

International
of the Chinese

h School of Maritime

Hongyan Liu

Liner Conference

HAMBURG STUDIES ON MARITIME AFFAIRS 17

International Max Planck Research School (IMPRS)
for Maritime Affairs
at the University of Hamburg

Hamburg Studies on Maritime Affairs

Volume 17

Edited by

Jürgen Basedow
Peter Ehlers
Hartmut Graßl
Lars Kaleschke
Hans-Joachim Koch
Doris König
Rainer Lagoni
Gerhard Lammel
Ulrich Magnus
Peter Mankowski
Marian Paschke
Thomas Pohlmann
Uwe Schneider
Jürgen Sündermann
Rüdger Wolfrum
Wilfried Zahel

Hongyan Liu

Liner Conferences in Competition Law

A Comparative Analysis
of European and Chinese Law

Hongyan Liu
International Max Planck Research School for Maritime Affairs
Max Planck Institute for Comparative and International Private Law
Mittelweg 187
20148 Hamburg
dongliuhongyan@gmail.com

Dissertation zur Erlangung der Doktorwürde
an der Fakultät für Rechtswissenschaft der Universität Hamburg
Vorgelegt von: Hongyan Liu, Qingdao, Shandong, Volksrepublik China
Erstgutachter: Prof. Dr. Dr. h.c. Jürgen Basedow
Zweitgutachter: Prof. Dr. Dr. h.c. Marian Paschke
Tag der mündlichen Prüfung: 29. April 2009

ISSN 1614-2462 e-ISSN 1867-9587
ISBN 978-3-642-03874-7 e-ISBN 978-3-642-03875-4
DOI 10.1007/978-3-642-03875-4
Springer Heidelberg Dordrecht London New York

Library of Congress Control Number: 2009936002

© Springer-Verlag Berlin Heidelberg 2010

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilm or in any other way, and storage in data banks. Duplication of this publication or parts thereof is permitted only under the provisions of the German Copyright Law of September 9, 1965, in its current version, and permission for use must always be obtained from Springer-Verlag. Violations are liable to prosecution under the German Copyright Law.

The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Cover design: WMXDesign GmbH, Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

The topic of this dissertation was proposed by my supervisor, Professor Dr. Dr. h.c. Jürgen Basedow, Director of the Max Planck Institute for Comparative and International Private Law in Hamburg. I am deeply grateful for his inspiring advice and constant support during my studies. I would further like to thank Professor Dr. Dr. h.c. Marian Paschke, Director of the Law of the Sea and Maritime Law Institute of the University of Hamburg, for his very valuable comments and the timely submission of the second opinion on my dissertation.

I had the great honour to be admitted to the International Max Planck Research School for Maritime Affairs (IMPRS), at which I could do my research and finish my dissertation with a generous scholarship. I am greatly obliged to the Directors of the IMPRS and to the interdisciplinary discussion and professional exchange with other scholars and colleagues, and grateful that the publication of this dissertation has been aided by a grant from the IMPRS.

During the work on this dissertation, many experts and friends, both from Germany and China, helped me with their invaluable advice and sincere assistance. I cannot mention them all, but would like to thank Prof. Dr. Frank Münzel (Georg-August-University of Göttingen) as well as Dr. Knut Benjamin Pißler (Senior Research Fellow for Chinese Law, Max Planck Institute for Comparative and International Private Law, Hamburg) for their constant support. Special thanks are also due to Prof. Dr. Dr. h.c. Peter Ehlers and Prof. Dr. Rainer Lagoni (Directors of the IMPRS), Prof. Dr. Rolf Herber (University of Hamburg), Prof. Dr. Xiaoye Wang (Law Institute of the Chinese Academy of Social Sciences), Prof. Junhao Zhang, Prof. Jian Mi, Prof. Dr. Qingyu Zhu and Prof. Dr. Shiyong Tian (China University of Political Science and Law), Prof. Dr. Shuanggen Zhang (Peking University), Prof. Dr. Weixing Shen (Tsinghua University), Prof. Dr. Wolfgang Wurmnest (Gottfried Wilhelm Leibniz University of Hannover), Dr. Anatol Dutta and Ms. Vera Wiedenbeck (coordinators of the IMPRS) and Mrs. Gisela Schmitz-Krause (Executive Assistant to Prof. Dr. Dr. h.c. Jürgen Basedow).

Last but not least, my special gratitude is due to my husband, Yiliang Dong, who has always stood by me during my LL.M program and Ph.D. research and spared no effort to help me letting my dreams come true. And I give my heartfelt thanks to my parents and my brother for their constant support and encouragement.

This study takes into account literature and documents available until May 2009.

Summary Contents

Introduction.....	1
Chapter I: Maritime Policy and Regulation.....	9
A. Maritime Policy and Regulation in the EU	9
I. The First Stage: From the Ground of the EEC to the Adoption of the UNCTAD Liner Code.....	9
II. The Second Stage: 1986 Package of Regulations	15
III. The Third Stage: New Dimensions and Legislation on Consortia.....	18
IV. The Fourth Stage: Review of Regulation 4056/86 and Adoption of Regulation 1419/2006 and Regulation 1490/2007.....	21
B. Maritime Policy and Regulation in China	26
I. China's Maritime Transport Industry: 1949–1977.....	27
II. Development of Maritime Policy: 1978–2001.....	30
III. Development and Legislation after China's WTO Accession.....	40
IV. International Convention and the UNCTAD Liner Code.....	48
C. Conclusion.....	54
Chapter II: General and Sector-Specific Competition Rules in Force.....	57
A. Community Competition Rules in Maritime Transport and Regulation 4056/86.....	57
I. Politicization of Community Competition Rules in Maritime Transport	58
II. Regulation 17 and Regulation 141.....	59
III. Development by Community Case Law	60
IV. Regulation 4056/86: Incompatibility with the EC Treaty from the Legislative Point of View	62
B. General and Sector-Specific Competition Rules in Maritime Transport in China.....	64
I. Regime of Competition Regulation in Maritime Transport	64
II. Applicability of General Competition Rules	68
C. Conclusion.....	79
Chapter III: Scope of Application of Sector-Specific Regulation of Liner Conferences.....	81
A. Scope of Application of Regulation 4056/86	81
I. Objective Scope	81

II. Territorial Scope	85
B. Scope of Application of the RIMT and the IRRIMT	88
I. Objective Scope	89
II. Territorial Scope	91
C. Conclusion	94
Chapter IV: Exemption and Prohibition Provisions Concerning Liner Conferences	95
A. Exemption Provisions of Regulation 4056/86	95
I. Definition of Liner Conferences	95
II. Exemption under Article 3 of Regulation 4056/86	99
III. Conditions under Article 4 of Regulation 4056/86	117
IV. Obligations under Article 5 of Regulation 4056/86	120
B. Competition Regulation of Liner Conferences under RIMT/IRRIMT	129
I. Definition of Liner Conferences	129
II. Filing Requirements on Liner Conferences	132
III. Legal Nature of Liner Conferences and Applicability of Competition Rules	138
C. Conclusion	144
Chapter V: Regulatory Procedure	147
A. Procedural Rules in the EU: Reform and Application	147
I. Regulation 4056/86 in Relation to Regulation 17	147
II. Regulation 4056/86 in Relation to Regulation 1/2003	148
III. System of Legal Exception and Monitoring Procedure in Regulation 4056/86	157
IV. Enforcement of Procedural Rules on Liner Conferences	166
B. China's Procedural Rules of Competition Regulation on Liner Conferences	186
I. Initiation of Investigation	186
II. Investigation Authorities and Investigation Committee	188
III. Investigation Procedure	189
C. Conclusion	195
Chapter VI: Future Perspectives after the Change of the Regulation Regime	197
A. Liner Shipping beyond the Expiration of Block Exemption in the EU	197
I. Incompatibility of Regulation 4056/86 with Articles 81 and 82 EC: A Substantive Review	197
II. Beyond Regulation 1419/2006	218
B. Liner Conferences after the Adoption of the Anti-Monopoly Law in China	237
I. Antitrust Investigation in Practice: Investigation of the Terminal Handling Charges (THC)	237
II. Anti-Monopoly Law	254
C. Conclusion	273

Chapter VII: Conclusion	275
Bibliography	279
Table of Legislations, Cases and Decisions	299

Contents

Introduction.....	1
Chapter I: Maritime Policy and Regulation.....	9
A. Maritime Policy and Regulation in the EU	9
I. The First Stage: From the Ground of the EEC to the Adoption of the UNCTAD Liner Code.....	9
1. European “Self-Regulation”	9
2. Development of Common Policy in Maritime Transport: Inside and Outside.....	12
3. The UNCTAD Liner Code and the Brussels Package	13
II. The Second Stage: 1986 Package of Regulations	15
1. The 1985 Commission Communication on Shipping Policy	15
2. The 1986 Package of Regulations.....	17
III. The Third Stage: New Dimensions and Legislation on Consortia.....	18
1. New Dimensions of Maritime Policy	18
2. Legislation on Consortia.....	19
IV. The Fourth Stage: Review of Regulation 4056/86 and Adoption of Regulation 1419/2006 and Regulation 1490/2007.....	21
1. The OECD Report 2002	21
2. The Review of Regulation 4056/86	22
3. Adoption of Regulation 1419/2006	24
4. Adoption of Regulation 1490/2007	26
B. Maritime Policy and Regulation in China	26
I. China’s Maritime Transport Industry: 1949–1977.....	27
1. Initiation of International Maritime Transport.....	28
2. Establishment and Development of the National Maritime Merchant Fleet	29
3. The First Battle with Liner Conferences.....	29
II. Development of Maritime Policy: 1978–2001.....	30
1. Industry Policy and Reform of SOEs in Maritime Transport Sector.....	32
a. General Review of Development	32
b. Industry Policy	32

c. Separation of Governmental Administration and SOEs Management.....	33
2. Sector Administration and Legislation in the Maritime Transport Sector.....	33
a. Administration Reform and Strengthening of Legislation	33
b. Market Opening and Market Access.....	35
c. Cargo Reservation.....	36
d. Port Services	37
e. Auxiliary Services.....	37
3. The Chinese National Maritime Fleet.....	38
III. Development and Legislation after China's WTO Accession.....	40
1. China's WTO Accession	40
a. A History Review.....	40
b. China's Specific Accession Commitments on Maritime Transport Services.....	41
c. MFN Exemptions in View of Maritime Transport Services ...	43
2. Maritime Legislation	44
a. Administrative Regulations on International Maritime Transportation	45
b. Provisions on the Administration of Foreign Investment in International Maritime Transportation.....	47
c. Legislation on Ports.....	48
IV. International Convention and the UNCTAD Liner Code.....	48
1. Reasons for China's Ratification of International Maritime Conventions	48
2. Legal Status and Applicability of International Maritime Conventions Ratified by China	49
a. General Review of Chinese Legal System	49
b. Legal Status and Applicability of International Maritime Conventions	50
c. The UNCTAD Liner Code.....	52
C. Conclusion.....	54
Chapter II: General and Sector-Specific Competition Rules in Force.....	57
A. Community Competition Rules in Maritime Transport and Regulation 4056/86.....	57
I. Politicization of Community Competition Rules in Maritime Transport	58
II. Regulation 17 and Regulation 141	59
III. Development by Community Case Law	60
IV. Regulation 4056/86: Incompatibility with the EC Treaty from the Legislative Point of View	62
B. General and Sector-Specific Competition Rules in Maritime Transport in China.....	64
I. Regime of Competition Regulation in Maritime Transport	64
1. Critique of Maritime Legislation in China.....	64

2. Competition Regulation relating to Liner Conferences	65
a. RIMT	65
b. IRRIMT	66
c. MOC-Notice 2007	67
II. Applicability of General Competition Rules	68
1. Competition Legislation: General Overview	68
2. Law Against Unfair Competition (LAUC)	72
a. Background	72
b. Applicability to Competition Regulation of Liner Conferences	73
3. Price Regulation	74
a. Background	74
b. Pricing Law and Implementation Rules	75
c. Pricing Monopolies under Article 2 PRCPM	76
d. Applicability to Competition Regulation of Liner Conferences	78
C. Conclusion	79

Chapter III: Scope of Application of Sector-Specific Regulation of Liner Conferences

Liner Conferences	81
A. Scope of Application of Regulation 4056/86	81
I. Objective Scope	81
1. Maritime Transport	81
2. Exclusion of Tramp Vessel Services	83
II. Territorial Scope	85
1. International Maritime Transport	85
2. Effect on Trade between Member States	85
3. Cabotage	87
4. Exclusion of Maritime Transport between Ports outside the EU	87
B. Scope of Application of the RIMT and the IRRIMT	88
I. Objective Scope	89
II. Territorial Scope	91
C. Conclusion	94

Chapter IV: Exemption and Prohibition Provisions Concerning Liner Conferences

Conferences	95
A. Exemption Provisions of Regulation 4056/86	95
I. Definition of Liner Conferences	95
1. Vessel-Operating Carriers under Agreement or Arrangement	96
2. International Liner Services within Specified Geographical Limitation	96
3. Uniform or Common Freight Rates	97
II. Exemption under Article 3 of Regulation 4056/86	99
1. General Review	99
2. Agreements with Reference to Participating Undertaking	100

a. Agreements between Various Liner Conferences	100
b. "Tolerated Outsider Agreements"	101
3. Objective Contents of Agreements Covered by Article 3 of Regulation 4056/86	102
a. Systematic Review	102
b. Fixing of Rates and Conditions	105
c. Inland Price Fixing and Multimodal Transport	106
d. Capacity Management Programs	108
e. Is the List of Agreements in Article 3 of Regulation 4056/86 Conclusive?	112
4. Article 2 of Regulation 4056/86	113
5. Article 6 of Regulation 4056/86	115
III. Conditions under Article 4 of Regulation 4056/86	117
1. Non-Discrimination	117
2. Severability	119
IV. Obligations under Article 5 of Regulation 4056/86	120
1. General Overview	120
2. Consultations with Transport Users	121
3. Loyalty Arrangements	121
a. Definition and Classification	122
b. Service Contract	122
c. Requirements	124
4. Inland Transport Operations and Quayside Services Not Covered by the Freight Charge	127
5. Availability of Tariffs	127
6. