

# *Fordham International Law Journal*

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*Volume 13, Issue 4*

1989

*Article 2*

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## European Community Competition Policy and International Shipping

Helmut W.R. Kreis\*

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Helmut W.R. Kreis

## **Abstract**

This Article discusses the regulation of competition in maritime transport by the European Community. Part I examines the history of the relationship between transport and competition policy under the "Treaty Establishing the European Economic Community." Part II discusses competition in maritime transport and, in particular, the new competition regulation in this area. Part III analyzes the application of the Community's maritime competition regulation in relation to non-Community countries. The Article concludes that the Community must protect its interests in the shipping industry without impeding international shipping or imposing barriers on free, worldwide trade.

## ARTICLES

# EUROPEAN COMMUNITY COMPETITION POLICY AND INTERNATIONAL SHIPPING

*Helmut W.R. Kreis\**

### INTRODUCTION

Success in trading depends on efficient and competitive transport systems. At a time when markets mean more than just territory and almost every market is an international market, competition worldwide will be getting tougher all the time—either in the important west-east trades along the Pacific, North Atlantic, and Europe/Far East routes, or in the north-south trades to and from Africa and Latin America. It is therefore essential that both industrialized and developing countries adjust to trade liberalization and international competition. This means the need to incorporate substantial elements of competition policy in trade and transport policies and to improve international cooperation on competition policy issues.

The European Community (the “EC” or the “Community”) has an important role to play in this respect. In 1993, it is expected to become a single market with a population larger than that of the United States. This internal market will be characterized by the free movement of goods, persons, services, and capital. It is evident that this market will require the supply of efficient and cheap, and thus competitive, transport services for its success.

Transport and competition are essential parts of the Treaty Establishing the European Economic Community (the “Treaty” or the “EEC Treaty”).<sup>1</sup> Article 3(e) and (f) of the

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\* Deputy Head of the Administrative Unit for Transport and Tourism, Directorate-General for Competition, Commission of the European Communities, Brussels. The views expressed herein are personal and not necessarily the views of the Commission. The author wishes to express his thanks to John Temple Lang for helpful discussions on various issues addressed by this Article.

1. Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11 (1958) [hereinafter EEC Treaty].

Treaty state that

[f]or the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- ...
- (e) the adoption of a common policy in the sphere of transport; [and]
  - (f) the institution of a system ensuring that competition in the common market is not distorted.<sup>2</sup>

These provisions have quasi-constitutional status as binding principles guiding the Community's policies in transport and competition matters.

Both transport and competition policy also are the subject of specific rules under the Treaty. For example, the Treaty addresses transport in Part Two, Title IV (Articles 74 through 84) and competition in Part Three, Title I (Articles 85 through 94), which includes provisions on state aids.<sup>3</sup> The basic substantive competition rules are found in Articles 85 and 86 of the Treaty. Article 87 of the Treaty obliges the Council of the European Communities (the "Council") to adopt appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.<sup>4</sup>

In December 1986, the Council adopted a package of legislative measures toward a common maritime transport policy including a competition regulation.<sup>5</sup> The most important measure, Council Regulation (EEC) No. 4056/86 of 22 December 1986 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport ("Council

2. *Id.* art. 3, 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 15-16.

3. *Id.* arts. 74-84, 85-94, 1973 Gr. Brit. T.S. No. 1, at 29-31, 32-36, 298 U.N.T.S. at 44-47, 47-52.

4. *Id.* arts. 85-86, 1973 Gr. Brit. T.S. No. 1, at 32-33, 298 U.N.T.S. at 47-49.

5. See Council Regulation (EEC) No. 4056/86 of 22 December 1986 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, O.J. L 378/4 (1986), Common Mkt. Rep. (CCH) ¶¶ 2821-22 [hereinafter Council Regulation No. 4056/86 on Maritime Transport]; see also Council Regulation (EEC) No. 4055/86 of 22 December 1986 Applying the Principle of Freedom to Provide Services to Maritime Transport Between Member States and Between Member States and Third Countries, O.J. L 378/1 (1986); Council Regulation (EEC) No. 4057/86 of 22 December 1986 on Unfair Pricing Practices in Maritime Transport, O.J. L 378/14 (1986); Council Regulation (EEC) No. 4058/86 of 22 December 1986 Concerning Coordinated Action to Safeguard Free Access to Cargoes in Ocean Trades, O.J. L 378/21 (1986).

Regulation No. 4056/86 on Maritime Transport"),<sup>6</sup> entered into force on July 1, 1987.<sup>7</sup>

This Article will discuss the regulation of competition in maritime transport by the European Community. Part I examines the history of the relationship between transport and competition policy under the Treaty. Part II discusses competition in maritime transport and, in particular, the new competition regulation in this area. Part III will analyze the application of the Community's maritime competition regulation in relation to non-Community countries. This Article concludes that the Community must protect its interests in the shipping industry without impeding international shipping or imposing barriers on free, worldwide trade.

### I. *THE HISTORY OF THE RELATIONSHIP BETWEEN TRANSPORT AND COMPETITION POLICY UNDER THE TREATY*

It seems worthwhile to look back for a moment to the history of the relationship between transport and competition policy under the EEC Treaty. The Community's competition policy entered its active policy phase more than twenty-five years ago when the question first arose whether shipping (and air transport) were subject to the competition rules of the Treaty like other industries.

From the outset, competition policy was seen as an integral part of the Community's basic aims and essential to the achievement of these aims. Moreover, competition policy has been a vital part of the creation of the common market. Over the years, the Commission has devised a policy to support these basic aims with a view toward ensuring that competition is effective and undistorted. At the same time, the Commission of the European Communities (the "Commission") has always sought to encourage innovation and cooperation between businesses, particularly those businesses of a cross-border nature, including joint ventures, as long as these businesses are not unduly restrictive of competition. Because competition and transport policy were basic foundation stones of the Treaty, however, the question must be asked: Why has it taken

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6. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5.

7. *Id.* art. 27, O.J. L 378/4, at 13, Common Mkt. Rep. (CCH) ¶ 2822C, at 2070.

twenty-five years for competition rules to be effectively applied and enforced in the maritime sector? Several reasons exist for slow development in this area of competition policy.

First, it must be remembered that, until 1973 upon the accession of the United Kingdom, Ireland, and Denmark, the Community of six Member States was a continental block of countries with about ninety percent of transports carried by road, railway, or inland waterways. After 1973, however, nearly ninety percent of export/import between the old and the new Member States, including Greece, became seaborne trade with almost no competitive alternative by land transport services. Thus, for intra-Community trade, shipping became considerably more important than it was before 1973.

Second, the controversy that arose when the Council adopted the basic Competition Regulation (17/62) ("Regulation No. 17")<sup>8</sup> and, at the same time, decided to except from the scope of Regulation No. 17 the areas of air and sea transport further hindered the development of competition policy in maritime transport.<sup>9</sup> In 1968, the controversy continued when the Council adopted Regulation (EEC) No. 1017/68 of the Council of 19 July 1968 Applying the Rules of Competition to Transport by Rail, Road and Inland Waterway ("Regulation No. 1017/68 on Inland Transport").<sup>10</sup> The Council stated in the fifth recital of Regulation No. 1017/68 on Inland Transport that "since the rules of competition for transport derogate from the general rules of competition, it must be made possible for undertakings to ascertain what rules apply in any particular case."<sup>11</sup>

The initial uncertainty on the direct applicability of the competition rules to transport, however, has been removed by rulings of the European Court of Justice (the "Court" or the "Court of Justice"). In 1974, the Court held that air and sea transport were to be treated on the same basis as other modes

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8. Council Regulation No. 17, 5 J.O. 204/62, O.J. Eng. Spec. Ed. 1959-62, at 87, Common Mkt. Rep. (CCH) ¶ 2401 [hereinafter Regulation No. 17].

9. Council Regulation No. 141 of the Council Exempting Transport from the Application of Council Regulation No. 17, 5 J.O. 2751/62, Eng. Spec. Ed. 1959-62, at 291, Common Mkt. Rep. (CCH) ¶ 1945.01.

