regulation 1/2003. However, proposals in the review of Regulation 4056/86, would bring this to an end, while at the same time creating potential new uncertainties.

Article 3 of Regulation 4056/86 distinguishes between "liner conferences" which come within the ambit of the block exemption and its accompanying rules; and "tramp vessel services" which do not. As noted earlier in this chapter, the TAA decision created a new category of "specialist transport", a term which has never been properly defined (*TAA decision 94/980/EC Recital 33*). The proposed removal of the exclusion from the implementing regulations was seen by the industry as almost inevitable once the only other exception, relating to air transport, had been removed early in 2004.

ECSA's response to the proposal was to open a dialogue with the Commission to explain in greater detail the workings of non-liner services. Cabotage arrangements attracted very little comment and efforts were therefore concentrated only on the tramp sector. A tramp shipowner, operating in total isolation, is the very embodiment of textbook competition. In most cases the firm is too small individually to have any influence over a market populated by dozens, and often hundreds, of charterers. A study undertaken for the industry identified some 4,800 shipping companies in the tramp sector with only four having over 300 ships (2 % of the market share) and an average number of five ships per company.

However, isolation is not always an effective answer and bulk operators often work through shipping pools as an efficient means of administering and marketing their vessels. Pools are created for the purposes of facilitating chartering and

husbandry. Rates set themselves in response to market mechanisms of supply and demand.

The other affected category, specialised transport, embraces a variety of trades using high-cost, purpose-built vessels, such as chemical carriers, car carriers, reefer vessels and forest product carriers. Trade routes may be determined by the availability of specialist terminals or dedicated infrastructure provisions or there might be an element of flexibility in the routes served. Specialist trades can share characteristics of liner services but they do not enjoy the, albeit limited, protection afforded to conference operators.

Removal of the exclusion would bring the non-liner sectors into unknown legal territory. Despite the competitive environment, certainty would be essential in relation to co-operative arrangements in areas such as pools. The abolition of the notification arrangements under Regulation 1/2003 would mean that pools, which could not be notified in the past because of the sectoral exclusion, would be subject to self-assessment requirements. Guidance was therefore needed on the criteria to be applied in future to assist operators seeking to determine whether any actions potentially giving rise to a prohibition under Article 101(1) would be eligible for an exemption under Article 101(3).

Subsequent Events and Developments

The next major event was the Commission's White Paper in October 2004 which, not surprisingly, recommended:

- Repeal of the block exemption for liner conferences; and
- Lifting the exclusion applicable to tramp (including specialist) shipping and cabotage services.

Views were invited on the recommendations, on potential alternative arrangements for future application, and on the ELAA's proposals.

Responses again mirrored the parties' known positions. Carriers questioned the need for any change but took the position that if change was inevitable, a new regime for liner shipping should be built on ELAA's proposals. In contrast, shipper interests advocated reform. Government views were mixed. There was less comment on the proposal to lift the tramp exclusion although ECSA responded emphasising the importance of providing guidance as a means of enhancing certainty for shipowners.

In December 2005, the Commission adopted the following proposals:

- ***Repeal of the liner conference block exemption***: this was said to benefit EU exporters by lowering transport prices while maintaining reliable services and in turn enhance the competitiveness of EU industry.

  However, carrier representations for limiting the extent and speed of change had been heeded with the Commission proposing that repeal should not take

effect until 2 years after adoption of the required Council decision. The transitional period would enable carriers to adapt to new market conditions and Member States time to review their international obligations including, no doubt, treaty implications under the Code of Conduct for Liner Conferences and bi-lateral trade agreements.

- ***Tramp Shipping***: the exclusion from the implementing provisions set out in Regulation 1/2003 would be lifted thereby bringing the sector within Community competition rules. This will mean that the Commission, rather than individual Member States, would have competence to apply the powers and instigate enforcement measures.
- ***New Guidelines***: nevertheless, account had been taken of industry representations for guidance on the future practical application of the rules. Guidelines would be issued on the application of competition rules to all forms of co-operation across the maritime sector. It was hoped that they would include elements of the alternative arrangements governing liner shipping operations advocated by ELAA and also advice particularly in relation to bulk shipping pools. On the latter, the Commission maintained its stance that formal guidance could not be issued until it had been granted the necessary oversight powers, but acknowledged the need for informal advice in advance of the changes taking effect and the issue in due course of the definitive and comprehensive Guidelines.

