WHICH ANTITRUST RULES ARE SUITABLE FOR PROMOTING SUSTAINABLE COMPETITION IN THE LINER SHIPPING INDUSTRY?

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Abstract

Literature has always looked at co-operation in the shipping industry with some benevolence, justifying agreements among operators with the fear that, due to huge fixed costs in the management of freight liners, fierce competition might result in monopolies and eventually jeopardise users' benefits.

Containerisation and standardisation of supply has strenghtened the arguments for co-operation in liner shipping. Containerisation emphasizes co-operation aiming at capacity rationalisation and extension of geographical/temporal scope.

While co-operation causes benefits for the transport industry as it reduces the risk of operators, guarantees higher profits and regulates the supply, does it also increase the consumers' surplus, or does it cause lower benefits and eventually inefficiency? In fact, liner shipping is barely the sole industry heavily exempted from antitrust regulations, both in Europe and North America, usually with the blessing of the shippers themselves.

The paper, moving from the recent decision of EU regarding maritime liner sector (Commission Decision C(2002)4349 - Case COMP/37.396/D2 – Revised TACA), and from the EU Commission issues Consultation Paper on the review of Regulation 4056/86 (concerning maritime transport), aims at investigating how antitrust set of rules, at the EU scale, have to "monitor and control" the market in a proper way according to the emerging trends of integration in the maritime logistic sector.

Keywords: Liner shipping; Conferences; Anti-trust regulation
Topic Area: A2 Maritime Transport and Ports

1. Introduction

Intra-firm co-operation ranks among the major organizational innovations to have taken place in the liner shipping industry (LSI) over the last decades.

The economic literature has studied in depth the causes for this phenomenon in the LSI, both in terms of horizontal and vertical forms of co-operation. The former involving firms producing the maritime transport services, the latter in the form of cooperation between shipping liners and terminal operators and/or land transport operators (the so-called Multimodal Transport Operators, or MTO). Since the advent of conference agreements, liners have experienced considerable variety in forms of co-operation, ranging from conferences to consortia, from slot charters to strategic alliances. The first form of co-operation is the Conference agreement, aimed at providing a regular and reliable liner service in a "stable trading environment where service and rate levels are not subject to wild swings" (as reported in the web page of the USSEC - United States South Europe Conference).

In over one hundred years of liner services, Conference agreements were the first form of co-operation to appear. The most modern form are strategic alliances, which group

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conference members (also those belonging to different conferences) and independent liners. According to Ryoo and Tanopoulou (1999), strategic alliances give the opportunity to:

i. widen operative borders of a single firm;
ii. achieve the scale suitable to compete in global markets;
iii. quickly enter new markets so maximizing the return (output) of each partner's resources (input).

The literature has analysed in detail this topic both through theoretical and practical studies, highlighting the effects of different forms of co-operation on the single firm, the maritime transport industry as a whole, the logistics industry, and on the supply chain. The results, in a broad sense, were that co-operation may be necessary to pursue competition inside the market. Song, (2002) in his study on the ports of Hong Kong and those of South China, coined the new term of 'co-opetition'.

Academics have seldom investigated the effects of co-operation on consumers and whether the economic benefits gained by carriers through co-operation aiming to limit competition inside the market, are in fact also passed onto consumers.

The real point, as pointed out by the OECD, is whether "these practices – and the anti-trust exemptions granted to them by most countries – are beneficial or harmful to society at large" (OECD, 2002), and if the indulgent attitude of most governments towards these agreements should be consequently replaced by regulation that protects competition within the sector.

Within the same broad topic, what is noticeable is that over the last few years there has been increasing market concentration. Recent data published by BRS-Alphaliner (referring to 1st January 2004) show that the top 25 liner companies account for about 79.6% of the whole container fleet (expressed in number of Teu) in comparison to 77.4% of the previous year. Clearly, the matter is complex and cannot be investigated thoroughly in this paper.