10. O.J. L 175/1 (1968), Common Mkt. Rep. (CCH) ¶ 2815 [hereinafter Regulation No. 1017/68 on Inland Transport].

11. *Id.* at 1, Common Mkt. Rep. (CCH) ¶ 2815, at 2031.

of transport by means such as road, rail, inland waterway and, thus, were subject to the general rules of the Treaty.<sup>12</sup> The Court confirmed in 1978 and 1986 that these general rules included, in particular, the competition rules.<sup>13</sup> Despite these judgments of the Court of Justice, which confirmed the view that the competition rules were fully applicable to air and sea transport, the Council did not finally agree to adopt the necessary regulations pursuant to Article 87 of the Treaty until 1986 for sea transport<sup>14</sup> and until 1987 for air transport.<sup>15</sup>

The new Council Regulation No. 4056/86 on Maritime Transport has confirmed the principle of the universal application of Articles 85 and 86 by stating in its first recital that

the rules on competition form part of the Treaty's general provisions which also apply to maritime transport . . . [and the] detailed rules for applying those provisions are set out in the Chapter of the Treaty dealing with the rules on competition or are to be determined by the procedures laid down therein.<sup>16</sup>

Therefore, the Council, through this regulation, clearly ex-

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12. *Commission v. French Republic*, Case 167/73, 1974 E.C.R. 359, Common Mkt. Rep. (CCH) ¶ 8270.

13. *Ministère Public v. Asjes*, Joined Cases 209-13/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,793; *Commission v. Kingdom of Belgium*, Case 156/77, 1978 E.C.R. 1881, Common Mkt. Rep. (CCH) ¶ 8513.

14. See *supra* note 5 and accompanying text for the regulations applying to sea transport.

15. On December 14, 1987, the Council adopted a package of legislative measures toward a common air transport policy. These measures included the following two competition regulations: Council Regulation (EEC) No. 3975/87 of 14 December 1987 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, O.J. L 374/1 (1987), Common Mkt. Rep. (CCH) ¶ 2831 [hereinafter Council Regulation No. 3975/87 on Air Transport], and Council Regulation (EEC) No. 3976/87 of 14 December 1987 on the Application of Article 85 (3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector, O.J. L 374/9 (1987), Common Mkt. Rep. (CCH) ¶ 2755. The other measures included the Council Directive of 14 December 1987 on Fares for Scheduled Air Services Between Member States, O.J. L 374/12 (1987), and the Council Decision of 14 December 1987 on the Sharing of Passenger Capacity Between Air Carriers on Scheduled Air Services Between Member States and on Access for Air Carriers to Scheduled Air-Service Routes Between Member States, O.J. L 374/19 (1987).

16. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, O.J. L 378/4, at 4, Common Mkt. Rep. (CCH) ¶ 2821, at 2055. The new Council Regulation No. 3975/87 on Air Transport, *supra* note 15, contains a first recital with the same wording.

pressed the view that maritime transport should be subject to the competition rules of the Treaty.

Finally, the fact that international shipping has specific features distinguishes it from other sectors of economic activity. These features not only arise from its tradition as a symbol of national pride and worldwide trade, and as a means for serving political and defense requirements, but also from the fact that the application of competition rules may have an impact on the Community's and, in particular, the Member States' relations with third countries. This is an important issue that has been dealt with in Council Regulation No. 4056/86 on Maritime Transport under various provisions, such as the provisions regarding the United Nations Convention on a Code of Conduct for Liner Conferences (the "UN Liner Code" or the "Code"),<sup>17</sup> the provisions regarding the monitoring of exempted agreements, and the provisions regarding conflicts of international law.<sup>18</sup>

## II. COUNCIL REGULATION NO. 4056/86 ON MARITIME TRANSPORT

Council Regulation No. 4056/86 on Maritime Transport contains both procedural and substantive provisions. Procedurally, the regulation provides the Commission with more effective powers to enforce the competition rules. For example, the Commission now may require the supply of information by governments and businesses and may conduct on-the-spot investigations.<sup>19</sup> The Commission also may impose sanctions for infringements of competition rules.<sup>20</sup> The procedural rules and investigative powers under Council Regulation No. 4056/86 on Maritime Transport are almost identical with the powers provided to the Commission under Council Regulation No. 17, Regulation No. 1017/68 on Inland Transport, and Council

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17. Apr. 6, 1974, U.N. Doc. TD/CODE/11/Rev.1 (1974), Gr. Brit. T.S. No. 45 (Cmd. 213) (1987) [hereinafter UN Liner Code].

18. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, O.J. L 378/4, at 4-9, Common Mkt. Rep. (CCH) ¶ 2821, at 2055. See *infra* notes 64-105 and accompanying text for a discussion of these issues.

19. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 16-18, O.J. L 378/4, at 10-11, Common Mkt. Rep. (CCH) ¶¶ 2821T-V, at 2066-67.

20. *Id.* arts. 19-20, at 11-12, Common Mkt. Rep. (CCH) ¶¶ 2821W-X, at 2067-68.



Regulation (EEC) No. 3975/87 of 14 December 1987 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector.<sup>21</sup>

Substantively, Council Regulation No. 4056/86 on Maritime Transport includes a block exemption for liner conferences and for their agreements with transport users.<sup>22</sup> The exemption is not limited in time. In addition, the regulation does not obligate parties to notify the Commission of agreements, but companies may do so when they believe their agreements may violate the prohibition against cartels laid down by Article 85(1) of the Treaty. An "opposition procedure" has been introduced for granting individual exemptions under Article 85(3), which simplifies and accelerates the process of granting exemptions where appropriate.<sup>23</sup> The Commission has received applications for individual exemptions pursuant to articles 11(4) and 12 of the regulation in the cases of Eurocorde, the 1237 Agreement,<sup>24</sup> and the Gulfway Agreement. The Commission has also received applications for individual exemptions concerning cross-channel ferry services pursuant to article 12 of the regulation.<sup>25</sup>

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21. O.J. L 374/1 (1987), Common Mkt. Rep. (CCH) ¶ 2831 [hereinafter Council Regulation No. 3975 on Air Transport]. Compare Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5 with Council Regulation No. 3975/87 on Air Transport, *supra* and Regulation No. 1017/68 on Inland Transport, *supra* note 10 and Regulation No. 17, *supra* note 8. For a general discussion of procedures in competition proceedings, see Kreis, *Commission Procedures in Competition Proceedings—Recent Reforms in Practice and Law*, in 1983 FORDHAM CORP. L. INST. 145 (B. Hawk ed. 1984). For a discussion of investigative powers, see H. Kreis, *EEC Commission Investigation Procedures in Competition Cases*, 17 INT'L LAW. 19 (1983).

22. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 3, 6, O.J. L 378/4, at 6, 7, Common Mkt. Rep. (CCH) ¶¶ 2821D, 2821G, at 2059, 2061.

23. *Id.* art. 12, at 9-10, Common Mkt. Rep. (CCH) ¶ 2821P, at 2064.

24. See Notice Pursuant to Article 12(2) of Council Regulation (EEC) No. 4056/86 and Article 12(2) of Council Regulation (EEC) No. 1017/68 Concerning Case No. IV/33.168 Agreement 1237, O.J. C 59/2 (1990). The applications to the Commission with respect to Eurocorde and the Gulfway Agreement will be published in future issues of the *Official Journal of the European Communities*.

25. See Notice Pursuant to Article 12(2) of Council Regulation No. 4056/86 Concerning Case No. IV/32.385 Sealink—SNCF, O.J. C 17/8 (1989); Notice Pursuant to Article 12(2) of Council Regulation No. 4056/86 Concerning Case No. IV/32.383 Sealink—SMZ, O.J. C 17/12 (1989).

A. *The Importance of Council Regulation No. 4056/86 on Maritime Transport*

Council Regulation No. 4056/86 on Maritime Transport is important because it provides for a fairly liberal regime, increases legal security, and clarifies the relationship between liner conferences and transport users.

1. A Liberal Regime

The UN Liner Code and Council Regulation (EEC) No. 954/79 of 15 May 1979 Concerning the Ratification by Member States of, or Their Accession to, the United Nations Convention on a Code of Conduct for Liner Conferences (the "Brussels Package")<sup>26</sup> provide for a self-regulatory system of the so-called closed conferences. The Community has accepted this self-regulatory system through the adoption of Council Regulation No. 4056/86 on Maritime Transport.

The new regulation grants for an unlimited time period a far-reaching block exemption for conferences and for their agreements with users.<sup>27</sup> Such unlimited block exemptions do not exist for any other industry, not even civil aviation. In accordance with this block exemption, participants in the maritime transport industry must insure that their agreements conform to the competition rules because notification of these agreements to the Commission has not been made compulsory.

If undertakings, however, seek individual exemptions there is a simplified objections procedure available. In addition, because Council Regulation No. 4056/86 on Maritime Transport does not require filing of tariffs or other agreements, the regulation provides for a minimum of bureaucratic and state intervention.

2. Legal Security

The new competition regulation also has increased legal security by clarifying the fact that Articles 85 and 86 of the Treaty directly apply to shipping and, therefore, has put to rest

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26. O.J. L 121/1 (1979) [hereinafter *Brussels Package*].

27. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 3-6, O.J. L 378/4, at 6-7, Common Mkt. Rep. (CCH) ¶¶ 2821D-G, at 2059-61.

the discussion on the applicability of Article 84(2).<sup>28</sup> The uncertainty over nullity of agreements by way of decisions pursuant to Articles 88 and 89(2) also no longer exists.

Under the regulation, the formal right to complain no longer applies only for governments (as was the case under Article 89 of the Treaty), but now also applies for natural or legal persons who claim to have a legitimate interest.<sup>29</sup> The procedural rules apply to *all* participants in maritime transport and include clearly defined rights and obligations, hearings and due process, protection of business secrets, and unlimited jurisdiction of the European Court of Justice to review decisions of the Commission imposing sanctions.<sup>30</sup>

Furthermore, the Commission now has the sole power to monitor exempted agreements pursuant to article 7 and to grant exemptions under Article 85(3) of the Treaty pursuant to article 14 of the regulation.<sup>31</sup> This makes it possible to prevent the problem of uncoordinated national policies by way of varying decisions and rulings of Member States under Articles 85 and 86 of the Treaty. Finally, all procedures provided for in Council Regulation No. 4056/86 on Maritime Transport will be carried out in close and constant liaison with the competent authorities of the Member States and in consultation with an advisory committee composed of national officials competent in the sphere of maritime transport and competition matters.<sup>32</sup>

### 3. Transport Users

The new regulation is designed to support the competitive participation of Community merchant fleets in international shipping. The important trading interests of the Community's exporting and importing industries using shipping services, however, have to be considered equally so that a fair balance of

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28. *See id.* art. 1, at 5-6, Common Mkt. Rep. (CCH) ¶ 2821B, at 2058.

29. *Id.* art. 10, at 9, Common Mkt. Rep. (CCH) ¶ 2821M, at 2063. Article 10 of the regulation states, in part, that "[c]omplaints may be submitted by . . . Member States [or] . . . natural or legal persons who claim a legitimate interest." *Id.*

30. *See id.* arts. 10-27, at 9-13, Common Mkt. Rep. (CCH) ¶¶ 2821M-2822D, at 2063-70.

31. *Id.* arts. 7, 14, at 7-8, 10, Common Mkt. Rep. (CCH) ¶¶ 2821H, 2821R, at 2061-62, 2065.

32. *Id.* art. 15, at 10, Common Mkt. Rep. (CCH) ¶ 2821S, at 2065-66.

interests is maintained between liner conferences and transport users.

Council Regulation No. 4056/86 on Maritime Transport clarifies the position of transport users. Their interests are involved directly and indirectly. As such, conditions and obligations attach to the conference block exemption to prohibit discrimination on grounds of nationality<sup>33</sup> and to foster consultations on general issues of principle and on forms and terms of loyalty arrangements between transport users and conferences.<sup>34</sup>

Agreements between transport users and conferences and certain agreements among transport users are block exempted.<sup>35</sup> The regulation also provides the formal right for natural and legal persons claiming a legitimate interest to submit complaints pursuant to article 10 in cases of breached obligations incurred upon the granting of a conference block exemption or in other cases of alleged infringements of the competition rules.<sup>36</sup>

### *B. Specific Issues in Applying Competition Rules to Shipping*

The Commission will have to consider a number of specific problems in applying competition rules to shipping. In this context, the issue of non-conference competition in liner trades will be of paramount importance. This issue is particularly relevant for the monitoring of exempted agreements pursuant to article 7 of the regulation, of abuses of a dominant position under article 8, and of agreements or concerted practices between conferences and outsiders on price or capacity. The Commission is also faced with the need to solve the problems of consortia and multimodal price fixing arrangements and with the need to deal with mergers.

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33. *Id.* art. 4, at 6, Common Mkt. Rep. (CCH) ¶ 2821E, at 2059.

34. *Id.* art. 5(2), 6, at 7, Common Mkt. Rep. (CCH) ¶¶ 2821F, 2821G, at 2059-60, 2061 (permitting loyalty arrangements between conference lines and transport users). The loyalty arrangements permitted under article 5 of the regulation provide safeguards making explicit the rights of transport users and conference members and are based on the contract system or any other lawful system. Loyalty arrangements must comply with certain conditions as set out in article 5(2)(a) and 5(2)(b).

35. *Id.* art. 6, at 7, Common Mkt. Rep. (CCH) ¶ 2821G, at 2061.

36. *Id.* art. 10, at 9, Common Mkt. Rep. (CCH) ¶ 2821M, at 2063.

### 1. The Role of Non-Conference Competition

The presence of effective competition is an indispensable requirement for granting exemptions from the prohibition of cartels laid down in Article 85(1) of the Treaty. This effective competition is of particular importance with respect to agreements on price, which constitute the main element of conference agreements.

The Commission has always taken the view that an exemption from the prohibition of cartels can only be justified if there remains effective competition or, in the language of the Court of Justice, workable competition for the goods or services concerned. The Court confirmed this principle in its judgment in *Metro v. Commission*,<sup>37</sup> where it stated:

The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition . . . necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.<sup>38</sup>

The court went on to say in the course of the same judgment that "price competition is so important that it can never be eliminated."<sup>39</sup> This corresponds to what the Court had already stated in *Europemballage and Continental Can v. Commission*:<sup>40</sup>

But if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is to "promote throughout the Community a harmonious development of economic activities". Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the require-

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37. Case 26/76, 1977 E.C.R. 1875, Common Mkt. Rep. (CCH) ¶ 8435.

38. *Id.* at 1904, ¶ 20, Common Mkt. Rep. (CCH) ¶ 8435, at 7850.

39. *Id.* at 1905, ¶ 21, Common Mkt. Rep. (CCH) ¶ 8435, at 7850.

40. Case 6/72, 1973 E.C.R. 215, Common Mkt. Rep. (CCH) ¶ 8171.

ments of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.<sup>41</sup>

This does not exclude the possibility of exempting agreements between conferences and outsiders by individual decision if they meet the requirements of Article 85(3) of the Treaty. In fact, article 11(4) of Council Regulation No. 4056/86 on Maritime Transport already provides for this potential exemption.<sup>42</sup>

In this context, the Eurocorde agreements are of particular importance. The history of these agreements may be briefly described as follows. In July 1987, the same month in which the new competition regulation entered into force, the Commission received formal complaints from two shippers' associations involving the North Europe-U.S. Atlantic Conference (the "NEAC") and the U.S. Atlantic-North Europe Conference (the "ANEC").<sup>43</sup> These two shippers' associations complained about so-called tolerated outsider agreements ("TOA") between the conferences serving the North Atlantic trades between Europe and the United States and their major competitors, which included Evergreen Marine Corporation and Polish Ocean Lines.

These agreements became known collectively under the name of Eurocorde and attracted some public attention.<sup>44</sup> After the Commission started formal proceedings under the new regulation for infringement of the competition rules, the parties to Eurocorde made a formal application for individual exemptions even though they had taken the legal position that their agreements were already covered by the conference block exemption pursuant to article 3 of Council Regulation No. 4056/86 on Maritime Transport. The Eurocorde parties' applications for individual exemptions, however, may enable the Commission to proceed by way of a decision under Article

41. *Id.* at 244, ¶ 24, Common Mkt. Rep. (CCH) ¶ 8171, at 8299-8300.

42. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, art. 11(4), O.J. L 378/4, at 9, Common Mkt. Rep. (CCH) ¶ 2821N, at 2063.

43. See Comm'n, Seventeenth Report on Competition Policy ¶ 47 (1987).

44. See Väil, *Eurocorde Becomes More Cordial*, AMERICAN SHIPPER, Oct. 1987, at 38; *EG hält Abkommen für rechtswidrig*, Deutsche Verkehrs-Zeitung, Jan. 21, 1988, at 1, col. 2 (Hamburg); Unsworth, *EC Body Challenges Eurocorde Agreements*, The Journal of Commerce, Jan. 20, 1988, § B, at 1, col. 4.

85(3) of the Treaty and, thereby, establish certain competition policy principles concerning agreements between conferences and non-conference lines.

Such a decision by the Commission should be considered a constructive step. Because there might be similar agreements or concerted practices on rates or capacity in other trades in the future, it would allow the Commission to define its enforcement policy intentions regarding so-called tolerated outsider agreements in the context of competition and shipping policy. This would be beneficial in general to both carriers and transport users.

When formulating its enforcement policy regarding agreements between conferences and outsiders, the Commission may consider the following points. First, a TOA is not a conference agreement and, therefore, needs an individual exemption under Article 85(3) of the Treaty to become legally valid. A TOA also should not simply be a price-fixing arrangement, a cargo- or market-sharing arrangement, or a capacity control arrangement between conferences and non-conference lines. These agreements should provide for advantages that outweigh the restriction of competition by such means as discussion arrangements to avoid disruption of liner shipping trades in the interests of both carriers and shippers.

Finally, a TOA might be more acceptable in U.S. trades because, at least to some degree, the so-called open conferences under the U.S. Shipping Act of 1984<sup>45</sup> are subject to internal competition through mandatory independent rate action.<sup>46</sup> Therefore, certain restrictions of external competition through TOAs might be allowed. These exemptions depend upon the expectation that independent rate action is effectively used.

In most of these cases, however, it seems unlikely that the Commission could give its approval unconditionally to TOAs. One of the more important conditions or obligations attached to an exemption might be the assurance that the parties not discriminate between or among ports, shippers, or carriers, whether such discrimination is the result of an agreement or such discrimination is the result of a concerted practice. This

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45. 46 U.S.C. app. §§ 1701-20 (Supp. V 1987).

46. *See id.* § 1704(b)(8).

condition follows from Article 7 of the Treaty, which says that any discrimination on grounds of nationality shall be prohibited.<sup>47</sup> A further condition might be that the results of discussions or cooperation between the conference and independent carriers do not bind any participants.

Therefore, following their meetings, all the participants must retain the right to act independently without prior notice to the other parties. There also may be a need for other conditions or obligations according to the specific circumstances of each individual case.

## 2. Consortia

The Council raised the issue of consortia in liner shipping during discussions on the Commission's proposal for a competition regulation in 1984, when some Member States wanted to except them from the prohibition of cartels. The Commission took the view that these forms of cooperation between shipping lines were agreements that might fall within the scope of Article 85(1) of the Treaty and, if so, would need to be exempted under Article 85(3) in order to become legally valid.

The question of consortia was considered so important that, in April 1986, a hearing was held with representatives of the Member States as well as representatives from the shipping industry and the transport users. The result of these hearings demonstrated that no common views existed even on the definition of what constituted a consortium except that the shipping industry claimed antitrust immunity for consortia agreements.

For a number of reasons, no real progress towards a solution of the problem was made before adoption of Council Regulation No. 4056/86 on Maritime Transport. As a consequence, the Council adopted this regulation without specific provisions concerning consortia. The Council, however, looked to the future at the time of this regulation's adoption and invited the Commission to study the situation regarding consortia and to consider whether it was possible and necessary to provide for a block exemption. The Council inserted a specific statement in this respect into the minutes of the meet-

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47. See EEC Treaty, *supra* note 1, art. 7, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), at 4, 298 U.N.T.S. at 17.



ing in which it adopted Council Regulation No. 4056/86 on Maritime Transport. This statement reads as follows:

The Council invites the Commission to study the situation regarding competition in the sectors of passenger shipping, tramp shipping, joint ventures, consortia and agreements between transport users to consider whether it is necessary to submit new proposals. The Council notes, however, that where the object and effect of joint ventures and consortia is either to achieve technical improvement or co-operation as provided for in Article 2 of the Regulation or where close-knit consortia only cover minor market shares, the prohibition laid down in Article 85(1) of the Treaty does not apply to them.<sup>48</sup>

Thus, the Commission undertook to submit a report to the Council on whether to provide for a block exemption for consortia and to submit proposals to that effect, if necessary. Since the entry into force on July 1, 1987, of Council Regulation No. 4056/86 on Maritime Transport, representatives from the Directorate-General for Competition of the Commission of the European Communities (the "Directorate-General for Competition") and the shipping industry have participated in additional discussions.

In an interim report to the Council issued in January 1988, the Commission pointed out that it was indispensable to have a sufficiently broad and reliable basis of factual knowledge of consortia agreements to determine whether it was justifiable to propose a block exemption. The Directorate-General for Competition urged the industry to cooperate fully and, in particular, to provide a number of texts of consortia agreements. Because the Commission does not receive notification of these agreements, the precise character and contents of them were unknown to the Directorate-General for Competition. After numerous further contacts and discussions with shipowners, the industry representatives finally cooperated constructively.

It should be noted that shippers were opposed to a block exemption. The European Shippers' Councils held the view that consortia should apply for individual exemptions and that conditions and obligations, including an obligation to conduct

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48. Council Doc. No. 11584/86 MAR 84, Annex III (Dec. 19, 1986).

meaningful consultations with shippers, should be attached to each exemption granted by the Commission.

As to the legal status of consortia under Community competition law, the following points should be taken into account. First, consortia could rarely, if ever, be regarded as mergers between the participating shipping lines. As a rule, consortia agreements contain provisions to terminate the agreement with different periods of notice.

Moreover, there seems to be no case in which any of the parties to consortia transferred all its assets or activities to the consortium or completely and irreversibly abandoned business in the area covered by the consortium. On the contrary, it seems that consortia members in general remain free to act independently on other routes or to join other consortia. If consortia, however, were to be considered as mergers or concentrations in the sense of article 3 of Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings (the "Merger Control Regulation"),<sup>49</sup> these consortia would fall outside the scope of application of Council Regulation No. 4056/86 on Maritime Transport pursuant to article 22(2) of Council Regulation No. 4064/89.<sup>50</sup> The Commission has taken the view that, in general, consortia constitute operations or joint ventures within the meaning of article 3(2) of the Merger Control Regulation.<sup>51</sup>

In most cases, consortia are not purely technical arrangements because there are few, if any, agreements whose sole object and effect are to achieve only technical, non-commercial cooperation. Most of these agreements are not limited to technical arrangements on joint fleet and terminal operations, but also contain commercial arrangements that restrict competition. Finally, consortia members regulate the use of their vessel capacities in given trades and are actual or potential competitors. For these reasons, consortia, other than perhaps in exceptional cases, cannot be considered as falling within the

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49. Merger Control Regulation, art. 3, O.J. L 395/1, at 4 (1989).

50. *Id.* at 11. Article 22(2) of the Merger Control Regulation provides that "[r]egulations No. 17, (EEC) No. 1017/68, (EEC) No. 4056/86 and (EEC) No. 3975/87 shall not apply to concentrations as defined in Article 3." *Id.* (citations omitted).

51. *See* Council Doc. No. 10958/89 RC 51, at 4 (Dec. 19, 1989) (statement for entry into the Council minutes entitled "Commission statement re Article 3(2), first indent" of the Merger Control Regulation).

scope of article 2 of Council Regulation No. 4056/86 on Maritime Transport.

Consortia also are not covered by the conference block exemption provided by article 3 of Council Regulation No. 4056/86 on Maritime Transport. It seems to be the common view that, even operating as conference members, consortia are not conferences themselves. Conferences are historic arrangements going back for more than a century and exist essentially to ensure that their members charge the same rate of freight.<sup>52</sup>

Consortia also pursue different objectives and organize differently than conferences. The fact that three to six conventional ships may equal the cargo capacity of one container ship means that, in many cases, single shipping companies no longer are capable of providing on their own a credible service to shippers in the new era. To be viable, a shipping service must provide a regular service, such as weekly sailings, to its customers. Therefore, rationalization<sup>53</sup> of schedules is a *sine qua non* of liner shipping with each participating line being allocated slots in each sailing.

If the aim of consortia is to reduce the costs to the participants by achieving economies of scale, the consortium may be the *modus operandi* for achieving rationalization and increasing competitiveness. Therefore, the future of liner shipping may rest with cooperation agreements like consortia more than with conferences.

Consortia are also different from conferences in restricting competition. The effect of consortia agreements largely eliminates competition between the parties on a given trade. In most of the cases, the consortia agreements eliminate competition in (1) the provision and use of capacity and transport facilities; (2) the timing of sailings; (3) the marketing on a given trade; (4) inland operations, at least in a number of cases; and (5) price competition that is eliminated either by conference membership or by arrangements in the consortium agreement.<sup>54</sup> Thus, many consortia agreements contain re-

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52. See generally A. HERMAN, SHIPPING CONFERENCES 8 (1983) (noting cooperation between competing shipowners on U.K.-Calcutta route in 1875).

53. The term "rationalization" generally refers to the allocation of the number of sailings, the ports to be covered, and, in certain circumstances, the number of tons a liner may carry during a specified period.

54. A number of consortium agreements contain provisions on price-fixing au-

strictive arrangements that extend beyond the scope of article 3 of Council Regulation No. 4056/86 on Maritime Transport and, therefore, would not be covered by the block exemption for conferences even if they were to be considered as similar to conference agreements.

Several arguments, however, suggest that consortia could be granted a block exemption under Article 85(3) of the Treaty. Commercial pressures on the liner shipping industry have created the need for structural adjustments if wasteful use of resources is to be avoided. The shipping industry is a capital intensive one with a high proportion of fixed to variable costs. Ships, therefore, need to be well utilized if the capital costs are to be covered. Individual enterprises acting alone, without strong financial resources, are in a vulnerable position if heavy overcapacity should show itself on a particular trade route.

Historically, the formation of shipping conferences might have been the most obvious use of existing shipping resources on individual trade routes. The development of container services, however, brought about even stronger pressures for cooperation and rationalization on the longer deep sea trade routes. Therefore, the necessity to maintain regular services led shipping lines to join their fleet operations on containerized trade routes.

Consortia could help to provide the necessary means for improving the productivity of liner shipping and promoting technical and economic progress. In return, users of transport services offered by consortia obtain several important advantages. First, these users are ensured regular sailings at prices that do not depend on which ships are used for their containers. Economies of scale in the use of ships and onshore facilities are achieved. Costs are also reduced because consortia tend to bring about higher levels of capacity utilization. Consortia increase the quality of shipping services by using more modern ships and equipment as well as port facilities. Last, but not least, through provision of joint inland services, consortia are responding to many shippers' requirements for effi-

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thority or, at least, on obligations to coordinate pricing policies and to avoid or to reduce price competition between the participants. These agreements, however, are not to be considered as conferences by their members.

cient door-to-door transport. For all these reasons, serious consideration should be given to the possibility of granting a block exemption under Article 85(3) of the Treaty.

Regarding the form that this block exemption should take, it seems that it would need to be an independent self-contained regulation rather than an amendment or addition to Council Regulation No. 4056/86 on Maritime Transport for the following two reasons. First, consortia are a specialized and complex form of joint ventures covering a large variety of different arrangements. Despite the efforts of the Directorate-General for Competition and the interested industries, it has proven impossible to draft a block exemption for joint ventures in general. This demonstrates the need for a new, different approach to consortia. Second, a separate, group exemption is required because some consortia deal with multimodal transport operations, which fall partly within the scope of Council Regulation No. 4056/86 on Maritime Transport, partly under Regulation No. 1017/68 on Inland Transport, and, insofar as containers are concerned, under Regulation No. 17.

As has been discussed above, consortia deal with multimodal transport and collective price fixing for land, as well as sea transport. These consortia are not covered by the exception for technical agreements pursuant to article 2 of Council Regulation No. 4056/86 on Maritime Transport because the achievement of technical improvement or cooperation is not their sole objective. In addition, consortia are covered neither by the block exemption in article 3 of Regulation No. 4056/86 on Maritime Transport because they are not liner conferences, nor by the block exemption pursuant to article 4 of Regulation No. 1017/68 on Inland Transport because, in general, members of consortia are not small or medium-sized undertakings in the field of road or inland waterway transport.

Unlike most commercial and industrial joint ventures, the scope, parties, activities, and terms of consortia are altered frequently. Therefore, it would be extremely difficult to decide which specific clauses and arrangements of consortia agreements should be permitted. In addition, it would be undesirable to employ a case-by-case approach rather than a block exemption because, every time the terms of a consortium agreement were altered, it often would make legal advice necessary,

and, perhaps, individual exemption procedures necessary under the maritime competition regulation. Any effort to grant a block exemption for consortia as rationalization cartels should concentrate on clarifying the conditions and/or obligations under which consortia may be exempted from the general prohibition of cartels pursuant to Article 85(3) of the Treaty.

### 3. Multimodal Transport

Although the evolution of containerization has affected all modes of transport, containerization has made the greatest impact on international liner shipping. In most cases, the movement of cargo is no longer a matter of only blue water carriage. Therefore, shipping lines often become multimodal transport operators offering their customers door-to-door transport services.<sup>55</sup> The evolution of containerization is also important from a competition policy point of view because multimodal transport services may contribute to technical and economic progress and may improve the quality of transport services. Moreover, the multimodal transport operations may lead to an integration of transport markets in the interests of both carriers and users.

A competition law problem, however, exists with respect to the "through" rates, applied by liner conferences, consortia, or other participants to similar agreements. One such problem may arise in the area of collective price fixing for multimodal transport as well as inland transport and, as the case may be, air transport services.

In the United States, through-rate price-fixing agreements by liner conferences are exempted from the antitrust laws under the Shipping Act of 1984.<sup>56</sup> Under Community law, the situation is different. The Commission has taken the view that multimodal transport price-fixing is not permitted under existing law because the block exemption for liner conferences pursuant to article 3 of Council Regulation No. 4056/86 on

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55. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNITED NATIONS CONFERENCE ON A CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT at 1-16, U.N. Doc. TD/MT/CONF/17 Vol. I, U.N. Sales No. E.81.II.D.7(Vol. I) (1981).

56. 46 U.S.C. app. §§ 1703(a), 1704, 1706 (Supp. V 1987).

Maritime Transport does not cover it.<sup>57</sup> This view has been opposed by a number of Member States and by representatives of the transport industry. It has been suggested that multimodal transport operations and through-rate fixing are already covered by the conference block exemption. In addition, the parties suggesting this view have referred to articles 2 and 5(3) of the regulation<sup>58</sup> and to a statement in the minutes of the Council of Ministers on the adoption of Council Regulation No. 4056/86 on Maritime Transport, which reads as follows:

The Commission states that multi-modal sea/land transport operations are subject to the rules of competition adopted for land transport and to those laid down for sea transport. In practice, non-application of Article 85(1) will be the rule as regards the organization and execution of successive or supplementary multi-modal sea/land transport operations and the fixing or application of inclusive rates for such transport operations, since both Article 2 of this Regulation and Article 3 of Regulation No. 1017/68 state that the prohibition laid down by Article 85(1) of the Treaty shall not apply to such practices.<sup>59</sup>

According to article 1(2), the Council Regulation No. 4056/86 on Maritime Transport "shall apply only to international *maritime* transport services from or to one or more Community ports."<sup>60</sup> The eleventh recital of the regulation further states that "inland transports . . . continue to be subject to Regulation (EEC) No. 1017/68."<sup>61</sup> Because the scope of the block exemption for conference agreements pursuant to article 3 of Council Regulation No. 4056 on Maritime Transport cannot be wider than the scope of the regulation itself, however, the conference exemption does not cover multimodal price-fixing agreements. Moreover, the arguments advanced with respect to articles 2 and 5(3) of this regulation are not convincing.

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57. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, O.J. L 378/4, at 6, Common Mkt. Rep. (CCH) ¶ 2821, at 2059.

58. See Hootz, *Seeschifffahrt im deutschen und im EWG-Kartellrecht*, in 67 *SCHRIFTEN DES DEUTSCHEN VEREINS FÜR INTERNATIONALES SEERECHT* 36 (Hamburg 1988).

59. Council Doc. No. 11584/86 MAR 84, Annex III, at 5 (Dec. 19, 1986).

60. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, art. 1(2), O.J. L 378/4, at 6, Common Mkt. Rep. (CCH) ¶ 2821B, at 2058 (emphasis added).

61. *Id.* at 5, Common Mkt. Rep. (CCH) ¶ 2821, at 2057.

Price-fixing agreements for door-to-door rates are commercially restrictive arrangements and do not have as their *sole* object and effect the achievement of *technical* cooperation in the sense of article 2(1) of the regulation. Although the provisions of articles 5(3) and 5(4) admittedly are not very clear,<sup>62</sup> these provisions only constitute obligations attached to the conference block exemption, which, if anything, limit the exemption and certainly do not extend it beyond the scope of the regulation itself. The statement of the Commission for the Council minutes expressly refers to the technical exceptions as provided for under article 2 of Council Regulation No. 4056/86 on Maritime Transport and article 3 of Regulation No. 1017/68 on Inland Transport. The statement, therefore, does not refer to the question of the block exemption, but confirms the applicability of both regulations in cases of multimodal sea/land transport operations. These conclusions are supported by the fact that the European Parliament proposed an amendment to article 3 of the draft regulation adding that "[t]he aforesaid exemption shall also apply to 'intermodal transport' (i.e. maritime transport including transport to and from ports),"<sup>63</sup> but this proposed amendment was not adopted by the Council.

The Council's rejection of this amendment strongly sup-

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62. Article 5(3) of Council Regulation No. 4056/86 on Maritime Transport provides as follows:

3. *Services not covered by the freight charges*

Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.

*Id.* art. 5(3), at 7, Common Mkt. Rep. (CCH) ¶ 2821F, at 2060. Article 5(4) states:

4. *Availability of tariffs*

Tariffs, related conditions, regulations and any amendments thereto shall be made available on request to transport users at reasonable cost, or they shall be available for examination at offices of shipping lines and their agents. They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.

*Id.* art. 5(4), at 7, Common Mkt. Rep. (CCH) ¶ 2821F, at 2060.

63. See Amendments to the Proposal for a Council Regulation Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, O.J. C 255/176, at 177 (1986).



ports the argument that multimodal price-fixing agreements are not covered by the block exemption under Council Regulation No. 4056/86 on Maritime Transport. The parties to these arrangements, however, may be granted individual exemptions under article 12 of the regulation. If one takes into account the economic importance and possible benefits of multimodal transport services, it would be desirable to find a solution for granting a block exemption under Articles 85(3) and 87 of the Treaty.

### III. THE RELATIONSHIP OF THE REGULATION ON MARITIME TRANSPORT TO NON-COMMUNITY COUNTRIES

The scope of Council Regulation No. 4056/86 on Maritime Transport is defined in article 1(2), which states, "It shall apply only to international maritime transport services from or to one or more Community ports."<sup>64</sup> The Community competition rules do not apply only to intra-Community traffic but also apply to shipping trades with third countries.

#### A. *The International Dimension*

The UN Liner Code and the Brussels Package of 1979 undoubtedly prompted the Commission's proposal for a competition regulation.<sup>65</sup> Therefore, Council Regulation No. 4056/86 on Maritime Transport clearly has an international dimension and an impact on non-Community undertakings.

What does this mean in practice? First, it means that not only Community shipping lines, but also non-EC carriers, benefit from the far-reaching block exemption for conferences and for their agreements with transport users without being required to file all their agreements with the Commission. These non-EC carriers also benefit from the opportunity to apply for individual exemptions in other cases, to lodge complaints with the Commission in cases of alleged law infringements, and to appeal Commission decisions before the Court of Justice. If

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64. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, art. 1(2), O.J. L 378/4, at 6, Common Mkt. Rep. (CCH) ¶ 2821B, at 2058.

65. See Proposal for a Council Regulation Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, O.J. C 282/4 (1981); Brussels Package, *supra* note 26.

third-country companies, however, want to operate in Community shipping trades, they must also respect certain obligations. For instance, these third-country companies should consult with transport users,<sup>66</sup> become subject to monitoring of exempted agreements,<sup>67</sup> should not abuse any dominant position,<sup>68</sup> and should cooperate with the Directorate-General for Competition by supplying information or by submitting to investigations, if necessary.<sup>69</sup>

Second, although the application of EC competition law cannot stop entirely at the edge of the Community's waters, this law does not apply to foreign-to-foreign trades, or the carriage of cargo without calling at Community ports, and the Commission does not claim extraterritorial jurisdiction over such trades. In this respect, reference should be made to the Court of Justice's judgment of September 27, 1988 in *Ahlström Osakeyhtiö v. Commission* (the "Woodpulp Judgment"),<sup>70</sup> where the Court confirmed that the key to the jurisdictional reach of EC competition law is the territoriality principle. The *Woodpulp Judgment* involved restrictive agreements, contrary to Article 85 of the Treaty, between a number of companies producing woodpulp, all of whom had their headquarters outside the European Community. The Court found that these companies either were exporting directly to Community countries or were doing business in these countries through subsidiaries or agents. The woodpulp-producing companies claimed that the Commission had no jurisdiction to apply EC competition rules to them because their headquarters were located outside the common market's territory. The Court did not accept this argument and ruled that an infringement of Article 85 of the Treaty

consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice, and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to de-

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66. Council Regulation No. 4056/86 on Maritime Regulation, *supra* note 5, art. 5, O.J. L 378/4, at 6-7, Common Mkt. Rep. (CCH) ¶ 2821F, at 2059-61.

67. *Id.* art. 7, at 7-8, Common Mkt. Rep. (CCH) ¶ 2821H, at 2061-62.

68. *Id.* art. 8, at 8, Common Mkt. Rep. (CCH) ¶ 2821J, at 2062.

69. *Id.* arts. 16-18, at 10-11, Common Mkt. Rep. (CCH) ¶¶ 2821T-V, at 2066-67.

70. Joined Cases 89/85, 104/85, 114/85, 116/85, 125-29/85, 1988 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,595.

pend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor therefore is the place where it is implemented.

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Accordingly, the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.<sup>71</sup>

The Court, however, did not utilize the "effects doctrine," but rather the "implementation text," which is broad enough to cover the vast majority of cases in which the Commission would need to take action against cartels.<sup>72</sup>

The Member States and non-EC countries, however, may face problems in trades where the UN Liner Code or other international agreements apply. The compatibility between the UN Liner Code, EC competition rules, and, with respect to the African-Caribbean-Pacific ("ACP") countries, the Fourth ACP-EEC Convention of Lomé (the "Lomé IV Convention")<sup>73</sup> is essential. Therefore, it is useful to analyze briefly the relationship between Community legislation and these agreements.

### B. *The UN Liner Code*

After World War II, there was great pressure, most notably from developing countries, for a worldwide regime for liner shipping. Developing countries felt that they were being "squeezed" and wanted a larger role in the operation and the profits of the shipping services that affected them. After long discussions and negotiations within the developed world and within the United Nations Conference on Trade and Development ("UNCTAD"), the Convention on a Code of Conduct for Liner Conferences emerged at Geneva in April 1974.<sup>74</sup>

One of the best known provisions of the Code is the "40/

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71. *Id.* at \_\_, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,612.

72. See Temple Lang, *Institutional Aspects of EC-EFTA Relations*, in *CREATING A EUROPEAN ECONOMIC SPACE: LEGAL ASPECTS OF EC-EFTA RELATIONS* 17, 32 (M. Robinson & J. Findlater eds. 1989) (available from the Irish Centre for European Law, Trinity College, Dublin).

73. Dec. 15, 1989, 29 I.L.M. 809 (1990) [hereinafter Lomé IV Convention].

74. See UN Liner Code, *supra* note 17.

40/20" cargo sharing rule of article 2(4), which addresses participation in trade and states:

When determining a share of trade within a pool of individual member lines and/or groups of national shipping lines in accordance with Article 2(2), the following principles regarding their right of participation in the trade carried by the conference shall be observed, unless otherwise mutually agreed:

(a) The group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference;

(b) Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 per cent, in the freight and volume of traffic generated by that trade.<sup>75</sup>

The UN Liner Code attracted much support in the developing world. The industrialized countries, however, gave it a rather mixed reception. In the Community, several Member States voted in favor of it, but others were opposed. This presented the Community with the danger of a wide divergence between national shipping practices in the Community if the Code were to be adopted by some Member States and not by others.

The Community eventually achieved a common position on the UN Liner Code in 1979 in the form of the Brussels Package.<sup>76</sup> This regulation requires Member States to adopt the Code subject to certain modifications.<sup>77</sup> The famous "40/40/20" cargo sharing rule contained in article 2 of the Code caused the greatest difficulty in compatibility with the principles of the Community and the Organization for Economic Cooperation and Development (the "OECD"). Because it could not be accepted within the Community, article 4(2) of the Brussels Package stated that, if a party decided to display this rule, article 2 of the UN Liner Code should not be applied in conference trades between Member States and between Member States and other OECD countries that are parties to the

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75. *Id.* art. 2(4), U.N. Doc. TD/CODE/11/Rev.1 Annex I, at 4-5, Gr. Brit. T.S. No. 45 (Cmd. 213) at 5.

76. Brussels Package, *supra* note 26.

77. *See id.* Annex I, at 4.

Code.<sup>78</sup>

As to the relationship between the UN Liner Code and Council Regulation No. 4056/86 on Maritime Transport, the following points should be considered. First, the Member States that have ratified the UN Liner Code,<sup>79</sup> and the Community, if it would accede as such to it, are or will be faced with an international obligation to respect the Code. Thus, the Code has become a political and legal fact that cannot be ignored by Community authorities.<sup>80</sup> The Commission has recognized the right of the conference system to exist by granting conference agreements a block exemption.

On the other hand, the UN Liner Code is silent on the degree of competition that should exist in the markets concerned, which does not imply that the Code has no effect on competition in the field on liner shipping services. The Brussels Package, however, has added nothing to the Code on this basic point, but states, in its last recital, that "it is nevertheless necessary to avoid possible breaches by conferences of the rules of competition" in order to eliminate incompatibilities between the Code and Articles 85 and 86 of the Treaty.<sup>81</sup> The Brussels Package accomplished the goal of avoiding breaches of the competition rules by eliminating the application of the "40/40/20" cargo sharing rule to conference trades between EC countries or, on a reciprocal basis, to other OECD countries.<sup>82</sup> Finally, although the Code and the Brussels Package are to be regarded as a concession to meet the aspirations of developing countries, nothing in their provisions may be interpreted in such a way as to recognize the UN Liner Code as a set of competition rules in EC liner shipping.

The application and the enforcement of Council Regula-

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78. *Id.* art. 4(2), at 2.

79. As of 1987, the UN Liner Code had been signed or acceded to by seventy-four countries including half of the EC Member States—Belgium, Denmark, France, the Federal Republic of Germany, the Netherlands, and the United Kingdom. UN Liner Code, *supra* note 17, Gr. Brit. T.S. No. 45 (Cmd. 213) at 29-30. In addition, as of the same year, nineteen of these countries, including France and the Federal Republic of Germany, had ratified the Code. *Id.* at 29.

80. For a more thorough analysis of the UN Liner Code's importance within the European Communities, see Vermote, *The Application of the United Nations Liner Code Within the European Communities*, 23 EUR. TRANSP. L. 571 (1988).

81. Brussels Package, *supra* note 26, O.J. L 121/1, at 1.

82. *Id.* art. 4, at 2-3.

tion No. 4056/86 on Maritime Transport, therefore, is not legally dependent on the Code, and any review of the UN Liner Code should not involve possible conflicts between this convention and Community law. In addition, when accepting a system of conferences that conform to the Code, the Commission should be entitled to determine the degree of competition it considers necessary in order to meet the requirements contained in Articles 3(f), 85, and 86 of the Treaty and, if a conflict should exist, to require the operators in question to comply with the law and/or to propose amendments to the regulation, if appropriate.

For instance, any regulation of the participation by non-conference lines that differs from the UN Liner Code resolution on non-conference lines would be contrary to the principle of closed conferences operating in open trades.<sup>83</sup> For this reason, this type of regulation would lead to a conflict with articles 3 and 7 of Council Regulation No. 4056/86 on Maritime Transport, which provides for the block exemption of liner conferences and the monitoring of exempted agreements.<sup>84</sup>

The UN Liner Code must not take precedence over the Community's competition rules in trade with third countries. Nevertheless, in applying the competition regulation, a need exists to consider the often rather difficult relations with third countries and the Community's concerns in the areas of competition, transport, and general trade policies. Articles 7(2) and 9 of Council Regulation No. 4056/86 on Maritime Transport provide the necessary instruments to consider these problems and concerns.<sup>85</sup>

The signing of the Lomé IV Convention in Lomé, Togo, on December 15, 1989, has also confirmed the conclusions set forth above.<sup>86</sup> Articles 86(2), 87, and 88 of the Third ACP-

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83. See UN Liner Code, *supra* note 17, U.N. Doc. TD/CODE/11/Rev.1 Annex II, at 1. The conference on the liner code adopted Resolution No. 2 on non-conference lines April 6, 1974. *Id.* This resolution provided that non-conference lines should not be prevented from competing with conferences as long as they adhered to the principle of fair competition on a commercial basis. *Id.*

84. See Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 3, 7, O.J. L 378/4, at 6, 7-8, Common Mkt. Rep. (CCH) ¶¶ 2821D, 2821H, at 2059, 2061-62.

85. *Id.* arts. 7(2), 9, at 8, 8-9, Common Mkt. Rep. (CCH) ¶¶ 2821H, 2821K, at 2061-62, 2062-63.

86. See Lomé IV Convention, *supra* note 73.

EEC Convention (the "Lomé III Convention")<sup>87</sup> on transport and, in particular, international shipping, remained unchanged in articles 126(2), 127, and 128 of the Lomé IV Convention.<sup>88</sup> The Community and the ACP countries, however, have made unilateral declarations on the interpretation of articles 126(2), 127, and 128 of the Lomé IV Convention that are not fully compatible with each other.<sup>89</sup> In particular, this incompatibility relates to the question of unrestricted access to liner trades and anti-competitive practices affecting liner conferences as well as non-conference lines.

In a joint statement for entry into the minutes, the Council of Ministers stated:

The Council and the Commission declare that the Articles 86, 87 and 88 [now articles 126, 127, and 128 of the Lomé IV Convention] are the basis for the maritime relations between the ACP and the EEC states, and that the phrase "restrictive and anti-competitive practices" is to be interpreted as affecting companies both inside and outside liner conferences and also companies or vessels involved in the bulk

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87. Dec. 8, 1984, O.J. L 86/3 (1986).

88. Compare *id.* arts. 84-94, at 34-35 with Lomé IV Convention, *supra* note 73, arts. 123-34, 29 I.L.M. at 835-36.

89. See Lomé IV Convention, *supra* note 73, Annexes XVIII, XIX, reprinted in THE ACP-EEC COURIER, Mar.-Apr. 1990, at 162. The Community declaration states, in part:

The rules of unrestricted access to the trade on a commercial basis as set out in Articles 126(2), 127 and 128 exclude restrictive and anti-competitive practices, affecting all shipping companies. The Community and its Member States reaffirm that these rules are designed to increase the competitiveness of shipping companies and thereby benefiting exporters and importers. The Community and its Member States further recall that competitive access to the bulk trade shall not be impaired.

*Id.* Annex XIX, at 162. The ACP declaration states, in part:

Conscious of the need to ensure that ACP shipping industries are able to participate on an equitable basis in markets which are dominated by powerful international shipping companies, the ACP States reaffirm their view that the provisions of Articles 126(2), 127 and 128 of the Convention do not imply that such international companies can operate, either in or outside liner conferences, without constraint.

The spirit of the Convention requires that the principle of fair competition is not interpreted solely in favour of such companies, but also takes into account the right of ACP States to greater and fairer participation in all freight generated by their external trade and the need to facilitate the development of their industries.

*Id.* Annex XVIII, at 162.

trade. The policies and practices of the Community and its Member States will be based upon this interpretation.<sup>90</sup>

Thus, the Commission and the Member States have reiterated their intention to respect fully the principle of a system of undistorted competition pursuant to Article 3(f) of the Treaty in maritime transport.

### *C. Open Trades*

The Commission already in 1985 viewed with concern the increasing trend to exclude non-conference competition from trades in which so-called closed conferences, or conferences pursuant to the rules of the UN Liner Code, operate.<sup>91</sup> Several cases exist in which certain countries reserve cargo and regulate or control outsiders in their liner trades with the Community and, thereby, close access of outsiders to the trade or restrict their freedom to operate in the trades. When these countries preclude outsider competition, however, the liner conferences operating in these trades become monopolies, and Council Regulation No. 4056/86 on Maritime Transport requires the withdrawal of the block exemptions for them.

Since the entry into force of the new competition regulation in maritime transport, a number of formal complaints have been lodged with the Commission by shipowners and transport users as well as by Member States. The parties mainly direct these complaints against cargo allocation systems and restrictions of free access to and free operation in trades between Europe and West and Central Africa for non-conference carriers.<sup>92</sup>

In 1988, based on a Council decision pursuant to article 3 of Council Regulation No. 4058/86 of 22 December 1986 Concerning Coordinated Action to Safeguard Free Access to Cargoes in Ocean Trades ("Council Regulation No. 4058/86"),<sup>93</sup> the Community took coordinated action to safeguard free access to cargoes in ocean trade. In considering the problems encountered in West and Central African trades in-

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90. Council Doc. TFN/MISC/MIX/181 (Dec. 12, 1989) (entry for the minutes of the Council regarding Lomé IV Convention).

91. *See* Progress Towards a Common Transport Policy, *BULL. EUR. COMM. Supp.* 5 (1985).

92. *See* Comm'n, Seventeenth Report on Competition Policy ¶ 47 (1987).