The European Parliament was broadly supportive of the industry approach and need for Guidelines but, although consulted, had no decision-making powers in this area.

The Commission's proposals were adopted unanimously by the Competitiveness Council in September 2006. The liner conference block exemption was repealed but a 2-year transitional period meant that it would not take unconditional effect until October 2008. However, and despite representations by the industry for a similar transitional period, the sectoral exclusion for tramp shipping was lifted when the implementing Regulation 1419/2006 took effect in October 2006—although it was generally understood that the Commission would be unlikely to use its new enforcement powers until the promised Guidelines had been issued.

At the same time, an Issues Paper was published by the Commission as a first step in the development of Guidelines. It dealt almost entirely with liner shipping including a preliminary assessment of ELAA's proposals. However, a brief introductory comment noted that tramp operations, particularly bulk pool arrangements, would also be addressed. The industry hoped that this would recognise the purpose and rationale for pool co-operation which had been explained to Commission officials at a series of meetings hosted over the summer by individual shipowner associations in the main European centres.

A consultant report, drawn up on behalf of the European Commission, published early in 2007, examined the workings of tramp shipping. Its main focus was on the compatibility of bulk pools with competition legislation. The consultants' preferred view was that if pools were seen as production joint ventures with an integrated

distribution function, they would not be caught by the prohibition in Article 101(1). Accordingly, the extent to which pools represented an integrated whole and not a separate function of supply by owners and fixing (i.e. selling) by pool managers, was crucial to determining how pools should be assessed. As far as owners were concerned, this was the position. Owners provide one or more vessels and remain responsible for technical safety issues but pool managers undertake all commercial activities including planning vessel movements, instructing vessels, nominating port agents, liaising with charterers and shippers, concluding fixtures, issuing freight and demurrage invoices, ordering bunkers and resolving problems or disputes. Pool managers will also be scanning markets for new opportunities. In other words, this is production of the service.

It was, therefore, disappointing that draft Guidelines issued in September 2007 took an alternative approach and applied a narrower interpretation characterising shipping pools as joint selling coupled with some features of joint production. This would mean that every pool would have to be analysed to determine whether it fulfilled the criteria for a claimed exemption under Article 101(3).

Further representations were made over the following months on the importance of maintaining a stable environment for bulk pool operators while emphasising that the system had never been challenged by charterers. At the same time, liner interests called for clarification of the Guideline contents to ensure certainty in future information exchange arrangements, noting that such arrangements were essential to the continuing provision of competitive and efficient services for customers.

The final Guidelines were adopted by the Commission in July 2008. The approach towards pools is not quite so uncompromising as originally suggested and acknowledges that the greater the joint production element, the less likely it is that the pool will be caught by the Article 101(1) prohibition. However, this will not absolve pool managers from having to self-assess their arrangements. Anecdotal evidence suggests that some pools have decided to cease operations, not because they are acting unlawfully but, rather, because they have no desire to be pinpointed for a test challenge. Commission officials have hinted that they will not be targeting pool agreements for their own sake.

The Guidelines also address future co-operation in liner trades. Advice is set out in broad terms and it will be for undertakings to determine the compatibility of their arrangements with the legislation. The Guidelines suggest factors which should be taken into account such as market structure, including number of operators and any structural links between competitors; whether information exchanged is already in the public domain; sensitivity of the information; whether it is individual or aggregated; whether it is historic, recent or future; frequency of exchanges; and how, and to whom, it is circulated. Discussions and information exchanges can be conducted in a trade association but the association must not be used for undertaking prohibited or anti-competitive practices or to remove the uncertainty of market operations or competitors' behaviour. In other words, the market must be capable of offering price-based vibrancy to customers. The Commission is in the process of

consulting interested parties on a proposal to remove the guidelines altogether as from September 2013.

On 18th October 2008, and after an existence of more than 125 years, the conference system in Europe slipped quietly into history. It remains to be seen whether the Commission's success in Europe to restrict the extent of co-operation in liner shipping will open up a new era of uncertainty by reference to untried criteria. Moreover, changes in Europe might have implications for the future shape of anti-trust arrangements in other jurisdictions. Some governments outside Europe are beginning to look with interest at the direction taken by the EU. Only time will tell whether the process gains momentum and heralds the eventual demise of conference arrangements throughout the world.

Liner Consortia

As explained earlier, liner consortia working both within and outside of conferences have become an essential part of the liner shipping scene. It is through them that European (and other) carriers have been able to rationalise and combine their services in order to meet competition from the massive, and sometimes subsidised, single operators. Nevertheless, from a policy standpoint, consortia also raise issues about their effect on competition.

Detailed discussions on whether liner consortia (not liner conferences) were in conformity with the Treaty of Rome, or whether some special regime for them was necessary, were in train between governments, the industry and the Commission's competition and transport directorates prior to the adoption of Regulation 4056/86. They continued into the early 1990s.

The shipowners' view was that, since the primary restrictive practices in the liner shipping industry—rate-setting and capacity rationalisation—had been addressed in Regulation 4056/86 in regard to liner conferences and since consortia as then formed did not have those functions, no further regulation was needed. In this thinking, they drew on Article 2 of Regulation 4056/86 which defined certain types of agreement as "technical" and then excluded them from the regulation; in other words, they were considered not to have contravened the prohibition of cartel activity in Article 101 at all. The shipping industry through ECSA argued that agreements between consortia members—where they were not covered by the full conference exemption—were technical agreements in that sense.

There was a major definitional problem with the industry being compelled to define a concept which, although some consortia had been in existence for more than 10 years, was flexible and varied. The competition directorate on the other hand, insisted that an exemption could only be established in respect of agreements which were clearly defined and indeed only for specified activities. This period marked the beginning of a much tougher approach by the European Commission to the application of competition policy to the maritime sector and also reflected a

deliberate intention to re-assert Commission—as opposed to Council (i.e. governments)—competence in this key area of EU policy-making.

In 1992, the EU governments agreed in Council Regulation 479/92 to grant a group exemption for consortia and instructed the Commission to develop an implementing regulation taking the utmost account of agreed Guidelines which they set out in an annex. This decision marked the end of the possibility that governments might themselves continue to regulate competition issues in other areas of the maritime sector as they had in Regulation 4056/86.

The Commission's Regulation (870/95) was adopted in 1995, at least 20 years after the establishment of the first consortium—a European invention—and about 10 years after work on it had begun.

The main features of the regulation were the following:

- *Definition*. This encompassed a number of agreements which would have been traditionally regarded as technical or operational, and therefore unexceptionable in competition terms. Consortia had to be involved in container operations, a limiting factor thus ruling out co-operation between, in particular, specialist operators in the non-liner sector, although it was not clear to what degree. They had to improve the service offered by each of the member lines and rationalise their operations, but that service could not include price-fixing.
- *Exemption*. This was applied only to a list of specified activities, many of which recalled technical or other functions mentioned in the conference regulation (4056/86). They were grouped under the broad headings which had featured in the matrix developed during the consultation stage: operation of liner services, use of port terminals, participation in pools, and joint marketing.
- *Pre-requisites*. The application of the regulation was dependent on one of three situations applying: price competition within the conference within which the consortium was operating through the ability to take independent rate action in the trade in question; or sufficient competition between the conference members through the ability for the consortium to offer its own independent service contracts/arrangements; or the consortium members had to be subject to effective competition from lines outside the consortium. All three options were extremely vague, and their full meaning was difficult to assess and potentially inconsistent with the application of Regulation 4056/86.
- *Market share*. There was a complicated and somewhat arbitrary requirement that the consortium should not have more than a specified share of the trade. For consortia within conferences, the maximum limit was 30 %; for those not, 35 %. This was helpfully amended from share of trade to share of the full market when the Regulation was renewed in 2000.
- *Consortium membership*. Those consortia with a market share of between 30–35 % and 50 % were subject to a further limit on the numbers of members they could have, namely, six. Nothing was said about such consortia where one or more members decided to leave, for whatever reason.
- *Further requirements*. Conditions and obligations were also established, among others, regarding:

- Individualised service contracts by lines within the consortium;
- Notice periods for withdrawal from part or all of the consortium agreement;
- Non-discrimination between ports, transport users or carriers (as in Regulation 4056/86);
- Consultations with transport-users "on all important matters . . . concerning the conditions and quality" of the services offered by the consortium. These did not of course include rate-fixing.
- A *grandfathering clause* concession to those consortia in existence at the time of the adoption of the regulation, which had more than the permitted market share and/or numbers of member lines.

The Commission subsequently dealt with, and for the most part cleared, applications from consortia in different trades.

The renewal of Regulation 870/95 in 2000 for a further 5 years was not contentious. The main difference was the change from trade share to (the generally wider) market share for determining whether a consortium fell within the block exemption criteria but this was threatened in proposals for renewal of the Regulation from 2010 (see below). Automatic exemption would apply where a consortium operating within a conference had under 30 % market share, or 35 % outside a conference. Until Regulation 1/2003 replaced the notification system, the Commission had 6 months in which to oppose a consortium beyond the block exemption limits but not exceeding 50 % of market share. However, the opposition procedure was repealed in Regulation 463/2004, so that undertakings would have to self-assess any claim for an individual exemption beyond the block exemption limits.

The Regulation was further renewed from April 2005. Nevertheless, this was no more than an interim renewal pending completion of the review, and repeal, of Regulation 4056/86.

At this juncture, it is appropriate to recall that, in contrast to the rate-setting provisions under the former Regulation 4056/86 (and it should be pointed out that as a result of legislative and trade changes, conferences had already ceased to apply and police rigid tariff-setting long before the demise of the block exemption), consortia activities do not involve commercial dialogue. Consortia are predicated on technical co-operation with the benefits being passed on to customers through lower costs. It is a mistake to view consortia and their objectives as being ancillary to conferences or a cover for anti-competitive practices.

It was against this background that the industry approached the Commission in the summer of 2008 with recommended issues to be addressed as part of the process in the lead-up to the 2010 renewal. Industry proposed:

- Broadening the concept of a consortium beyond an agreement between two or more vessel-operating carriers which fails to take account of other forms of co-operation such as vessel sharing, slot charters, swap agreements and container service agreements;

- Removing the restrictive chiefly by container as this would open the way for co-operation in specialist liner trades such as chemical parcel, timber and car carriers;
- Abolishing market share limits, or at least significantly increasing, the 35 % maximum for automatic coverage under the block exemption, because individual lines, and not the consortium, are discrete market parties and in fierce competition with each other to offer a better and differentiated service;
- Extending the period for members to give notice of withdrawal from a consortium beyond the laid down maximum of 36 months to a more realistic timescale of up to 10 years for the recovery of new building and operating investment costs.

Formal consultation launched by the Commission in October that year largely failed to take account of the industry position. A certain amount of flexibility was added to the definition of consortium but even so it remained open to subjective interpretation by reference to "economic reality" rather than legal form. This would be far from ideal and could lead to legal challenges putting operators in mind of the early days of Regulation 4056/86 when the legislative boundaries were constantly tested by the Commission. The container restriction would be maintained and while it was argued by the Commission that consortia operating (cargo) ro–ro and semi-container vessels would not be excluded, the scope remains restrictive to the detriment of other liner-type services.

The biggest surprise, and disappointment, was a reversal of the market share test which would be reduced from the maximum 35 % (previously applicable to consortia operating outside of a conference) to 30 % (which had, prior to the repeal of Regulation 4056/86, been the maximum for operations within a conference). Furthermore, new, and restrictive, criteria had been introduced for determining the threshold figure based on market reality and the need for effective external competition. DG Competition argued that the threshold reduction was to bring the figure into line with the relatively few block exemptions permitted in other industries. It quickly became clear, not only to carriers but also to some shippers, that the provisions would be restrictive, difficult to assess and could perversely reduce available choice if operators were forced to withdraw tonnage to bring a service within the allowed percentage trade share. Consortia above the 30 % qualification would not be unlawful but would have to be justified by individual self-assessment, a time-consuming and expensive undertaking especially where carriers operated on multiple trades.

