Shipping Conferences under EC Antitrust Law

Criticism of a Legal Paradox

Luis Ortiz Blanco

Translated by Andrew Read
Contents

Abbreviations xvii
Table of Regulations, Directives and Other Community Acts xix
Table of Legislation xxv
Table of Cases xxvi

1 The Origin, Development and Regulation of Maritime Cartels 1

1.1 Liner Shipping in the World and in the European Union 1

1.2 The Cartelisation of the Sea
   1.2.1 Origins of Liner Conferences 3
   1.2.2 A century of conferences: 1875 to 1966 6
   1.2.3 The Container Revolution 10
   1.2.4 New Realities, new Agreements 14

1.3 Conferences and their Agreements
   1.3.1 Essential Characteristics, Objectives and Legal Nature of Liner Conferences 16
   1.3.2 Evolution of the Term 'Liner Conference' and the Definition of 'Conference' 18
   1.3.3 Agreements and Restrictive Practices of Conferences: Tradition and Renewal 19

1.4 Initial Reactions of Public Authorities to Conferences
   1.4.1 Conferences before the UK and US Courts
      1.4.1.1 The Mogul Case 20
      1.4.1.2 First Actions against Conferences brought by the US Department of Justice 22
   1.4.2 First Investigations into Conferences: the British and United States Commissions of Enquiry
      1.4.2.1 First Commissions of Inquiry into the Practices of Conferences in Trade between the United Kingdom and Singapore and Australia 23
      1.4.2.2 Royal Commission on Shipping Rings 23
      1.4.2.3 Alexander Committee 26
      1.4.2.4 Other subsequent inquiries into liner conferences 28

1.5 US Regulation of Conferences
   1.5.1 Shipping Act 1916 30
   1.5.2 The 1961 Reform and Erosion of Antitrust Immunity 33
   1.5.3 Shipping Act 1984 35
   1.5.4 The 1998 Reform and Erosion of the Concept of 'Common Carrier' 40

1.6 European 'Self-regulation' 45
1.6.1 Unregulated 'Self-regulation' (1875–1963) 45
  1.6.2.1 Application of Antitrust Law Criteria to Liner Conferences in the USA and the Organisation of the Defence of the Conference System 47
  1.6.2.2 Increased Dissatisfaction with Maritime Conferences in Developing Countries and Reactions to them in Developed Countries 51
1.7 Partial Regulation of Self-regulation: Other Regulatory Systems up to 1970 56
1.8 Developing Countries and Liner Conferences 58
1.9 UNCTAD and Maritime Transport 63
1.10 Liner Conferences in UNCTAD: Towards an International Code of Conduct for Conferences 66
  1.10.1 Liner Conferences in UNCTAD I and UNCTAD II: The Common Measure of Understanding and the New Delhi Conclusions 66
  1.10.2 The Rochdale Report, the CENSA Code and its Influence on the UNCTAD Code 69
1.11 International Regulation of Conferences: the United Nations Convention on a Code of Conduct for Liner Conferences 72
  1.11.1 Definitions, Content and Rules for Participation in Conferences 72
  1.11.2 Relations between Conferences and Shippers: Consultation Machinery 77
  1.11.3 Freight Rates, Tariffs and Surcharges 78
  1.11.4 Adequacy of Services 80
  1.11.5 Loyalty Agreements 82
  1.11.6 Dispute Settlement Machinery and Final Clauses 84
1.12 International Community's Reaction to the Code of Conduct 85
  1.12.1 The Third World, the UNCTAD Code and the 'Codist' Philosophy 86
  1.12.2 The OECD Countries and the UNCTAD Code 88
    1.12.2.1 Maritime Policy of the OECD and Freight Rate Conferences 88
    1.12.2.2 The OECD Countries and the Code of Conduct for Liner Conferences 97
1.13 European Community's approach to the Code of Conduct for Liner Conferences and the Phenomenon of Conferences 98
  1.13.1 Origins of EC Maritime Transport Policy 98
  1.13.2 Code of Conduct as the Catalyst for Community Maritime Policy and the Brussels Package 100
  1.13.3 Importance, Characteristics and Content of the Brussels Package 104
  1.13.4 The Brussels Package and the Competition Rules 108
  1.13.5 International Reaction to the Brussels Package 110
  1.13.6 Maritime Transport Policy of the Community and of the OECD after the Brussels Package 114
    1.13.6.1 A Time of Change for Community Maritime Transport Policy 114
    1.13.6.2 The 1985 Shipping Memorandum 116
1.14 Application of the Competition Rules to Transport and the Origins of Regulation 4056/86

