Deregulation in the European Maritime Sector

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I. Introduction

Within the European Community, anti-competitive agreements which 'may affect trade between Member States,' are prohibited under Article 81(1) EC (ex Article 85(1))[1] unless they produce economic, technical or consumer benefits (Article 81(3) EC). In such cases, either a group or individual exemption may be extended to the agreement. Group exemptions, however, do not excuse abuse of a dominant position since Article 82 EC (ex Article 86) relies on an assessment of market power.

For a long time, there was uncertainty about whether these provisions of the EC Treaty applied to the shipping industry. In fact, transport had been specifically excluded by Council Regulation [CR] 141/62[2] from the general statutory instrument implementing the competition rules, CR 17/62.[3] The confusion ended with the adoption of CR 4056/86 of 22 December 1986,[4] which gave the Commission the power to investigate breaches of the competition rules and impose any necessary penalties. Liner conferences,[5] but not tramp shipping, were accorded a group exemption from the prohibitions contained in Article 81(1) EC, subject to complying with certain conditions (specified in Article 4). Apart from the new situation resulting from the accession of Denmark, Ireland and the United Kingdom in 1972 (two of which were major shipping powers), and the Commission's desire to expand on the 1974 UNCTAD Code of Conduct for Liner Conferences, the rationale for this exemption was broadly similar to that underlying Part X of the Australian *Trade Practices Act 1974* (Cth). This part permits certain derogations from the restrictive trade practices provisions of the Act in relation to international liner cargo shipping, and more specifically, conference agreements, in so far as they apply to the 'blue water' (maritime) stage of the voyage, namely, the advantages of the stability and reliability shipping conferences bring to the market.[6]

II. Liner conferences

Following a recommendation from Competition Commissioner Mario Monti, the Commission on 19 April 2000 renewed for a further five-year term the block exemption for liner shipping consortia operating both within and outside conferences with a market

1 The EC Treaty was renumbered with effect from the entry into force of the Treaty of Amsterdam on 1 May 1999. I follow the citation system adopted by the European Court of Justice [ECJ]. See Press Release No 74/98, 2 December 1998, http://www.europa.eu.int/cj/en/cp/cp98/cp9874en.htm (9.6.1999).

2 [1962] OJ 124/2751, 28.11.1962.

3 [1962] OJ 13/204, 21.2.1962. See V Korah, 1997, *An Introductory Guide to EC Competition Law and Practice*, 6th ed, Hart Publishing, Oxford, 7.

4 [1986] OJ L 378/4, 31.12.1986.

5 Shipping conferences are associations of shipowners operating liner, as distinct from tramp, services. Because they fix freight rates, conferences have an anti-competitive aspect.

6 A report published by the US Federal Trade Commission on 4 January 1996 (Clyde, PS and Reitzes, JD, 'The effectiveness of collusion under antitrust immunity: the case of liner shipping conferences') found that, although 'some aspects of the conference system may contribute to higher shipping rates . . . conferences do not act as perfect cartels.'

share of less than 30-35% *in each market* in which they operate.[7] Individual exemptions may also be granted to consortia with market shares higher than this limit. However, the new Regulation still does not address an issue of interpretation over which the shipping industry has been locked in dispute with the Commission for several years. While the Commission has supported the fixing of freight rates for the 'blue water' stage of voyages (horizontal price fixing), subject to the rules contained in CR 4056/86, it has opposed the interpretation of the group exemption as including inland rate fixing (of considerable significance to the industry in view of the growing importance of multi-modal transport), capacity management and restrictions on service contracts with shippers, and has steadfastly refused to countenance individual exemptions for these arrangements.[8] In fact, it is a condition of the block exemption that shipping consortia do not apply differential rates and conditions that might cause 'detriment to certain ports, users or carriers' (and, the Preamble adds, 'or providers of services ancillary to transport'). Inland transport by rail, road and inland waterways is still governed by a separate Council Regulation No 1017/68 of 19 July 1968.[9]

In a series of cases involving liner conferences and also their relationships with 'outsiders' (non-conference shipping lines), the Commission has issued 'cease and desist' orders and imposed heavy fines, even though the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport had recommended on 15 June 1998 that proposed fines against Trans Atlantic Conference Agreement [TACA] members amounting to 10% of annual revenue were excessive.

TACA members have appealed against this decision to the Court of First Instance [CFI]. With the exception of Maersk Sealand, the members of the Far East Trade Tariff Charges and Surcharges Agreement [FETTCSA], which was established on 4 June 1991 by members of the Far Eastern Freight Conference [FEFC] and its principal competitors and subsequently disbanded in 1994, have also lodged an appeal against the Commission's decision on 16 May 2000 to fine them 7 million ECU for agreeing not to offer discount rates.[10] The much smaller fine reflected the Commission's view that such collusion was less significant than price fixing. Judgements in these matters are still pending.

The first, and so far only, case to be decided on the application of the competition rules to a shipping conference resulted from a Commission finding of abuse of collective dominance (a breach of Article 82 EC) by Associated Central West Africa Lines [CEWAL].[11] Three CEWAL members (Dafra-Lines A/S, Compagnie Maritime Belge SA and Compagnie Maritime Belge Transports SA) appealed to the European Court of Justice [ECJ], denying that they held a collective dominant position or that they had abused a dominant position, and objecting to the fines. Advocate General N Fennelly argued for the fines to be set aside because of procedural irregularities, while at the same time rejecting the appellants' pleas: 'The grant of an exemption under Article 85(3) does not prevent application of Article 86 of the Treaty.' He also noted that 'CEWAL sought to rely on the contractual exclusivity provided for in the Ogefrem Agreement (with the

7 CR 823/2000, [2000] OJ L 100/24, 20.4.2000.

8 Wood, D, 'Recent Commission decisions concerning the scope of the Group Exemption for Liner Conferences' (1999) 1 *Competition Policy Newsletter* 17.

9 [1968] OJ L 175/1, 23.7.68.

10 Nippon Yusen Kabushiki Kaisha [NYK] was particularly incensed at the severity of its fine, which was the same as that imposed on Hapag-Lloyd Container Linie GmbH, which has a seven-fold market capacity on the North Atlantic route. See Press Release IP 00/486, 17.5.2000; *Informare* 5.1.1999.

11 The original decision, Case 93/82, [1992] OJ L 34/120, [1995] 5 *CMLR* 198, was upheld by the CFI in *Compagnie Maritime Belge Transports SA v Commission*, T 24, 26, 28/93 of 8.10.1996, [1997] 4 *CMLR* 279, although the Court reduced the fines which had been imposed by the Commission. A number of cases have been brought by the Commission against Member States, in which the CFI has found the cargo sharing and shipping agreements maintained with former colonies and other African States to be discriminatory.

Zairean Office de Gestation du Fret Maritime) in order to remove its only competitor from the market.'[12]

By far the most important of the liner conference cases has been that involving TACA because a general understanding exists between the various conferences (TACA, FEFC) and the Commission that any settlement reached with TACA will apply to all conference lines operating into and from the European Union.

On 5 July 1994, the fifteen members of TACA submitted an application to the Commission for group exemption for TACA under Article 12(1) of CR 4056/86, or failing approval of a group exemption, an individual exemption. The TACA replaced the previous Trans-Atlantic Agreement [TAA], which had been notified to the Commission on 28 August 1992 and had subsequently been 'abandoned' by the lines in the light of the substantial changes they were proposing.[13] The TAA was prohibited anyway on 19 October 1994.[14] Over the next two-and-a-half years, the TACA was revised several times, partly to head off investigation of breaches of the *Shipping Act 1984* by the US Federal Maritime Commission [FMC]. In the event, on 16 September 1998, the Commission held that TACA breached Article 81(1) EC (ex Article 85(1)) with respect to fixing inland transport prices within the EU, agreement on the terms and conditions for service contracts, and payments to freight forwarders. TACA member lines were found to have abused their dominant position by hindering the entry into the market of independent competitors and fines ranging up to a total of 272.94 million ECU were imposed, the largest individual fine being imposed against P&O Nedlloyd (41.26 million ECU).[15]

As Jean-Francois Pons, a Deputy Director General of DG IV, pointed out at a meeting of the European Shippers' Council in Barcelona on 29 October 1998 (one month after the TACA decision), the Commission's objective is to 'ensure that shippers[16] obtain the *modern, efficient, flexible and competitively priced maritime (and inland) transport services* that they need.' He went on to emphasise that '*improving the quality of the supply chain from manufacturer to ultimate consumer is an essential part of improving industrial competivity and insuring benefits to consumers.*'[17] This stance, and the Commission's punitive attitude to liner conferences, should be contrasted with its promotion of liner consortia agreements under CR 870/95,[18] which is outlined below.

III. Inland Rate Fixing

As mentioned above, the Commission has long opposed inland rate fixing by liner conferences because it has not seen any evidence of advantages to shippers or increased competition between shipowners. Furthermore, it is loathe to extend the scope of the Regulation. Not only did the Council of Ministers specifically reject the proposal by the European Parliament to include land transport within the scope of group exemptions, but the text of the Regulation expressly refers to 'international maritime transport services' (Article 1(2)).

As far back as July 1989, then Commissioner Sir Leon Brittan had advised the FEFC that collective inland rate fixing was not covered by the group exemption. The prevailing

12 *Compagnie Maritime Belge NV and Dafra-Lines v Commission*, C 395, 396/96 P of 29.10.1998; also (1998) 9 *IntML* 310. Judgment was not actually delivered until 16 March 2000 (oral argument by the parties was on 14 May 1998 and the Advocate General gave his opinion on 29 October 1998).

13 Case IV/35.134, [1999] OJ L 95/1, [1999] 4 *CMLR* 1415.

14 Case 94/980, [1994] OJ L 376/1.

15 [1999] OJ L 095/1, 9.4.1999.

16 This is the party who contracts with a carrier for the carriage of goods by sea.

17 Pons, J-F, 'After Taca? Towards a more competitive and innovative liner shipping market' http://europa.eu.int/comm/competition (19.8.99), original emphasis; also (1998) 9 *IntML* 308.

18 [1995] OJ L 89/7, 21.4.1995.

view, as endorsed by the so-called 'Group of Wise Men' chaired by Sir Bryan Carsberg in its report to the Council of Ministers on Multimodal Transport,[19] is that individual exemptions may be granted for co-operation agreements involving price fixing between shipowners, or shipowners and freight forwarders, if all the conditions specified in Article 81(3) EC are met. Still to be determined (presumably by the CFI) is whether agreements involving port handling services fall within the scope of CR 4056/86,[20] although the wording of Article 3 would not seem to cover independent contractors (stevedores, warehouse operators).

In *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)*,[21] the Privy Council extended the application of Himalaya clauses in bills of lading to provide protection to independent contractors on the grounds that this accorded with commercial reality (*as also accepted by shippers*).[22] It will be interesting to see if the European courts allow commercial realities to prevail; so far, they have shown little appreciation of such realities in the maritime sector.

The TACA members sought an individual exemption for their inland rate fixing agreement on the grounds that it improved the service they provided to shippers. The major freight forwarding body, Freight Forward Europe [FFE], also supported the TACA stance,[23] although both the European Shippers' Council [ESC] and its Dutch counterpart EVO have always opposed extending the exemption to cover inland transportation. However, the Commission reaffirmed its earlier position in the TAA and FEFC cases, that there had been no improvement in services or reduced costs, and that price fixing was not essential to achieve these goals. On the contrary, the determination of inland rates by TACA only served to inflate prices.

The revised TACA submitted to the Commission on 29 January 1999 sought to meet these objections by introducing a 'not below cost' rule for through inter-modal freight rates to replace the inland tariff. The intention was that 'no applicant (would) charge a price less than the direct out-of-pocket cost incurred by it for inland transport services supplied within the EEA in combination with those maritime transport services.'[24] Third party comments were sought,[25] but in the end the Commission did not object to this proposal within the 90-day period for raising serious objections, so that it is now exempt for three years.[26] In the meantime, all conferences serving the European market have now given up on inland rate fixing, although appeals against the Commission ruling are still pending before the CFI. At the same time, shippers have appealed against the Commission's stance on the 'not below cost' rule.

IV. Capacity Management Agreements

Capacity management agreements are employed by both liner conferences and other non-conference lines to balance supply and demand, and involve an agreement to abstain from using a certain amount of space for the carriage of specified goods. However, the Commission regards them as a particularly insidious price-fixing mechanism, which not only does not reduce costs, but actually leads to restrictions on the capacity available. In

19 *Final report of the multimodal group*, presented by Sir Bryan Carsberg, Chairman, 18 November 1997.

20 See Wood, D, 'Recent Commission decisions concerning the scope of the Group Exemption for Liner Conferences' (1999) 1 *Competition Policy Newsletter* 17.

21 [1975] AC 154.

22 Circular indemnity clauses also operate to prevent the holder of a bill of lading from initiating proceedings against an independent contractor.

23 See Para 167, Case IV/35.134, [1999] 4 *CMLR* 1415.

24 Para 10, Notice of the EC Commission, Case IV/37.396, [1995] 5 *CMLR* 197.

25 Notice of the EC Commission, Case IV/37.396, [1999] OJ C 125/6, [1999] 5 *CMLR* 197.

26 Williams, C, 'Revised TACA' (1999) 3 *Competition Policy Newsletter* 24 at 25. The new grouping is also known as the North Atlantic Agreement [NAA].

this connection, the Commission does not consider that these agreements lead to the withdrawal of old and inefficient vessels, following instead the view of the US FMC, that capacity management is a 'technique for dealing with over-tonnaging and depressed rates.'[27]

In the TAA case, the Commission found that the capacity management agreement was aimed at enforcing price discipline amongst the conference members. Because such agreements have the dual objective of price fixing and limiting supply to consumers, they are unacceptable. On 30 April 1999, a decision prohibiting the capacity management programme of the Europe Asia Trades Agreement [EATA] was made by the Commission, even though EATA itself was terminated in September 1997, in order to increase 'legal certainty to the benefit of other liner shipping companies' and 'for the purposes of future enforcement action.'[28] EATA had set aside up to 17% of vessel capacity, but only eastbound. TAA had operated in a similar fashion, but only westbound. European exporters were thus faced with competition in the shape of capacity management agreements, which only operated *from* Europe to their disadvantage.

V. Restrictions on Service Contracts

The Commission's interest in the TACA service contracts related to whether they were covered by the group exemption. Since the overwhelming majority of the contracts the Commission examined did not contain any terms other than those in the standard service contract, but 'merely set a tariff rate lower than the standard tariff rate, depending on volume,'[29] and since conditions were imposed on TACA members concerning the terms of service contracts and even an obligation of disclosure, the Commission ruled that they fell within the ambit of Article 81(1) EC.

The TACA parties argued that the service contracts were a normal commercial practice in liner shipping and conformed to 'agreements on rates and conditions of carriage,' but the Commission held that their effect was to reduce competition and lead to a situation where different shippers did not pay 'uniform or common freight rates' to ship the same goods. By restricting the availability of service contracts, TACA member lines also abused their collective dominant position in breach of Article 82 EC.

The outcome of these liner conference cases is that to escape penalties (and these will become more punitive if the existing 'cease and desist' orders are ignored), conferences will be unable to place restrictions on their member lines with regard to negotiating individual service contracts or to determine inland freight rates, while being permitted to fix tariffs under individual exemptions.[30]

VI. Liner Consortia

The different attitudes of the Commission to liner conferences and liner consortia are only explicable if one recognises their overwhelming desire to achieve greater benefits for shippers (who supposedly alone are interested in the consumer).

Shipping consortia are joint ventures or strategic alliances between carriers with the intention of better utilising capacity — and promoting containerisation. Even though consortia restrict competition, the Commission considers they have other advantages, which satisfy the requirements of Article 81(3) EC, including improving productivity,

27 See Wood, D, 'High tides, low tides: the scope of the Conference Group Exemption,' paper presented to EMLO 1999, London, 29 January 1999 at 8.

28 [1999] 4 *CMLR* 1145 at 1164–65; [1999] OJ L 193, 26.7.1999.

29 Para 127, Case IV/35.134, [1999] 4 *CMLR* 1415.

30 Pons, J-F, 'After Taca? Towards a more competitive and innovative liner shipping market' http://europa.eu.int/comm/competition/speeches/text/sp1998_049_en.html (19.8.99).

rationalisation, economies of scale and frequency of services.[31] As a consequence, they are covered by a group exemption, originally under CR 870/95 and now under CR823/2000, which extended the original exemption for the same reason that they benefit customers.

In discussions with the industry in 1988–89, before adoption of the Regulation, three options had emerged for dealing with shipping consortia, which were not covered by CR 4056/86. The major shipowner associations (European Community Shipowners' Association [ECSA], Council of European and Japanese National Shipowners' Associations [CENSA]) argued for amendment of the existing Regulation in the interests of a unified approach. Not surprisingly, the ESC sought a separate Regulation for consortia, while a third option was to issue individual exemptions because of the widely diverging nature of various consortia agreements.[32]

Since the prime purpose of both the old and new Regulations is 'to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity' (Preamble), it is interesting to note that the consortia which have been granted exemptions (group or individual) are comprised of many of the same lines which are members of TACA (Maersk Sealand/OOCL, Maersk/P&O Nedlloyd/OOCL), all of which are operating exactly the same container vessels regardless of type of service (Maersk is, in fact, the largest container shipping line in the world).

In its Working Paper, DG IV signalled some of the possible modifications to be considered when CR 870/95 comes up for renewal. Of these, one of the most significant was the idea of replacing the 'trade share' test criticised by shipowners, by a 'market share' test based on competition in specific geographic markets.[33] Despite the expectation that the Commission, in view of it's attitude to shipowner interests, would not implement such a change, Art 6 of CR 823/2000 does specify that 'a consortium must possess on each market upon which it operates a market share of under 30% calculated by reference to the volume of goods carried . . . when it operates within a conference, and under 35% when it operates outside a conference' in order to obtain the exemption. This change in the applicable test is in line with the general approach to determining market power in competition law.

VII. State Aid

State aid for the European maritime sector is also facing deregulation — but of a different kind, as it looks to be heading for elimination, just as has occurred in the aviation sector. State aid is, of course, anti-competitive, but is tolerated if it supports European flagging and the employment of European crews, or serves to maintain a viable shipbuilding and maritime industry. The shipbuilding industry, in particular, has been suffering for some considerable time under the burdens of high costs, the need for modernisation and pressures from countries such as South Korea, which have heavily subsidised shipbuilding industries based on IMF credits. At the present time, EU and South Korean officials are continuing negotiations on the 'Agreed Minutes relating to the World Shipbuilding Market' in an effort to stave off a complaint to the World Trade Organisation [WTO] that Korean ship builders are dumping vessels.[34]

State aid is allowed where the benefits to disadvantaged or economically depressed

31 See [1998] 4 *CMLR* 477 at 482.

32 'Report on Commission Regulation No 870/95,' DGIV Working Paper, Brussels, 28 January 1999 at 3.

33 See Clough, M, 'Review of the Consortia Block Exemption Regulation,' (1999) 5 *Int ML* 93 at 96–97. The 'trade share test' was based on a consortium's share of trade between any two particular ports.

34 *Informare*, 29.8.2000. See Press Releases, IP 00/364, 11.4.2000; IP 00/432, 3.5.2000. The 'Minutes,' dealing with such matters as ending subsidies, use of international accounting standards and commercially sustainable pricing practices, were agreed by the two sides on 10 April 2000 following several rounds of discussions.

regions outweighs the overriding concern to establish a single European market. Following German reunification, particular support has been given to the former East German shipyards on the Baltic coast (such as those at Wismar and Stralsund, and the Warnow Werft GmbH in Warnemde) to enable them to remain viable.

The legislative basis for State aid is provided in Articles 87–89 EC (ex Articles 92–94). Member States proposing to provide State aid to domestic industries are required to notify the Commission, which examines the proposals to see if they meet the criteria for exceptions specified in the EC Treaty. These criteria include such measures as 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' and 'aid to promote the execution of an important project of common European interest' (Article 87 (3) EC). Block exemptions are now also possible under CR 994/98[35] for certain horizontal State aid measures which are not intended to assist specific regions or sectors.

The Commission is currently tackling State aid to the maritime sector, which for a long time was largely immune from regulation in this regard. The thrust appears to be to end all State aid to shipping and ferry concerns, although the Commission is still supporting State aid to meet the fundamental policy objectives mentioned above. For this reason, it has allowed the French and Irish Governments to provide relief from social security contributions to shipping companies in order to ensure that they continue their operations in Europe and employ European sailors. State aid to the shipbuilding industry has been permitted under a series of Directives, and is now regulated by CR 1540/98,[36] which will be discussed further below.

1. Shipping

In May 1997 the Commission issued new guidelines concerning State aid for the maritime sector.[37] These replaced the previous guidelines issued in 1989, which had linked the extent of State aid to the costs European fleets faced in competing on the global market. The new guidelines are designed to increase transparency, enhance competitiveness, safeguard employment of European crews, preserve maritime skills and improve safety. Total State aid to the sector is now required to not exceed all amounts contributed to revenue by way of taxes and social security contributions by the shipping industry.

The European shipping industry faces higher labour and taxation costs than many of its competitors. State aid seeks to assist shipowners faced with commercial incentives to flag out their vessels to registries outside the EU or even to shift their operations elsewhere. Several Member States (Denmark, Greece, United Kingdom) have considerable fleets and the Commission is able to approve favourable fiscal treatment, including accelerated depreciation of investment in ships, reservation of profits tax-free provided they are reinvested in ships and replacement of corporate tax by a tonnage tax.

The Commission has also extended the guidelines on rescuing and restructuring aid to maritime companies in distress. However, this did not prevent it initiating action against France over its rescue package for Brittany Ferries, which included bearing the cost of reducing the workforce, guaranteeing commercial bank loans and injecting capital into companies loaning vessels to Brittany Ferries at below market rates. The Commission has refused the French Government's proposals to provide FF 150 million in State aid to the company because it considers there is no restructuring plan.[38]

Several cases are pending concerning subsidies for public service obligations (PSOs), or national requirements for shipping lines to provide services, which otherwise would not

35 7.5.1998.
36 [1998] OJ L 202/1, 18.7.1998.
37 [1997] OJ C 205/5, 5.7.1997.
38 [1998] OJ C 244/9, 4.8.1998.

be economically viable (and therefore probably not maintained). Such subsidies are not considered to be State aid if an open tendering process is followed, if the period of contract is limited and if competition is allowed.[39]

In May 1998 the Commission initiated proceedings against Spain over the tender process for the award of a ten-year PSO contract to supply ferry services to the same firm, which had been operating them for the previous twenty years, Trasmed.[40] The Commission determined that the procedure followed by the Spanish Government effectively breached CR 3577/92, which had the objective of opening cabotage trade to all Community-flagged vessels from 1 January 1999. Trasmed has appealed the Commission decision on the grounds that Article 86(2) EC requires the competition rules not to be applied so as to obstruct an undertaking in the performance of a service of general economic interest.[41] Another case which is exercising the Commission, and also the Italian Autorita Garante de la Concorrenza e del Mercato (whose advisory opinions the Italian Government has repeatedly ignored), concerns aid amounting to more than 300 billion lira annually for the State-owned shipping line Gruppo Tirrenia di Navigazione. The Commission believes that Tirrenia is determining its own PSO terms and that it is being subsidised to compete against competitors on several routes. In effect, it is being sheltered from market forces.[42] The Commission has also commenced proceedings against France over subsidies to Corsica Marritima, whose operating losses and operating costs are apparently being underwritten by its parent company SNCM using French State aid.[43]

2. Shipbuilding

The new Regulation concerning State aid to shipbuilding (CR 1540/98) applies until 31 December 2003. The goal is to phase out operating subsidies by the end of 2000 and to achieve a more competitive shipbuilding industry in Europe. The Commission has opposed French State aid to ACH Constructions Navales, which exceeded the amount authorised for the upgrading of French shipyards and was intended to assist the company meet cash flow problems. The support provided by the French Government was considered to be unjustified and also distorting competition.[44]

State aid may also be available to meet the costs of closing shipbuilding and ship repair yards that are beyond rescue. Such assistance can be used to compensate workers for redundancy, for retraining and for actual redevelopment of the site. State aid may also be available for restructuring shipbuilding firms in financial difficulty. Most of the cases have involved former East German shipyards. However, the Commission has ordered the German Government to recover State aid granted to Bremer Vulkan Verband AG to restructure MTW Schiffswerft Wismar and Volkswerft GmbH Stralsund, but which was misdirected to other subsidiaries,[45] and aid paid to KWW to restructure the Warnow Werft,[46] and on 26 July 2000 took Spain to the ECJ over its failure to recover tax credits paid by the State-owned holding company Sociedad Estatal de Participaciones Industriales to the Juliana and Cadiz shipyards.[47]

39 1999, *Competition law in the European Communities. Vol IIA: Rules applicable to State aid*, European Commission, Brussels, Luxembourg, 675–6.

40 [1998] OJ C 147/10.

41 [1998] OJ C 340/24.

42 Press Release, IP 99/478. The Commission's primary aim is to ensure that the subsidy is reasonable and does not impede market forces.

43 [1999] OJ C 62/10; Press Release, IP 98/1078, 9.12.1998.

44 [1999] OJ C 113/7, 27.5.1999; Press Release, IP 99/34.

45 Case C 7/96; SEC (1998) 71 final and SEC (1998) 1313 final.

46 Press Release, IP 99/473, 8.7.1999.

47 Press Releases, IP 00/760, 12.7.2000; IP 00/846, 26 July 2000.

VIII. Marine Insurance

Some 89% of world maritime tonnage (and almost all European tonnage) is insured through the P&I clubs that are members of the International Group [IG]. P&I clubs are mutual non-profit associations providing a wide range of marine insurance, including cover for third-party risks, cargo losses and collision damage. Traditionally, P&I clubs shared each other's claims by agreement. Nowadays, there are two main agreements, the International Group Agreement [IGA] and the Pooling Agreement, which provides for different approaches to various levels of claims: sharing, contributions based on tonnage and calls (premiums), and reinsurance.[48] Although certain IGA rules have been anti-competitive under Article 81(1) EC[49] and the IG as a whole enjoys a dominant position in the world market for marine insurance within the meaning of Article 82 EC, the Commission has always taken the view that the P&I clubs are not abusing their dominant position.

Accordingly, when the original IGA exemption granted on 16 December 1985[50] came up for renewal, the Commission overruled the objection of the Greek Shipping Cooperation Committee [GSCC] that shipowners were not free to negotiate their own level of cover, and on 12 April 1999 extended the exemption.[51] The stance of the Greek shipowners was, of course, greatly influenced by the fact that there are many old single-hulled vessels on the Greek register.

IX. Conclusion

The Commission has also been involved in several other aspects of the European maritime sector, including ports,[52] joint ventures (P&O and Stena, Scandlines),[53] mergers between shipping operators (Stinnes/BTL),[54] price fixing between Greek and Italian ferry operators,[55] and competition in Italian and Danish ports (Genoa, Elsinore).[56] Increasingly, in the light of the reforms proposed in the Commission's White Paper aimed at streamlining the application of Articles 81–82 EC, such cases will be largely determined in the national courts.

The Commission's concern to implement deregulation in the European maritime sector has almost brought an end to the long period of uncertainty over the application of the competition rules to the industry, the caveat being that final legal certainty rests on the pending decisions of the ECJ in the liner cases. The Commission's support for, and indeed promotion of, liner consortia has been welcomed by the shipping industry. The main area of concern remains the Commission's apparent willingness to disregard commercial realities, even when supported by both shipowners and shippers.

48 The operation of the Pooling Agreement is described in detail in [1998] OJ C 256, 14.8.1998.

49 In 1998, the IG amended the Agreement to provide greater transparency and remove internal costs from rate calculations at the demand of DG IV.

50 [1985] OJ 1 376, 31.12.1985.

51 [1999] OJ L 125/12, 19.5.1999. See [1999] 4 *CMLR* 550; [1999] 4 *CMLR* 1145 at 1162-63; [1999] 5 *CMLR* 646.

52 See Van Miert, K, 'Concurrentieregels en zeehavens,' speech in Gent, 6.10.1997 htttp://europa.eu.int/comm./competition/speeches/text/sp1997_048_nl.html (30.10.99). Also Press Release, IP 00/770, 12.7.2000.

53 Case IV/36.253; [1995] 5 *CMLR* 682; Press Release, IP 99/56, 28.1.1999; Press Release, IP 98/101, 30.1.1999; OJ L 163/61, 29.6.1999.

54 Press Release, IP 98/131, 5.2.1998.

55 [1999] 5 *CMLR* 47; Press Release, IP 98/1091, 9.12.1998. One of the Italian ferry operators and two of the Greek operators have appealed the commission's decision before the CFI (Cases T-56, 59, 65 and 66/99). See OJ C 136, 15.5.1999.

56 See Dussart-Lefret, C and Armani, E M, 'Ports maritimes et concurrence,' (1998) 1 *Competition Policy Newsletter* 32; Press Release, IP 97/907, 21.10.1997; Press Release, IP 96/205, 3.6.1996.