Industry responded to the formal consultation, largely repeating the initial submission while harbouring a degree of pessimism about the direction being taken.

Regulation EC No 906/2009 was subsequently adopted by the Commission in September 2009 and reaffirmed the underlying principles of consortia activities. Contrary to expectations, the Commission accepted the industry case for broadening the application of consortia operations to all liner type services and removed the longstanding "chiefly by container" restriction. It was also satisfactory that a degree of recognition was given to industry arguments for extended notice periods for

withdrawal from a consortium, although the longer periods granted still, arguably, fail to recognise the length of time needed for investment recovery programmes.

While not unexpected, it was disappointing that the concept of a market share maximum for automatic coverage under the block exemption was maintained but set at 30 %, a level below the minimum advocated by the industry in the event that a figure was applied. Market share is to be determined by reference to volumes carried within a particular consortium and must also take account of participants' involvement in other consortia and any non-consortia services over the same trade route. Consortia exceeding the limits must self-assess the compatibility of their operations with competition legislation to demonstrate that any restrictions are outweighed by the wider benefits to users.

Finally, as the provision requiring consortia and customers to undertake consultations on conditions and quality of services has never been used, it has been removed from the Regulation.

Time will tell how the updated Regulation, which took effect for 5 years from April 2010, will function in practice, especially the interpretation of the market share tests. It will, also, be interesting to see whether liner operators in non-container trades take advantage of the newfound opportunity to streamline their services through the establishment of consortia.

Other Jurisdictions

North America

Canada

In Canada, conferences operating to and from the country's ports must comply with the Shipping Conferences Exemption Act 1987. This includes filing a copy of the lines' agreements setting out aspects of jointly agreed services and pricing arrangements. Conferences are prohibited from collective price-setting with inland carriers but individual lines may agree their own contracts. A consultation paper, issued in 1999, raised the prospect of phasing out immunity. However, this was rejected and amendments, introduced through the Canada Shipping Act 2001, permit conferences to continue but encourage greater competition by allowing individual shippers and carriers to negotiate confidential contracts. The notice period for independent rate action has been reduced from 15 to 5 days and administrative requirements eased, including the abolition of tariff filing with the Canadian Transportation Agency. Enforcement is administrative, rather than through the Courts, with greatly increased fines for non-compliance. Canada's move to introduce greater competition stems from reasons of comity and the competitiveness of the Canadian industry which seems to be generally following the United States' deregulatory lead.

Asia

Asian shippers have been pushing for repeal of antitrust immunity among Asian nations but with mixed success. The Asian countries have different dominant roles in liner services, which partly explain the respective position of these countries with respect to liner conferences. China and India are net users of liner services, Japan is a net provider of liner services, and Hong Kong and Singapore are primarily facilitators of liner services. The focal point over rate-setting practices in Asia has been the assessment of terminal handling charges that were instituted by the liner carriers starting in 2001.

China

In China, maritime regulations are under the jurisdiction of the Ministry of Commerce which allows collective agreements among shipping lines. However, in March 2007, China's Ministry of Communication issued a requirement that shipping lines first discuss any proposed rate increases with their customers and that they file their conference and discussion agreements with the Ministry 15 days before they become effective, raising speculation that the government will be scrutinizing the liner conferences more closely. Moreover, China passed a competition law in August 2007 that came into force in August 2008. The new law does not exempt liner conferences from the law's antitrust provisions. China's policy in this area appears to be in a state of flux, but it is not clear as yet what the exact implications will be for liner carriers calling at Chinese ports.

Recently, China has issued new maritime regulatory rules which require liner carriers that move container cargo from China to file tariff rates and negotiated rates with the Shanghai Shipping Exchange (SSE). These SSE rules state that liner service must be provided at a normal and reasonable price and must not be performed at a zero or negative freight rate. Tariff rates are to be published as a range containing a maximum and minimum freight quote. Negotiated rates according to the SSE should be filed if they are at a level that falls outside of the tariff ranges and must include, *inter alia*, the code of agreement, consignor, route, port of loading, port of destination, duration, the quantity of containers and the freight rate.