1.14.1 Competition Rules in the EC Treaty: Articles 81 and 82 and General Regulations for their Implementation

1.14.2 Controversy Surrounding the Specific Nature of the Treaty Title devoted to Transport and the Universality of the EC Treaty

1.14.3 Regulation 17, Regulation 141 and Regulation 1017/68: a Brief History

1.14.4 French Seamen: a Milestone in the Development of Competition Law in the Transport Sector

1.14.5 Adoption of Regulations 4056/86 and 3975/87

1.14.6 Procedure Applicable in Community Competition Law as regards the Transport Sector

1.15 The Application of Regulation 4056/86 by the European Commission

1.16 The Review Process and the Derogation of Regulation 4056/86

2 Council Regulation 4056/86 and the Block Exemption for Liner Conferences

2.1 Dual Nature of Regulation 4056/86

2.1.1 Regulation 4056/86 within Community Policies

2.1.1.1 Regulation 4056/86: a Competition Regulation

2.1.1.2 Regulation 4056/86 as part of Community Transport Policy

2.1.1.3 Objectives of Regulation 4056/86

2.1.2 Two Legal Bases for Regulation 4056/86

2.1.2.1 Article 87 of the EEC Treaty as a Legal Basis for Regulation 4056/86

2.1.2.2 Article 84(2) of the EEC Treaty as the Second Legal Basis for Regulation 4056/86: Institutional Conflict and Procedure for the Adoption of Decisions

2.2 Scope and General Content of Regulation 4056/86

2.2.1 Scope of Regulation 4056/86

2.2.1.1 Scope of Regulation 4056/86 compared with that of Articles 81 and 82 of the EC Treaty

2.2.1.2 Exclusion of Non-maritime Transport and the Doubts concerning Cargo-handling Services in Ports

2.2.1.3 Cabotage

2.2.1.4 Exclusion of Tramp Services

2.2.1.5 Exclusion of Maritime Transport between Ports of Third Countries and the Regime for 'Services Ancillary to' Maritime Transport