93. O.J. L 378/21 (1986).



volving countries that signed the Lomé III Convention, the ACP states and the Community took diplomatic initiatives pursuant to the framework of this convention. An expert group from the Community and the African states took part in negotiations that resulted in an agreed-upon report on general principles (including free access to trades for non-conference lines). This report was submitted to a meeting of the ACP-EEC Council of Ministers in Mauritius during May 1988. The Council noted the report and instructed the experts to pursue their work.<sup>94</sup>

The restrictions in Community trades with the main West and Central African states, however, still exist. Another round of talks with the African governments during April 1989 in Brussels did not produce any results because the African side withdrew from the compromise arrangement of March-May 1988. In 1989, the Commission conducted investigations into the practices of liner conferences serving West and Central African trades for alleged infringements of Articles 85 and 86 of the Treaty. As a result of these investigations, the Commission may issue decisions pursuant to articles 7 and 8 of Council Regulation No. 4056/86 on Maritime Transport.

#### D. *Conflicts of Law and Enforcement*

Although the Commission's jurisdiction to apply its competition laws is governed by the territoriality principle, differences may exist in the regulatory approach to be used and the enforcement of these laws. In this instance, one should draw a distinction between countries that have acceded to the UN Liner Code and those that have not acceded to it. These differences might be illustrated by examining the situations in the United States and in West and Central Africa.

It should be noted that there have been no specific difficulties between the Community and the United States. Both sides support commercially-oriented merchant fleets driven basically by market forces and, furthermore, both sides are moving towards open trades and competitive shipping. The Community and the United States, however, differ in their approaches to the regulatory policy that should be applied to liner shipping. The differences mainly involve the choice be-

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94. See Comm'n, Eighteenth Report on Competition Policy ¶ 32 (1988).

tween a governmental regulatory system or a self-regulatory system of liner conferences.

In an attempt to maintain competition, the United States prohibits closed conferences.<sup>95</sup> European countries and Japan, on the other hand, allow conferences to organize as they wish and believe that competition will be maintained as long as effective, non-conference operators remain in the trades. In addition, the United States requires all shipping agreements to be filed with the Federal Maritime Commission, a regulatory authority in the United States, before receiving antitrust immunity.<sup>96</sup> Under EC competition law, however, conferences have been granted a far-reaching block exemption, which is not limited in time and does not make individual notification to the Commission compulsory.<sup>97</sup>

The third difference between the Community and the United States is the extent of the jurisdiction because, at least in part, the United States has applied its laws to activities that the European governments consider to be outside the proper jurisdiction or the appropriate regulatory interest of the United States. In the *Woodpulp Judgment*, the Court of Justice clarified European Community law with respect to extraterritorial jurisdiction.<sup>98</sup> In any case, the application of EC law does not reach as far as U.S. antitrust law and does not apply to the "foreign commerce" of the Community as such.

Because the West and Central African states may be defined as "codists," or signatories to the UN Liner Code, these countries differ in approach from the Community mainly in the application of the Code. Major problems stem from the fact that these countries want to have a bigger share of the traffic in their trades and, therefore, in contrast to the Code, demand an application of the "40/40/20" rule not only to conference cargo but to the whole trade.

These countries want to limit the access of outsiders to their trades and have issued cargo reservation laws and estab-

95. See 46 U.S.C. app. §§ 1704(b), 1709(c)(1), 1709(c)(3) (Supp. V 1987).

96. See *id.* § 1704(a).

97. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 3, 6, O.J. L 378/4, at 6, 7, Common Mkt. Rep. (CCH) ¶¶ 2821D, 2821G, at 2059, 2061.

98. See *Woodpulp Judgment*, Joined Cases 89/85, 104/85, 114/85, 116/85, 125-29/85, 1988 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,491, at 18,595.

lished central freight booking offices for the allocation of cargo, which is contrary to their international obligations under the Code, including the resolution on non-conference shipping lines, and under the Lomé conventions. In these cases, the Community has responded by adopting a decision in accordance with Council Regulation No. 4058/86,<sup>99</sup> and by initiating investigations under the competition regulation because, in cases where a trade is closed, the conference has a monopoly and the block exemption must be withdrawn.

Thus, there may be the potential for overlapping regulatory claims and, perhaps, clashes of jurisdiction in the Community's shipping trades with other countries. Of course, the possibility exists of an exchange of information and of views on shipping matters within the Consultative Shipping Group and between non-EC states and the Commission.

In specific cases of alleged infringements of the law, Council Regulation No. 4056/86 on Maritime Transport provides for appropriate safeguards itself by virtue of articles 7 and 9.<sup>100</sup> Thus, where actual or potential competition in a liner trade is absent or eliminated contrary to Article 85(3) of the Treaty, the Commission shall withdraw the benefit of the block exemption from the conference operating in that trade. If the absence or elimination of competition is the result of action by a third country, however, the Commission may enter into consultations with competent authorities of that country in accordance with article 7(2) of the regulation on competition in maritime transport.<sup>101</sup> If necessary, these consultations will be followed by negotiations in order to remedy the situation.<sup>102</sup>

In all other cases where the application of EC competition rules may conflict with non-EC country laws to compromise important Community trading and shipping interests, the Commission would have to use article 9 of Council Regulation 4056/86 on Maritime Transport.<sup>103</sup> Article 9 provides the necessary procedure to consult and to negotiate with the other

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99. See O.J. L 378/21 (1986).

100. Council Regulation No. 4056/86 on Maritime Transport, *supra* note 5, arts. 7, 9, O.J. L 378/4, at 7-8, 8-9, Common Mkt. Rep. (CCH) ¶¶ 2821H, 2821K, at 2061-62, 2062-63.

101. *Id.* art. 7(2), at 8, Common Mkt. Rep. (CCH) ¶ 2821H, at 2061-62.

102. *Id.*

103. *Id.* art. 9, at 8-9, Common Mkt. Rep. (CCH) ¶ 2821K, at 2062-63.

country concerned.<sup>104</sup>

Such consultations and negotiations, however, must face certain challenges. One of these challenges is to provide for rapid procedures. Another one is to avoid the exercise of jurisdiction concurrently, whenever possible. Where parties are not willing to give up the opportunity of having the last word, they should agree to take full account of each other's interests and to adapt any remedies accordingly. In general, article 9 should be used in conjunction with proper respect for international law and political responsibility.<sup>105</sup>

### CONCLUSION

The Community and the shipping industry together must face the challenge of making the new competition regulation on maritime transport work effectively.

Council Regulation No. 4056/86 on Maritime Transport still has to stand the test of practice. While the regulation will have to be enforced with the aim of protecting the Community's shipping and trading interests, the Community must ensure that trades remain open and that it respects the justified interests of non-EC countries. The Commission must act where competition has been or is likely to be eliminated. In addition, it should take action in all appropriate cases concerning typical arrangements and practices to provide guidelines for the shipping industry and transport users on how to cope with the new regulatory scheme.

The Commission should also promote and uphold the principles of unrestricted and fair competition in the implementation of the new shipping regulations. At the same time, the Commission should not impede international shipping and should not impose barriers to trade. This is a difficult but important task for the Commission.

The European Community is the world's largest trading area and accounts for approximately twenty percent of the ton-

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104. *Id.*

105. See Rosenthal, *Ten Principles for Resolving Jurisdictional Conflicts*, in 1985 *FORDHAM CORP. L. INST.* 301 (B. Hawk ed. 1986). For a discussion of reasonableness as a principle of international law on jurisdiction, see Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 *LAW & CONTEMP. PROBS.* 47 (Summer 1987).

nage of world trade<sup>106</sup> even though it represents only approximately six percent of the world population. Some ninety-five percent of the tonnage of the Community trade with non-EC states and some thirty percent of intra-Community traffic is carried by sea.<sup>107</sup> In the light of these facts, one should not overlook the economic and political importance of competitive transport services—either by road, rail, inland waterway, air, or sea. Also, one should not doubt the importance of transport issues for the completion of the single European market by the end of 1992.

The Community is now in the final straight of the race to complete the single market, and fears of a “Fortress Europe in 1993” have been voiced in non-EC countries. International shipping requires freedom of the seas for peaceful and efficient transport services. Moreover, international shipping is a domain where it is obvious that countries share a vital interest in cooperation and in harmony of their laws and regulations for competition in transport. There is no place for a “Fortress Europe” in shipping.

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106. See Progress Towards a Common Transport Policy, BULL. EUR. COMM. Supp. 5, at ¶¶ 1, 10 (1985).

107. *Id.* ¶ 10 (footnote omitted).