India

India is purportedly moving in the direction of outlawing collective rate-setting. The Competition Commission of India (CCI), created by a law passed in 2002 but whose actions have been delayed by litigation, appears to be in favour of banning collective-rate setting and has advised India's Ministry of Shipping to curb the practice. However, India's Ministry of Shipping appears to favour further oversight of current shipping practices rather than an outright ban on conferences.

Japan

Japan appears to favour the *status quo* allowing the conference system to continue. The position is governed by the Marine Transportation Law 1949 (as subsequently amended), which sets out an overall framework for the regulation and promotion of shipping, including the competition aspects. It adopts a common carriage approach, requiring all liner carriers to establish and make public their tariffs and any changes before they take effect. Agreements between two or more carriers relating to freight rates and other conditions of transport, routes, sailings, etc, are exempted from the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade 1947 unless unfair trade practices are employed or user interests are unduly impaired by the effective restriction of competition in trade. A "report" of any such agreement must be filed in advance with the Ministry of Land, Infrastructure and Transport. Japan may prove to be a holdout for the conference system due to the fact that large shippers are linked to large ocean carriers in Japan through the *keiretsu* or "group system" of business organization. Also, Japan may favour the carrier's perspective because Japanese ocean carriers rely more on trade outside Japan than they do on trade to or from Japan. Japan does not wish to forego the maritime exemption as liners pump substantial monies into its national economy. Therefore, Japan will probably be the last state internationally to move towards a more market-based system.

Hong Kong and Singapore

Hong Kong and Singapore, like Japan, are also home to major ocean carriers and are world rivals as container transfer hubs, but neither is home to large producers or importers of liner cargo. Understandably, a concern of the Hong Kong and Singapore governments is that they not be too far out of step with the maritime regulatory regimes of the major trading nations using their transport services. Hong Kong's strong tradition for *laissez faire* policies may explain its lack of competition legislation, but it appears to be evaluating the need for a competition policy in the liner sector. Hong Kong has lost some of its market share to mainland Chinese ports, partly because of higher terminal handling charges that are applied across the board by the shipping lines calling at Hong Kong.

Singapore granted a 5 year exemption for liner carriers from its new Competition Act passed in 2004, which took effect from January 2006 and a block exemption for an initial unspecified period for conference and discussion agreements, but subject to review in the light of local and international maritime industry developments. Detailed provisions were subsequently worked out and the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 was given retrospective

effect from January of that year. The block exemption has since been extended for a further 5 years to 2015. The Singapore Competition Commission stated that "it was seeking to create a regulatory environment for shipping lines operating through Singapore that was broadly aligned with that in other major jurisdictions."

Australia

In Australia, liner conferences are permitted under Part X of their Trade Practices Act 1974, as amended by the International Liner Cargo Shipping Act 2000. The interpretation is broad and covers traditional conferences and discussion agreements. Shipping lines are allowed to co-operate in the provision of services, capacity agreements, service levels, rates and technical agreements. Exemptions are limited to liner shipping activities covering ocean transport and loading and discharging operations at cargo terminals, including inland cargo terminals. As far as possible, protection available to cargo interests is extended to cover importers' inward shipments. Powers are available to the Minister for Transport and Regional Services and the Australian Competition and Consumer Commission to respond to conduct likely to cause an unreasonable increase in freights and/or an unreasonable decrease in services. No unreasonable restrictions must be placed on new parties seeking to join a conference. Recently, the Australian Productivity Commission, an independent government agency charged with reviewing the economic effects of government policy, has undertaken a further review of the arrangements to determine the continuing justification of the Acts or any changes required to improve their effectiveness. The Commission reported in 2005 that its strongly preferred option is to repeal the ocean liner shipping exemption under Australian competition law. While cargo interests appear to be reasonably satisfied with the principles of the current system, it appears that regulators might take a less benign view.