2.2.1.6 Legal Consequences of the Exclusion of Tramp and Cabotage Shipping

2.2.2 Procedural Content of Regulation 4056/86 as a Specific Regulation for Certain Forms of Maritime Transport

2.2.3 Substantive Content of Regulation 4056/86 as a Block Exemption for Liner Conferences

2.3 Exemptions and Exceptions: Article 2 of Regulation 4056/86

2.3.1 Origin of Article 2 of Regulation 4056/86: Article 3 of Regulation 1017/68
2.3.2 Legal Effect of ‘Exceptions’ for Technical Agreements in the Transport Regulations 184
2.3.3 Exception in favour of Technical Agreements in Maritime Transport 185
2.4 Exemption under Article 3 of Regulation 4056: General Aspects 187
2.5 Definition of ‘Liner Conference’ in Regulation 4056/86 188
2.5.1 Lack of formal requirements 189
2.5.2 Activity of Conference Members
2.5.2.1 Requirement of Operating Vessels and the NVOC Regime 190
2.5.2.2 Exclusion of Tramp and Cabotage Services: the Position of Neo-bulk Transport 192
2.5.2.3 Cargo Conferences and Passenger Conferences 193
2.5.3 Geographical Scope of Conferences; Superconferences; Various Conferences in One Trade 194
2.5.4 Essential Characteristics of Liner Conferences 198
2.6 Requirements of Article 3 and Agreements Authorised by it: the Scope of the Block Exemption 200
2.6.1 Basic Scope of the Block Exemption: Article 3 as a Catch-all Exemption 200
2.6.2 AgreementsAuthorised as Prerequisites for Exemption
2.6.2.1 Fixing of Freight Rates as an Indispensable Requirement of the Exemption 201
2.6.2.2 Need for Other Restrictive Agreements to Obtain the Exemption 202
2.6.3 Certain Problems concerning the Fixing of Freight Tariffs for Liner Conferences 205
2.6.3.1 Existence of Malpractices within Conferences and its Consequences 205
2.6.3.2 Discrimination between Products in Conference Tariffs 207
2.6.4 Agreements Expressly Authorised by the Exemption 209
2.6.4.1 Rationalisation Agreements: Agreements concerning the Supply of Liner Shipping Services 209
2.6.4.2 Pool Agreements 213
2.6.5 Unspecified Agreements Ancillary to the Basic Conference Agreements 214
2.6.5.1 Rules concerning Participation in Conferences: Rules of Entry and Withdrawal (Open and Closed Conferences; Giving Notice) 216
2.6.5.2 Internal Regulations: Administration and Voting; Self-Policing 222
2.6.5.3 Dispute Resolution Machinery 226
2.6.5.4 Agreements on Distribution and Marketing of Services (Agents and Freight Forwarders) 227
2.6.6 Agreements between Members of Several Conferences 233
2.7 Agreements between Conferences and their Independent Competitors and the Limits of the Block Exemption contained in Article 3 of Regulation 4056/86 235
2.8 Non-authorised Conference Agreements: Applicability of the Exemption, Partial Nullity and Severability of Agreements 238
2.9 Conditions and Obligations Imposed on Liner Conferences 244
2.10 Condition of Non-discrimination contained in Article 4 of Regulation 4056/86 245
2.10.1 Discrimination between Ports and Countries and Community Liner Conferences 246
2.10.2 Consequences of a Breach of the Condition: Nullity and Severability of Discriminatory Agreements 250

2.11 Obligations attached to the Exemption for Liner Conferences: Article 5 of Regulation 4056/86 252
2.11.1 Consultations with Shippers and Self-regulation in Maritime Transport 253
2.11.2 Regulation of Loyalty Arrangements 255
2.11.3 Services not covered by Freight Rates 262
2.11.4 Obligation to Publish Tariffs 264
2.11.5 Obligation to Notify Conciliators' Recommendations and Arbitration Awards 266
2.11.6 Consequences of Breach of the Obligations 268

2.12 Exemption for Agreements between Conferences and Users, and between Users 269

2.13 Monitoring of Exempted Agreements and Conference Practices: Withdrawal of the Benefit of the Block Exemption in accordance with Articles 7 and 8 of Regulation 4056/86 272
2.13.1 Breach of an Obligation 273
2.13.2 Breach of the Basic Exemption Conditions: Effects Incompatible with Article 81(3) of the EC Treaty 273
2.13.3 Withdrawal of the Exemption for Abuse of a Dominant Position: Article 8 of the Regulation as a Procedural Provision 279

