

**Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services**

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(2006/C 309/10)

On 10 February 2006, the Council of the European Union decided to consult the European Economic and Social Committee, under Article 83 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 30 May 2006. The rapporteur was Dr Bredima-Savopoulou.

At its 428th plenary session, held on 5 and 6 July 2006 (meeting of 5 July 2006), the European Economic and Social Committee adopted the following opinion by 156 votes to 1 with 7 abstentions.

## 1. Conclusions and recommendations

1.1 Regarding the **tramp and cabotage sectors**, the EESC endorses the proposed extension to these sectors of the procedural competition rules of Regulation 1/2003<sup>(1)</sup>. It appreciates the ongoing discussions between the Commission and the shipping industry regarding the application of Articles 81 and 82 to tramp shipping. In the absence of complaints and legal precedents in the tramp sector, more information will be required about its operation and agreements. The EESC therefore welcomes the Commission's initiative to launch a study on the economic and legal characteristics of the tramp sector. For the sake of legal certainty, the EESC urges the Commission to provide guidance (prior to lifting the exclusion to Regulation 1/2003) regarding the self-assessment of the compatibility with EU competition law of various forms of cooperation agreement in the tramp sector.

1.2 With reference to the **liner sector**, the EESC notes the Commission's proposal's to repeal the block exemption of liner shipping conferences from the EC Treaty competition rules on the basis that the four cumulative conditions of Article 81(3) of the EC Treaty are no longer fulfilled. The Commission takes the view that repeal will result in lower transport costs, whilst maintaining reliability of services on all trades, and enhance the competitiveness of European industry. The EESC reserves its position to see whether the proposed repeal will have sustainable effect.

1.3 The EESC recommends the Commission to take the safety aspect (loss of quality shipping as a result of flagging out from the EU) into consideration — in addition to the pure competitive factors — when repealing the block exemption for liner shipping conferences.

1.4 The EESC recommends that the Commission should also take the human resources aspect (impact on employment for European seafarers) into consideration — in addition to purely competitive factors — when repealing the block exemption for liner shipping conferences.

1.5 The EESC notes the Commission's intention to issue appropriate guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime. The Commission intends to promulgate the guidelines by end 2007. Prior to this promulgation, the Commission — as an interim step in the preparation of the guidelines — will publish an 'issues paper' on liner shipping in September 2006. The EESC calls upon the Commission to draw up the guidelines in close contact with the relevant stakeholders and to inform the relevant EU institutions accordingly.

1.6 The Commission proposal is the result of a review process, which started in 2003, involving all relevant EU institutions and stakeholders. The Commission also contracted three studies from independent consultants, who looked into the issues arising from a repeal of the block exemption regime and whose findings are published on the website of the Directorate General for Competition.

1.7 The EESC has also taken note of the fact that the Commission's proposal to repeal the block exemption for liner shipping is based only on Article 83 of the EC Treaty (competition rules), whereas the legal basis of Regulation 4056/86 was Article 83 (competition rules) in combination with Article 80(2) (transport policy) of the EC Treaty. The EESC would appreciate some information from the Legal Service of the European Parliament about whether the transport considerations are ancillary to the competition considerations and whether the Service maintains its view about the dual legal basis as per its previous opinion<sup>(2)</sup>.

<sup>(1)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1). EESC Opinion: OJ C 155/2001; p. 73.

<sup>(2)</sup> A6-0314/2005 of 1/12/2005.

1.8 The EESC, anticipating possible conflicts of law in the future resulting from legal instruments of other jurisdictions, urges the Commission to devise a provision in the guidelines tackling such problems. Such a provision regarding consultations will minimise frictions and lead to mutually acceptable solutions internationally.

1.9 The EESC notes that the Commission recognises that competition law is not applied in the same way in all jurisdictions throughout the world and that divergences exist. The Commission also recognises the increasing importance of international cooperation between competition law enforcement authorities.

1.10 The EESC welcomes the fact that the Commission is pursuing a dual policy of developing enhanced bilateral cooperation with the EU's main trading partners and of examining ways to expand multilateral cooperation in the field of competition. The EESC therefore encourages the Commission to accelerate efforts to ensure that such cooperation and dialogue will help to identify potential problems resulting from a repeal of Regulation 4056/86 in the EU and to solve such problems in a constructive way, thereby respecting the particularities of each others' legal system. Consistency in how liner services are dealt with between different countries is indeed vital to international trade.

1.11 The EESC calls upon the Commission to take into account the outcome of the dialogue and cooperation between the Commission and its main trading partners when drafting the guidelines on competition in the maritime sector.

1.12 The EESC acknowledges that the following elements have been referred to in the Explanatory Memorandum of the Commission proposal and maintains that they should be taken into account when drafting the guidelines on competition in the maritime sector:

- It is recognised that maritime transport services are key to the development of the EU economy with maritime transport carrying 90 % of its external trade and 43 % of intra-EU trade.
- The ongoing trend towards containerisation has profoundly changed liner transportation since the adoption of Regulation 4056/86. It has resulted in an increase in the number and size of fully cellular container vessels and in an emphasis on global route networks. This has contributed to the popularity of new operational agreements and to a decline in the significance of liner conferences.
- The conference system — which has operated for 150 years — is still subject to multilateral and bilateral agreements to which the EU Member States and the Community are contracting parties. The EESC notes that the Commission recognises that — as a consequence of these agreements, the date of repeal of the following provisions of Regulation 4056/86 (i.e. Articles 1(3), points (b) and (c), Articles 3 to 8 and 26) should be postponed for a period of

two years, in order to denounce or revise these agreements with third countries.

1.13 The EESC believes that the Commission should also take into account the interests of small and medium-sized businesses in repealing Regulation 4056/86. Small and medium-sized businesses constitute the backbone of the EU economy and they play an important role in the context of the revised Lisbon Strategy. Markets should remain open to the current and potential competition, including small and medium-sized shipping operators.

1.14 The EESC maintains that although consolidation may have positive effects for EU industry (efficiency gains, economies of scale, cost savings), caution is needed to avoid that consolidation — which may follow the repeal of Regulation 4056/86 — results in fewer players in the relevant markets, i.e., less competition.

1.15 Under a new regime, the EESC invites the two interested parties at European level, — shippers and carriers — to engage in discussions on issues of mutual interest and significance.

## 2. Introduction

### 2.1 *Current trends and legislation*

2.1.1 Maritime transport services are key to the development of the EU economy with maritime transport carrying 90 % of the external trade and 43 % of the intra-EU trade. Maritime transport has been an international and globalised activity since antiquity. Basically, it is provided according to two types of services: liner and tramp which operate like buses and taxis of the seas respectively. The EU flagged fleet accounts for 25 % of the world fleet and EU shipowners control over 40 % of the world fleet. Another 40 % of the world fleet belongs to countries of the Pacific basin. EU shipping and its customers (charterers/shippers) operate in a highly competitive environment in overseas and European markets.

2.1.2 Regulation 4056/86 lays down detailed rules for the application of competition rules (Articles 81 and 82 of the Treaty) to liner shipping services to and from Community ports. Tramp vessel services, however, were excluded from the scope of Regulation 4056/86. Originally the Regulation had two functions. It contained procedural provisions for the enforcement of the EC competition rules in the maritime transport sector. This function has become redundant after 1 May 2004, when liner transport became subject to the general competition enforcement rules of Regulation 1/2003. Regulation 1/2003, however, does not apply to international tramp vessel services and cabotage services. Secondly, Regulation 4056/86 lays down certain specific substantive competition provisions for the maritime sector and notably a block exemption for liner shipping conferences allowing them under certain conditions to fix prices and regulate capacity.

## 2.2 *The liner sector*

2.2.1 The liner shipping market has changed considerably since Regulation 4056/86 was adopted. The continuing trend towards containerisation has led to an increase in the number and size of cellular container vessels and to an emphasis on global route networks in response to changes in global trade patterns. This has contributed to the popularity of new operational arrangements, to a decline in the significance of liner conferences and to a considerable increase in powerful outsiders. In other parts of the world, as in the US the introduction of the Ocean Shipping Reform Act (OSRA) 1999 has changed the rules for conferences serving the US trades allowing confidential service contracts. Today, global liner carriers operate mainly in East-West trades as well as in North — South trades, whilst small and medium-sized carriers mainly operate in the North — South trades and in European short sea shipping.

2.2.2 The UNCTAD Code of Conduct for Liner Conferences was originally devised to regulate the liner conference system in trades between developed and developing countries<sup>(3)</sup>. Thirteen EU Member States and Norway have ratified, approved or acceded to the Code of Conduct and Malta signed but has not ratified it. It is<sup>(4)</sup> referred to in several EU agreements with third countries and in the *acquis communautaire* (Regulations 954/79, 4055/86, 4056/86, 4058/86). Despite its virtual redundancy in the deep-sea liner trades, legally speaking, the UNCTAD Code still exists.

2.2.3 Transport users (shippers and freight forwarders) have systematically questioned the conference system which they consider does not deliver adequate, efficient and reliable services suited to their needs. In particular, the ESC<sup>(5)</sup> believes removal of the block exemption of conferences will allow improved customer-provider partnerships focusing on logistics solutions that help EU businesses to compete internationally. Likewise, consumers would benefit from slightly reduced prices when rates charged on in-bound products to the EU declined. Shipowners, on the contrary, have been of the opinion that liner conferences have contributed to service stability and that the conference regime has enabled them — both globally and regionally — to cope with imbalances (whether seasonal or geographical or due to climate conditions) on most trades. Meanwhile, global carriers (members of ELAA<sup>(6)</sup>) and the ESC have entered into a dialogue with the Commission assisting it in developing an alternative system that is compliant with EC competition rules.

<sup>(3)</sup> For more information about the UNCTAD Liner Code and Regulation 954/79, cf. EESC opinion OJ C 157, 28.6.2005, p. 130.

<sup>(4)</sup> See the document on the Status of multilateral treaties published by the UNCTAD Secretariat  
<http://www.unctad.org/en/docs/tbinf192.en.pdf> (page 4)

<sup>(5)</sup> ESC= European Shippers' Council.

<sup>(6)</sup> ELAA= European Liner Affairs Association.

2.2.4 In 2003, the Commission launched a review of Regulation 4056/86 with the aim of determining whether reliable scheduled maritime services could be achieved by less restrictive means than horizontal price fixing and capacity regulation. To that end, the Commission issued a Consultation Paper in March 2003 and organised a Public Hearing with the relevant stakeholders in December 2003. Furthermore, the Commission issued a discussion paper in June 2004 and a White Paper in October 2004 followed by extensive consultations with interested stakeholders. The European Parliament<sup>(7)</sup> and the EESC<sup>(8)</sup> delivered their opinions on the White Paper on 1 December 2005 and 16 December 2004 respectively and they both concurred that review rather than repeal was the preferable course of action. In December 2005, the Commission eventually issued a proposal for a Regulation repealing Regulation 4056/86.

## 2.3 *The tramp sector*

2.3.1 Although nearly 80 % of the entire maritime transport of dry and liquid bulk commodities worldwide operates on a tramp basis, this vast sector is a *terra incognita* to most. The basic characteristics of tramp shipping are: a globally competitive market, a close to perfect competition model, volatile and unpredictable demand, many small entrepreneurial companies, global trade patterns, ease of entry and exit, extreme cost effectiveness, and responsiveness to development of markets and shippers' needs. The tramp services market is highly fragmented and overall it has worked to the satisfaction of charterers and shippers without any major problems with competition rules, neither internationally nor within the EU. The absence of complaints regarding this sector is a further proof of its highly competitive and satisfactory characteristics. In view of the above, Regulation 4056/86 provides that tramp shipping services are activities to which it does not apply. Articles 81 — 82 of the EC Treaty apply directly to this sector. Moreover, international tramp vessel services (and cabotage services) do not fall within the scope of Regulation 1/2003 (procedural competition rules).

## 2.4 *The Commission's proposal*

2.4.1 In view of the changes to the structure of the market and industry since 1986, the European Commission has concluded that the four cumulative conditions, as laid down in Art. 81(3) of the EC Treaty, for granting a block exemption to liner conferences are no longer fulfilled. For this reason, the Commission has proposed to repeal Regulation 4056/86 in its entirety and notably the liner conference block exemption (Articles 3 to 8, 13 and 26). Certain provisions considered redundant are also repealed in line with the EC's overall policy to reduce Community legislation (Articles 2 and 9). The Commission takes the view that such a repeal will result in lower transport costs, whilst maintaining reliability of services on all trades and enhancing the competitiveness of European industry.

<sup>(7)</sup> A6-0314/2005 of 1.12.2005.

<sup>(8)</sup> EESC Opinion: OJ C 157, of 28.6.2005, p. 130.

2.4.2 Prior to repealing the block exemption for liner conferences, the Commission intends to issue guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime. The Commission intends to promulgate these guidelines by end 2007. Prior to this promulgation, the Commission — as an interim step in the preparation of the guidelines — will publish an ‘issues paper’ on liner shipping in September 2006.

2.4.3 The Commission proposal on repealing Regulation 4056/86 also contains a proposal to amend Regulation 1/2003 with a view to bringing international tramp vessel services and cabotage services under the scope of this Regulation.

### 3. General comments

3.1 The EESC believes that the current issue merits a balanced approach taking into account the following factors: the benefits of competition to the competitiveness of EU industry, the changing patterns of world trade and its effect on the provision of transport services, international transport implications for the EU’s major trading partners as well as for developing countries, the views of global shippers and carriers, and the views of small and medium-sized carriers and shippers.

#### 3.2 *The tramp and cabotage sectors*

3.2.1 Tramp shipping operates in a global market under conditions of perfect competition. This unique characteristic of the tramp sector, recognised by practitioners and academics, was also acknowledged by the EU in Regulation 4056/86. The EESC understands the need to bring this sector under the procedural competition rules of Regulation 1/2003 and, therefore, endorses the proposed approach. The EESC welcomes the Commission’s initiative to launch a study on the economic and legal characteristics of the tramp sector. For the sake of legal certainty, the EESC urges the Commission to provide guidance (prior to lifting the exclusion to Regulation 1/2003) regarding the self-assessment of the compatibility with EU competition law of various forms of cooperation agreements in the tramp sector. The absence of complaints and legal precedents in the tramp sector is a proof of its operation under conditions of perfect competition. In order to provide legal yardsticks for its self-assessment under EC competition rules, more information will be required about its operation and agreements. The EESC also appreciates the ongoing discussions between the Commission and the shipping industry regarding the application of Articles 81-82 to tramp shipping.

3.2.2 Concerning maritime cabotage the EESC agrees with the proposed treatment, i.e. cabotage to become subject to the procedural rules of Regulation 1/2003. The vast majority of agreements in this sector would not affect intra — EU trades nor create any restrictions on competition.

3.2.3 In the light of the above, the EESC agrees with the Commission’s approach on the future treatment of the tramp and cabotage sectors.

#### 3.3 *The liner sector*

3.3.1 Regarding the liner sector, the EESC notes the Commission proposal to repeal the block exemption of liner shipping conferences from the EC Treaty competition rules on the basis that the four cumulative conditions of Article 81(3) of the EC Treaty are no longer fulfilled. The Commission takes the view that such a repeal will result in lower transport costs, whilst maintaining reliability of services on all trades, and enhance the competitiveness of European industry. The EESC reserves its position to see whether the proposed repeal will have sustainable effect.

3.3.2 The EESC notes the Commission’s intention to issue appropriate guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime. The EESC calls upon the Commission to draw up the guidelines in close contact with the relevant stakeholders and to inform the relevant EU institutions accordingly.

3.3.3 The Commission’s proposal is the result of a review process, which started in 2003, involving all relevant EU Institutions and stakeholders. The Commission also contracted three studies from independent consultants, who looked into the issues arising from a repeal of the block exemption regime and whose findings are published on the DG COMP website.

3.3.4 The EESC has also taken note of the fact that the Commission proposal to repeal the block exemption for liner shipping is based only on Article 83 of the EC Treaty (competition rules), whereas the legal basis of Regulation 4056/86 was Article 83 (competition rules) in combination with Article 80(2) (transport policy) of the EC Treaty.

3.3.5 The EESC notes that the Commission recognises that competition law is not applied in the same way in all jurisdictions throughout the world and that divergences exist. The Commission also recognises the increasing importance of international cooperation between competition law enforcement authorities.

3.3.6 The EESC welcomes the fact that the Commission is pursuing a dual policy of developing enhanced bilateral cooperation with the EU’s main trading partners and of examining ways to expand multilateral cooperation in the field of competition. The EESC therefore encourages the Commission to accelerate efforts to ensure that such cooperation/dialogue will help to identify potential problems resulting from a repeal of Regulation 4056/86 in the EU and to solve such problems in a constructive way, thereby respecting the particularities of each others’ system/jurisdiction. Consistency in how liner services are dealt with between different countries is indeed vital to international trade.

3.3.7 The EESC calls upon the Commission to take into account the outcome of the dialogue/cooperation between the Commission and its main trading partners when drafting the guidelines on competition in the maritime sector.

3.3.8 The EESC acknowledges that the following elements have been referred to in the Explanatory Memorandum of the Commission proposal and maintains that they should be taken into account when drafting the guidelines on competition in the maritime sector:

- It is recognised that maritime transport services are key to the development of the EU economy with maritime transport carrying 90 % of its external trade and 43 % of intra-EU trade.
- The continuing trend towards containerisation has profoundly changed liner transportation since Regulation 4056/86 was adopted. It has resulted in an increase in the number and size of fully-cellular container vessels and in an emphasis on global route networks. This has contributed to the popularity of new operational agreements and to a decline in the significance of liner conferences.
- The conference system — which has operated for 150 years — is still subject to multilateral and bilateral agreements to which EU Member States and/or the Community are contracting parties. The EESC notes that the Commission recognises that — as a consequence of these agreements — the date of repeal of the following provisions of Regulation 4056/86 (i.e. Articles 1(3), points (b) and (c), Articles 3 to 8 and 26) should be postponed for a period of two years, in order to denounce or revise these agreements with third countries.

3.3.9 The EESC recommends that the Commission should also take the human element into consideration (impact on employment for European seafarers) — in addition to purely competitive factors — when repealing the block exemption for liner shipping conferences. The EESC also requests from the Commission to evaluate the scope of this impact, especially through consulting the Sectoral Social Dialogue Committee on Maritime Transport.

3.3.10 The EESC recommends the Commission to take the safety aspect (loss of quality shipping as a result of flagging out from the EU) into consideration — in addition to purely competitive factors — when repealing the block exemption for liner shipping conferences.

3.3.11 The EESC believes that the Commission should also take into account the interests of small and medium-sized businesses in repealing Regulation 4056/86. Small and medium-

sized businesses ‘constitute the backbone of the EU economy’ and they play an important role in the context of the revised Lisbon Strategy. Markets should remain open to the actual and potential competition, including for small and medium-sized shipping operators and shippers.

3.3.12 The EESC maintains that although consolidation may have positive effects for EU industry (efficiency gains, economies of scale, cost savings), caution is needed to avoid that consolidation — which may follow the repeal of Regulation 4056/86 — results in fewer players in the relevant markets, i.e., less competition.

3.3.13 Under a new regime, the EESC invites the two interested parties at European level — shippers and carriers — to engage in discussions on issues of mutual interest and significance.

## 4. Specific comments

### 4.1 *Legal basis*

4.1.1 The EESC notes that Regulation 4056/86 had a dual legal basis (Articles 80(2) and Articles 81-82 and 83 referring to transport policies and competition respectively), whilst the proposal maintains only one (Arts. 81-82). The EESC also notes that the single legal basis is upheld by the Legal Service of the Council. It would appreciate knowing from the Legal Service of the European Parliament whether the transport considerations are ancillary to the competition considerations and whether the Service maintains its view about the dual legal basis as per its previous opinion (December 2005).

### 4.2 *Conflict of Laws*

4.2.1 The Commission proposes to abolish Article 9 of Regulation 4056/86 on the basis that it does not believe that a repeal of the liner conference block exemption would create the risk of possible conflict of international laws. The Commission’s reasoning is that such a conflict of law would only arise if one jurisdiction prohibits something which another jurisdiction requires. The Commission is not aware of any jurisdiction that imposes such an obligation on liner shipping operators.

4.2.2 The EESC, anticipating possible conflicts of law in the future resulting from legal instruments of other jurisdictions, urges the Commission to devise a provision in the guidelines tackling such problems. Such a provision regarding consultations will minimise frictions and lead to mutually acceptable solutions internationally.

Brussels, 5 July 2006

The President  
of the European Economic and Social Committee  
Anne-Marie SIGMUND