Here, after a brief description of how the economic literature and European Union, through its regulations and institutions, have considered these practices over the last decades (§2), a detailed report of the revision process of EU Regulation 4056/1986 is presented. The authors suggest a possible interpretation of the economic nature of these services in order to derive some policy lines. This paper is the most recent link in a chain of surveys that have investigated over nearly six years different issues related to this broad topic, such as the reform of Italian port regulation (Marchese, Musso, Ferrari, 1998), the existence of an optimal size for port terminals (Musso, Benacchio, Ferrari, 1999), the technical efficiency of container terminals (Marchese, Ferrari, Benacchio, 2000), the market structure of container terminals (Ferrari, 2000; Ferrari, Benacchio, 2003) and the role of co-operation and competition in the liner sector (Musso et al. 2001).

2. Literature and institutional behaviour in regard to liners' co-operation

Since the first appearance of Conference agreements in the late 19th century, the literature has tolerated liners co-operation agreements for different reasons.

Revisiting the Ryoo and Lee (2002) distinction of liner shipping co-operation forms into co-operation on rates and operational co-operation, some justifications to co-operation agreements are founded on the economic structure of the liner industry. They focus on the fact that:

- liner operators face ever decreasing short marginal costs (the marginal cost curve runs below that of average costs). Consequently, a free market may result in destructive competition, which undermines the basic characteristics of liner services, such as frequency and reliability of schedules, and the certainty that services will be provided ahead of demand. This argument represents the

economic foundation for rate fixing, yet it implies that in order to stabilize rates, conferences will charge rates in line with the average cost of their less efficient members;

- the standard investment for each plant unit – in this case, a specialized liner ship such as a full containership – has increased over time; only large organizations can bear the financial burden associated with placing a new ship on the market, and new ships are becoming increasingly bigger in order to exploit the economies of scale and scope;
- there are substantial imbalances in traffic flows on the different routes served by liners in nearly all markets, resulting in voyages made with part of the ship's capacity used to carry ballast.

Some other arguments regard the structure of the market in which liners operate. Namely:

- the presence of an empty core, resulting in (and confirmed by) an unstable equilibrium of the market subject to frequent adjustments (Sjostrom, 1989; Pirrong, 1992);
- the pressure to move towards a hub-and-spoke structure, encouraging further mergers and alliances, while conferences remain a sort of bulwark in defence of a certain degree of competition within the market (Marchese, 2000);
- total volume of traffic is not sensitive to freight rate variations in the short run (Heaver, 2001);
- last but not least, the role that liner shipping has always had in the development of international commerce and economic development.

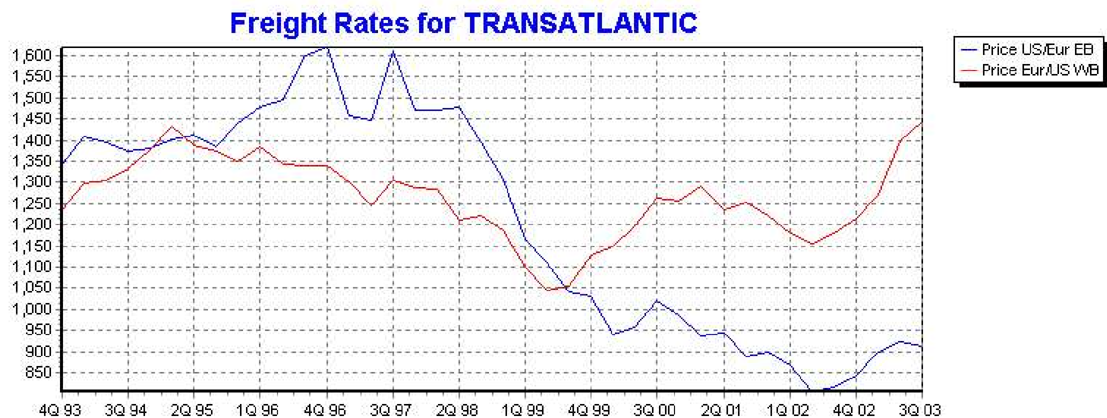
All these reasons have determined a generalized, although not unanimous, acceptance of price-fixing agreements, also because in the long run liners' prices have experienced some reductions in real terms, following the general level of prices. However, the attitude towards conference agreements has not always been completely supportive of the carriers' position. Over the last few decades, some forms of competition have been introduced in the liner market. This was sometimes the result of an internal spur, such as in the case of the compulsoriness of the "open conferences" in order to protect the existence of independent carriers. Their existence increases the competitive degree of the market, even if they rate trying to price off conferences instead of competing with conference on price. In periods of scarce demand, competition may be limited by agreements between conferenced and non-conferenced liners such as Capacity Stabilisation agreements and the Discussion Agreements, by which liners attempt to control the supply capacity and the level of rates.

At other times, pressure to increase the level of competition was external, as when regulatory changes occurred allowing more flexible pricing mechanisms. For example, the US Ocean Shipping Act of 1998 – known and referred to from now on as OSRA (Ocean Shipping Reform Act) - that abolished the requirement that service contract terms should be made public (as well as the "me-too" clause). Conference tariffs still have to be published, but shippers and carriers may negotiate confidential service agreements and keep the terms of the contracts safe from other carriers or shippers.

The effects of OSRA-OECD (2002) and Gardner *et al.* (2002) are shown by the great success of such confidential agreements (+200% increase) and the number of amendments filed. The marked shift towards individual service contracting determined the suspension of conference agreements on many US trades.

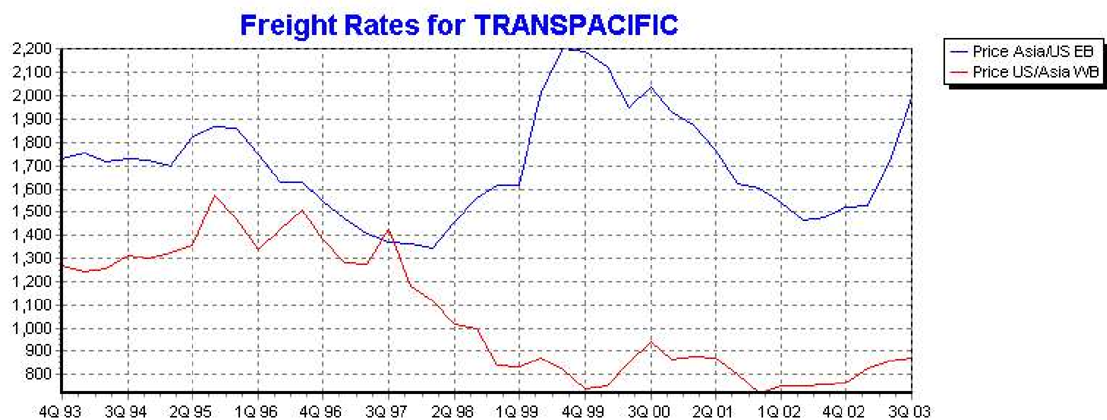
Moreover, the previous US Shipping Act of 1984 led to "a generalised decrease in rates with little impact on service" (OECD, 2002). The same (or an even better) result is expected as a consequence of OSRA. Available data are not as yet sufficient to support conclusive comments. However, data published in the web site of Containerisation

International show an increasing gap between westbound and eastbound freight rates in the transatlantic and transpacific routes since 1999 (see figures 1 and 2). This seems to show that US exports have benefited a wide reduction in rates since 1998 OSRA.



Source: Containerisation International web site

Fig. 1 – Transatlantic freight rates



Source: Containerisation International web site

Fig. 2 – Transpacific freight rates

In the European Union, conference liner operators benefit from more favourable conditions, since the EU in 1986 provided them with a block exemption from the anti-trust legislation. At the moment there is considerable debate as to the effectiveness of such an exemption. The Freight Transport Association, for example, claims that the block exemption should be removed as its members want flexible and transparent but not fixed rates. This matter is the subject of detailed analysis in the next section.

3. The Rationale of the exemption of Council Regulation 4056/86

3.1. The legislative framework

Council Regulation 4056/86, which came into force on 1st July 1987, ended years of speculation and uncertainty about whether the competition rules of the EC Treaty applied to undertakings engaged in maritime transport. Regulation 4056/86 marked the first step in imposing effective regulatory constraints on a sector that had previously been largely self-regulated.

Regulation 4056/86 is grounded on the acceptance of liner conferences as legitimate, and indeed the most common form of organization of liner shipping. On being adopted,

Regulation 4056/86 was intended to supplement the rules of the UNCTAD Code of Conduct for Liner Conferences, to which the EU Member States were signatories.

Central to the decision to accept liner conferences was the assumption that, if unfettered by the peer pressure typical of liner conferences, individual lines would engage in "destructive" competition, driving down margins to a level where there would no longer be any financial incentive for a carrier to maintain a regular service on those trades.

Under the assumption that liner conferences have a stabilizing effect and that they contribute to providing reliable scheduled maritime services, the idea behind the Regulation was that such stability and reliability cannot be obtained without cooperation within liner conferences relating to rate-setting and capacity restrictions. The Regulation stated, therefore, that agreements between carriers concerning the operation of scheduled maritime transport services that have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the objectives listed in Article 3, (a) to (e), for example coordination of timetables, the allocation of cargo or revenue among members or the regulation of carrying capacity offered, are exempted. The block exemption also covers agreements between conferences and transport users concerning the latter's use of conference services. Various obligations listed in Article 4 of the Regulation are attached to the exemption.

This block exemption is often called the most generous exemption ever given as it covers traditional hard-core restrictions and furthermore does not contain a review clause and remains in force for an unlimited period of time[1].

3.2. Recent caselaw

The adoption of Regulation 4056/86 was followed by a long period of conflict over the interpretation of the Regulation. The Commission strenuously defended a strict interpretation, consistent with the guidance for the application of Article 81(3) provided by settled case law (i.e. not to allow inland price-fixing and to promote confidential individual service contracts), while carriers sought to have the broadest possible interpretation given to the wording of the block exemption provisions.

During the 90s a string of prohibition decisions by the Commission and ensuing procedures before the Community courts were held.

In 1994, in the TAA (Trans-Atlantic Agreement) case, the Commission objected to, amongst other things, collective fixing of tariffs for the inland leg of multi-modal transport operations. The same issue arose in the FEFC (Far East Freight Conference) case, also in 1994, and in the TACA (Trans-Atlantic Conference Agreement) case in 1998. The issue was resolved by the Court of First Instance (CFI) in its ruling in the FEFC case in 2002, stating that the scope of the exemption is limited to transport by sea from port to port and does not cover the inland on- or off-carriage of cargo as part of inter-modal transport operations. As for individual exemption of inland price fixing, it was found in that case that a less restrictive rule according to which inland services may not be charged at less than costs was sufficient to achieve stability and thus price fixing could not be deemed indispensable. Another issue in the Commission's TAA decision was the notion of "uniform" rates in Article 1(3)(b) of the Regulation defining liner conferences. The TAA had applied a two-tier tariff structure, differentiating between former conference members and independents. The Commission's findings were recently confirmed by the CFI, which stated that "uniform" means the same rates being offered by all members of a conference.

The Commission in the TAA case also found that the regulation of capacity exempted under Article 3(d) of Regulation 4056/86 does not encompass a capacity freeze. Only

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[1] By way of comparison, the consortium block exemption (Regulation 823/2000) is valid for only five years at a time, after which it is reviewed to see whether the conditions for exemption are still in place.

capacity withdrawals fall within the scope of the block exemption, and, even then, only if withdrawals are intended to address short-term fluctuations and generate substantial cost savings that can be passed on to transport users. The CFI did not need to pronounce itself on this issue.

The 1998 Commission decision regarding the "first" TACA recognised major infringements of the competition rules leading to two forms of abuse, and refused to grant exemption to the member companies and fined them heavily. The first abuse concerned the conferences fixing of freight forwarder commissions, and certain restrictions on the availability and content of service contracts (in particular, a prohibition on member companies entering into individual contracts, and restrictive clauses applied to individual service contracts). The second abuse concerned measures by a dominant conference seeking to induce potential competitors to join the TACA rather than take part in the transatlantic trade as independent lines. The decision was appealed and the CFI's judgment of 30 December 2003 substantially upheld the Commission's findings that the restrictions in relation to service contracts constitute an abuse (the first abuse). It has, however, set aside due to lack of evidence and an infringement of defence rights that part of the decision concerning the measures inducing competitors to join the conference (the second alleged abuse of a collective dominant position)[2]. As for the inland part of the contracts for transport services provided as part of intermodal transport, in respect of which immunity does not apply, the Court found that the cooperation of the companies in question, and the legal uncertainty over the finding of abuse constitute mitigating circumstances which justify no fine being imposed. In May 2000, the Commission adopted its decision in the FETTCSA case, and fined the parties to the agreement, which included the FEFC and a number of individual carriers, for having entered an agreement not to provide a discount on published rates for charges and surcharges. The Commission's decision was upheld in the CFI's judgment of 19 March 2003 (but the fine was annulled because the five-year limitation had expired).

Finally, in November 2002, the Commission granted an individual exemption for the revised Trans-Atlantic Conference Agreement ("the revised TACA"), replacing the agreement prohibited by the Commission in 1998. The decision deals with cargo-handling services in ports and is in this respect in line with the FEFC judgment. Regarding capacity regulation, the decision imposes a reporting obligation on the parties to the Commission and an obligation not to increase tariff rates in conjunction with a capacity regulation programme or to create an artificial peak season. Provisions regarding agreement service contracts and multi-carrier service contracts were held to fall outside the scope of the block exemption, but qualified for an individual exemption. The Revised TACA - cleared in November 2003 - can be seen as a concrete attempt to change the way Conferences put agreements into practice. The rapid improvement in the competitive structure of the market allows Mr. Mario Monti to consider the Revised TACA as "*the most competitive outcome that can be achieved under the current legal regime*" (despite some black spots such as the collective fixing of terminal handling charges).

4. The on-going review process of Regulation 4056/86

The lessening of market shares by Conferences (as was clearly shown during the Revised TACA clearance procedure), allied to the publication by the OECD Secretariat of a report that severely criticised the need for Conferences' antitrust exemption, influenced

[2] The Court therefore annulled the Commission's decision in so far as it found that the TACA parties had abusively altered the structure of the market, together with the fines imposed in respect of the second abuse (approximately 90% of the total amount).

significantly the Commission's decision to re-examine the justification for the EU liner conference block exemption.

Whilst the Commission recognises that price stability as an objective may fall within the scope of Article 81(3) EC enabling as it does shippers to forecast transportation costs and thus their income more accurately, with the additional benefit of making it easier to organise regular, reliable and efficient services, it is questioned whether conferences are a necessary and proportionate means to that end. It is also questioned whether a balancing of these benefits against the disadvantages caused to consumers, in particular in the form of potentially higher prices, does not in fact produce a situation that is detrimental to consumers.

The Commission's Consultation Paper states in detail the grounds for a review, which has to be seen as part of the general – and ongoing – overhaul of the competition rules. The grounds are as follows:

- the issue whether reliable scheduled maritime services can be achieved by less restrictive means than horizontal price fixing and capacity limitation, also considering major changes in market conditions occurred since 1986 (*indispensability* and *proportionality* of the immunity);
- international liner shipping policy developments and the re-examination of antitrust immunity in the US, Canada, Australia and Japan;
- main findings of the OECD Secretariat's Report on Competition Policy in Liner Shipping, which alleged that there is no evidence that the current EU conference system leads to stability of freight rates and/or reliability of liner shipping services in a better way than within a broader competitive setting;
- effects that will be induced by the so-called Modernization of the European antitrust procedures (Reg. 1/2003)[3].

Concerning the procedures for the review, the Commission has opted for a three-stage approach, with the first consultation paper being followed by a Green Paper – outlining several possible options – or a White Paper – focusing on one particular option – and thereafter, if appropriate, by a proposal for legislation.

At this stage, the consultation paper has been published addressing specific questions related to costs and benefits of the antitrust exemption for Conferences. Thirty one parties (representing bodies and government organizations) replied to the invitation of the Commission and submitted comments on the mentioned paper[4]. A lively public hearing took place on 4 December 2003 in Brussels, where carriers and shippers pleaded their respective cases.. The two industries rather a-critically defended their own interests: shippers are in favour of abolishing immunity for that form of cooperation, arguing it has not contributed to stability, reliability and competition, while carriers argue the opposite. In fact they claim that, since liner shipping is a high fixed cost industry, as a result of regularity and frequency of services, marginal cost pricing may not be able to ensure sustainable services in the long run, to the ultimate detriment of consumers and shippers. This is why liner conferences have been allowed to set rates, ensuring in this way that long run average costs are covered. The evaluation of the submitted comments and the contents of the public hearing provided no new evidence or proof that compounds the already well

[3] Once Regulation 1/2003, which among others abolishes the opposition procedure, enters into force, applications made to the Commission under Article 12 of Regulation 4056/86 will lapse. Applications pending a decision by the Commission will thus not be considered after 1 May 2004, but exemptions already granted under Regulation 4056/86 will remain in force for their full duration.

[4] An team of researchers of the Erasmus University Rotterdam was chosen by the Commission to assist in processing public submissions received in response to the consultation paper.

known theoretical arguments in favour of or against the block exemption for liner conferences. Moreover, data are lacking, and those available are not 100% reliable[5].

Despite the different possible evaluations as to the degree of satisfaction concerning the early follow-up to the consultation process, as yet now it seems that there is no clear and sound evidence of the balance between the social costs of the exemption and its benefits for the consumer, since there is no measurable cause-effect relation between conferences and stability of freight rates, reliability of services etc, and there is no proof whether rates would have been lower or higher without conference protection. The "analytical" phase under the well known refrain *"more work is needed"* runs the risk not only of being never-ending, but also ineffective in pursuing "objective" proof of this cause-effect relation[6] through statistical analysis. (It does, however, highlight the problem of the burden of proof).

The positions and arguments of both shippers and carriers are to some extent comprehensible, but it should not be forgotten that the review is mainly a political economic one in which regulation costs are weighed up against foreseeable benefits. Regulators should therefore decide clearly which priorities should drive the revision process towards a (new?) sustainable market structure (regulated, partially regulated or deregulated) for liner shipping in the light of its peculiar features (and not vice versa). Thus, the oft-quoted "uniqueness" of the shipping industry should be carefully assessed in order to take into account possible effects of different goal-oriented regulation, and not as an a priori statement for preventing any change in the present legislative framework.

The present debate highlights furthermore some crucial issues regarding the key feature of liner shipping, which might help institutions to identify the principal guidelines of the review:

- can the excess of capacity observed on some trades be considered a signal of a shift in market power from carriers to shippers with a consequent effect in reducing freight rates and increase volatility, or does it represent a sort of barrier to entry set by conference members?
- Considering the lower market share of Conferences, as stated in the Revised Taca decision – which means more external competition from independent players - and the increasing importance of Individual Service Contracts – which means more internal competition – why should carriers defend collective price fixing immunity? Isn't it becoming increasingly irrelevant? Or might it hide the need for horizontal transparency allowing to signal a non cost-oriented target price which affects further negotiations with shippers?

Moreover, the review should preferably also focus on the fulfilment of the indispensability requirement in the light of the increasing importance of forms of technical co-operation such as consortia, whose discipline (regulation 823/2000, which expires in April 2005), should be taken into account in the revision of regulation 4056/86.

5. Conclusions

As we discussed in the previous sections, there are theoretical foundations both in favour of and against the block exemption from antitrust regulation granted to the liner shipping industry (LSI). Thus, the ongoing review of EU Council Regulation 4056/86, as well as any other possible reform of this matter, will tend to reflect the contrast between

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[5] Real commercial data in liner shipping are always covered by secrecy and parties sometimes adopt an uncooperative "prove if you can" code of conduct towards institutions. It is not a coincidence that data provided by the European Liner Affairs Association during the review process comes from a Drewry report or from official liner conference prices (which, they say, represent less than 20% of the volumes).

[6] Nevertheless, a price-cost margin analysis still has not been carried out for liner shipping.

players with different bargaining power. The output of the review could well fail to achieve the highest overall benefit, for at least three reasons:

- in the negotiation, any benefit hinged on a small number of players (the carriers), who are also in a position to quantify the benefit easily, normally overcomes those interests that are widely dispersed among a number of players that are not easily quantifiable or even perceivable due to information asymmetries, despite the fact that these benefits may be more significant;
- policy makers may consequently favour highly concentrated interests, which also tend to cluster in stronger lobbies;
- industrial organisation gives the highest bargaining power to a player or to a group of players that backs a regulation different from one that maximizes welfare.

This contraposition, and the related risks, is evident in the debate currently in progress in the European Union, and there is a real danger that the output of the ongoing regulatory review will not generate the highest overall net benefit. Consequently, the key point to be investigated is whether the block exemption of LSI from antitrust regulations causes comparatively higher costs or higher benefits for the economy as a whole.

From this point of view, the welfare-maximising solution can be attained if and only if:

1) the overall benefit for players taking advantage of the exemption is higher than the sum of disadvantages resulting for all other players, both on the demand (shippers) and on the supply side (competitors); *and*
2) this benefit is transferred, due to a competitive structure of the market or to specific regulations, to the economy as a whole.

Economic theory, besides bringing well-established arguments in favour of promoting and protecting competition as a “general” rule, also specifies cases in which agreements restricting competition are expected to bring macroeconomic benefits (see above, section 2). In the LSI there has been, historically, scope for granting exemption from antitrust regulations, the main benefit of which is claimed to be, given the peculiar characteristics of this industry, the preservation of stable and durable supply; fierce competition would otherwise cause a dramatic shortage, with considerable damage for the shippers. However, we must now wonder whether these arguments, albeit theoretically exact given certain hypotheses, are still today well-founded .

Two different ranks of arguments must be raised here, respectively on theoretical and empirical grounds. As regards the first point, significant changes which have taken place over the last 10-20 years in the transport and logistics industry must be considered. How do globalisation and technical or organisational innovation in the transport industry influence the demand for transport services and its elasticity?

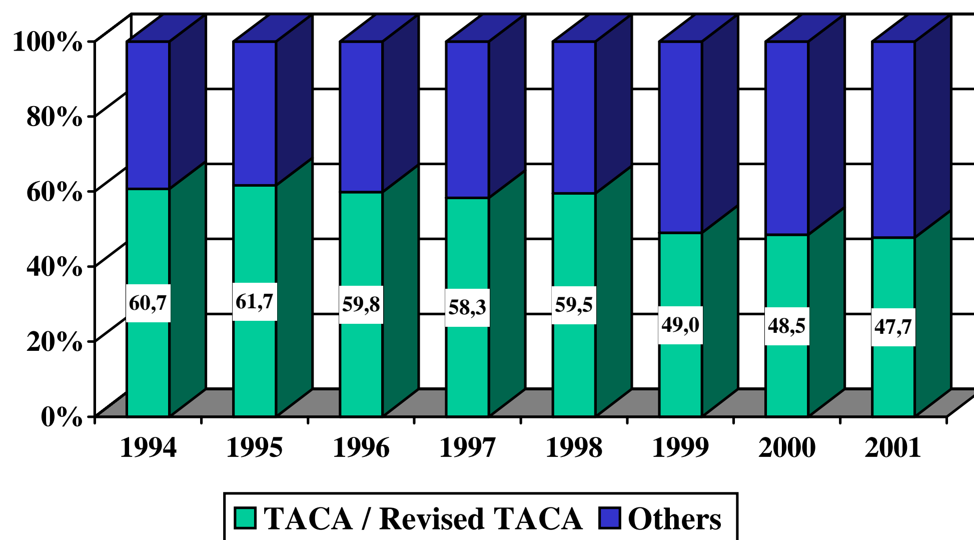
On the one hand, the breaking up of most production processes makes demand comparatively inelastic, since it reduces – all others being equal – the alternative of demanding goods produced in the local economy. In other words, once the international division of labour takes place, and substantial savings are attained through it, it is no longer conceivable that increasing rates of maritime transport will cause a shift in demand from goods imported to goods produced locally just as it is untenable that there will be a change in production organisation from a globalised to a spatially concentrated paradigm . This is even more the case if we refer to single components of goods produced or assembled elsewhere.

On the other hand, the ongoing reduction of real direct transport costs, caused by a rate of technical innovation over the last decades far higher than in the rest of the economy, normally reduces the incidence of transport on the final value of the transported goods.

There are then reasons to believe that the demand for maritime transport tends to become more and more inelastic. Therefore, as the economic literature points out (see

Sjiostrom, 2002), consequences are worse – for any given level of demand – if the industry is not characterised by competition: in theory, a non-competition market does not bring welfare losses at all if demand is perfectly elastic, while losses become increasingly greater if demand becomes inelastic. Thus, this circumstance suggests that in our case the social cost of exemptions is growing over time. As regards the empirical evidence, the significant fall in conferences' market share over the last few years (see for example fig. 3 concerning transatlantic trades), as well as the growth of individual service contracts within the conference[7], seem to suggest that the exemption is no longer indispensable for ensuring a supply of transport service which is both adequate and stable over time. Besides, the decreasing rates for US exports after the 1986 reform act (see above, fig. 1 and 2) suggests that the structure of the conference agreeement influences the whole range of rates.

Consequently, the most signifcant role of conference agreements seems to be the establishment of rates which act as a point of reference and basis of negotiation for all other rates, both inside (individual service contracts) and outside the conference agreement.



Source: Process on data and information contained in EU commission "Revised TACA" decision

Fig. 3 – TACA/Revised TACA Conference Market share in 1994-2001

Conference rates are likely to be linked to the average costs of the least efficient among the carriers of the agreement, which in principle should allow both individual contractors and outsiders to earn extra-profits by raising rates lower than those established by the agreement, yet higher than their costs. It seems then that, both inside and outside the conferences, margins for positive competition (leading to higher technical and allocation efficiency) already exist, albeit carriers persist in asking for block exemptions from antitrust regulation.

It has often been claimed that there is no clear evidence of the balance between the social costs of the exemption and its benefits for the consumer, since there is no measurable cause-effect relationship between conferences and stability of freight rates,

[7] ELAA (European Liner Affairs Association) in its response to EU Discussion Paper, states that "The Association estimates that 90 percent of TACA parties' transatlantic lift is pursuant to confidential individual or joint service contracts" and that in FEFC trades "There is only a limited amount of cargo carried under the conference tariff" while "The Association understands that according to the TEANZC around 75-80 percent of cargo now moves under this type of contract".

reliability of services, etc.. As a matter of fact, the analysis runs the risk to be never-ending and also ineffective in pursuing objective proof of that cause-effect relation through data analysis. Yet, if there is no evidence, it seems that the "general" rules should apply (i.e. antitrust and competition enforcement), while the burden of proof should fall upon those who ask for exemption from that rule.

Moreover, what actually is the public interest that should move the regulatory reform? Since the review is mainly a moment of economic policy, regulators should clearly decide which priorities have to drive the revision process towards a (new) sustainable market asset for LSI in the light of its peculiar features. Therefore, what is the main public interest pursued by the regulation? Basically, the efficiency of international trade and the availability of reliable means for trading. In this light, the needs of shippers can be seen as a proxy of public interest (assuming they transfer the efficiency gains along the chain).

After all the above mentioned remarks, can we still think that LSI is such a "unique" industry to justify the preservation of the broader block exemption under EU law? A cost structure with (very) high and largely prevailing fixed costs is not an exclusive characteristic of maritime liner transport, but indeed of a growing number of industries, which nevertheless are not granted any exemption from antitrust regulations.

The problem should rather be – in LSI as well as in other industries – to try to avoid the abuse of dominant positions. As a result, the problem is not so much the cost structure itself but the fact that excessive fixed costs allow a dominant position which can determine abuses. The block exemption seems clearly the less suitable tool in order to avoid this risk, and – on the contrary – favours (or can favour if coupled with lack of transparency, etc.) the establishment of a dominant position. Thus, it seems the time has come to cancel the block exemption, and to shift the burden of proof onto the carrier, who has an interest in exploiting it.

Nevertheless, in so doing one must take into account certain elements that might jeopardise the benefits expected from overcoming the block exemption, such as the following:

- to what extent may the risk of carriers' rent seeking induced by the exemption be counterbalanced by positive effects? Can the high number of players be considered as proxy of competition?
- What is the "value" of stability for consumers? Are stable prices, even if issued by a cartel, better than transparency and cost oriented rates? Can a possible lower stability of supply and rates be insured?
- How, within the meaning of Article 81(3), can the condition of "indispensability" be applied to the evaluation of the conference system? Can, for instance, consortia be considered as less restrictive alternatives in assuring the same goals to LSI currently provided by Regulation 4056/86?
- Without the block exemption, which strategies, tools and powers would national and/or international antitrust authorities use to protect consumers from industry abuses in case of further concentration?

It seems then that, despite these possible dangers, the tendency towards the abolishment of the block exemption should be definitely pursued.

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