2.14 Rules in Conflicts of International Law 281

3 Economic Advantages, Participation of Shippers and Indispensability of Liner Conferences 287
3.1 General Questions concerning the Application of Article 81(3) to Liner Conferences 287
3.2 First Condition for Obtaining an Exemption: the Economic or Technical 'Advantages' of Certain Restrictive Agreements as the Basis for their Authorisation in Community Competition Law 294
3.3 Advantages of Liner Conferences 299
3.4 Theoretical Reasons for the Advantages of Conferences 302
  3.4.1 Market Efficiency as opposed to Technical Efficiency 302
  3.4.2 Destructive Competition and Instability in the Liner Market: the Empty Core Theory 304
3.5 The Stability Argument: a Critique of the Traditional Theory of the Advantages of Freight Rate Fixing in Scheduled Maritime Transport 312
  3.5.1 Meaning of (an Advantage Called) Stability 312
  3.5.2 Generally Illegal Nature of Price-fixing Agreements in Community Competition Law and Exceptions to this rule 315
  3.5.3 Advantage of Price Fixing under Regulation 4056/86 320
  3.5.4 Dubious Advantages of Freight Rate Stability 323
  3.5.5 Conferences' Lack of Stabilising Effects 325
3.5.5.1 Frequency of General Increases in Freight Rates 326
3.5.5.2 Competition as regards the Quality of Services as a Destabilising Factor 327
3.5.5.3 Discriminatory Tariffs according to Products Imposed by Conferences 329
3.5.5.4 Malpractices within Conferences 330
3.5.5.5 Role of Conferences in Price Wars 333
3.5.5.6 Imposition of Surcharges 334
3.5.6 Conclusions regarding Stability 335
3.6 Adequacy and Efficiency of Services 336
3.6.1 Concepts of Adequacy and Efficiency 336
3.6.2 Rationalisation of Services as an Alleged Solution to the Problems of Inefficiency in the Liner Market 338
3.6.3 A Critique of the Efficiency, Adequacy and Rationalisation of Conferences 340
3.6.3.1 Liner Shipping and Monopolisation 340
3.6.3.2 Achievements of Conferences as regards Technical Efficiency 344
3.6.3.3 Liner Conferences and Rationalisation 345
3.6.3.4 Rationalising Capacity of Other Types of Agreements and of Independents compared to that of Conferences 348
3.6.4 Conclusions concerning the Efficiency and Adequacy that Conferences Provide 350
3.7 Conclusions on the Economic Advantages of Conferences 352
3.8 A Fair Share for Consumers of the Benefit resulting from the Activities of Liner Conferences: Some General Questions 352
3.9 Traditional Theory concerning the Resulting Benefits of Conferences for Consumers and Regulation 4056/86 358
3.10 Survival of the Traditional Benefits of Conferences and their Perception by Users 360
3.11 On Balance, do Liner Conferences have Positive, Neutral or Negative Effects? 366
3.12 Indispensable Nature of the Restrictions on Competition agreed by Conference Members: General Questions concerning the Third Condition of Article 81(3) of the EC Treaty 372
3.13 Dubiously Indispensable Nature of Fixing Freight Rates: Less Restrictive Alternatives 376
3.13.1 Acts of Conferences themselves as Proof of the 'Subjective Dispensability' of Freight Rate Fixing 376
3.13.1.1 Contingent Nature of belonging to Liner Conferences for Shipowners 376
3.13.1.2 Breach of Conference Agreements by their Members: Malpractice Revisited 378
3.13.2.1 'Objective Dispensability' of Discrimination according to Type of Cargo in Conference Tariffs 380
3.13.2.2 Service Contracts as an Historical Alternative to Price Fixing in Scheduled Maritime Transport: Common Carriage and Contract Carriage 380
3.13.2.3 Revival of Long-term Contracts in the USA and Return to the Fundamental Differences between Service Contracts and Freight Rates 382
3.13.2.4 Expansion of Contract Carriage and the End of Instability through Adequate and Efficient Means 384
3.13.2.5 Service Contracts in Community Competition Law 387
3.14 Indispensability of Market-sharing and Rationalisation Agreements entered into within Liner Conferences and the Control of Supply by Part of their Members 396
3.15 Open or Closed Conferences in the light of the Third Condition for the Exemption 399
3.16 Indispensable Nature of Other Restrictions on Competition authorised by Liner Conference Members: Agreements resulting from Consultations between Shippers and Conferences and Loyalty Agreements 401
3.17 Unlimited Duration of Exemptions in the light of the Third Condition of Article 81(3) of the EC Treaty and the General Principle of Proportionality 404

4 The Market Power of Liner Conferences 407
4.1 Introduction 407
4.2 Economic Power under Article 81(3)(b) of the EC Treaty: the Condition of Not Eliminating Competition in respect of a Substantial Part of the Market 407
4.2.1 General Questions regarding the Fourth Condition for the Exemption 407
4.2.2 Relationship between Articles 81(3) and 82 of the EC Treaty 412
4.2.3 Theories concerning the Relation between the Concepts of Dominant Position and Elimination of Competition in respect of a Substantial Part of the Market 416
4.2.4 Total Incompatibility of Dominant Positions resulting from a Restrictive Agreement with Article 81(3)(b) of the EC Treaty 421
4.2.4.1 Collective Dominant Positions in General 421
4.2.4.2 Analysis of the Collective Position and the Problem of Internal Competition 422
4.2.4.3 Collective (Dominant) Positions resulting from Restrictive Agreements 428
4.2.4.4 Analysis of Market Power in Situations where a Collective Dominant Position Exists 431
4.3 Definition of the Relevant Market in Liner Shipping: Analysis of Liner Markets by the European Commission 432
4.3.1 Technical Analysis of the Product Market 433
4.3.2 Geographical Analysis of the Product Market 441
4.3.3 Analysis of the Geographic Market 442
4.4 ‘Collective Position’ of Liner Conferences: the Problem of Internal Competition 443
4.4.1 Unequivocal ‘Collective Position’ of Conferences 444
4.4.2 Problem of Internal Competition 448
4.5 Dominant Position of Conferences 452
4.5.1 Structure of Supply 455
4.5.1.1 Introduction 455
4.5.1.2 Absolute Market Shares: Stability, Durability and Importance; the Nature and Objectives of Conferences 456
4.5.1.3 Relative Market Shares: Quality of Services and Quality of Competition from the Independents; their Role on Liner Markets 463
4.5.1.4 Competition from Non-vessel Operators 470
4.5.1.5 Degree of Market Concentration 473
4.5.2 Potential Competition 476
4.5.2.1 'Traditional' Potential Competition 477
4.5.2.2 Theory of Contestable Markets 482
4.5.3 Structure of Demand and the Countervailing Power of Users 486
4.5.4 Other Ancillary Criteria of a Structural Nature 501
4.5.5 Analysis of Behaviour: the Market Power of Conferences in the light of their Practices 501
4.5.5.1 Abuse of a Dominant Position in General: Concepts and Examples 502
4.5.5.2 Abuses committed by Liner Conferences in Community Decisions 503
4.5.5.3 Practices capable of being considered Abusive authorised by Regulation 4056/86: Increase of Freight Rates, Imposition of Surcharges, Discrimination against Different Types of Cargo and Loyalty Arrangements 505

4.6 Conclusions concerning the Condition of Non-elimination of Competition and the Market Power of Liner Conferences 520

5 The Future of Liner Conferences 523
5.1 Atypical Origin of the Block Exemption for Liner Conferences 523
5.2 The Dubious Merits of Liner Conferences 526
5.2.1 The Paradox of Stability 528
5.2.2 Shippers and Paternalism 531
5.2.3 Weighing up the Pros and Cons 533
5.2.4 Dispensing with Indispensability 533
5.2.5 Market Power of Liner Conferences 535
5.3 Stability and Effective Competition 536
5.4 Regulation 4056/86 as an Example of Abuse of the Block Exemption System 542
5.4.1 Acceptable Restrictions on Competition in Community Competition Law 542
5.4.2 Conferences and the Limits of Self-regulation in Community Competition Law 545
5.4.3 Manipulation of Article 81(3) for Maritime Policy Ends 548
5.5 Liner Conferences at the Community Cross-roads 552
5.5.1 Introduction 552
5.5.2 Application of the Competition Rules to Maritime Transport and its Risks 553
5.5.2.1 An Example of a Step Backwards: the US Policy towards Liner Conferences 555
5.5.2.2 Control Policies in the USA and Europe after 1984 559
5.5.2.3 Legal and Constitutional Limits on the Authorisation of Conferences in the USA and the European Union 561
5.5.2.4 New Content for US Comity 562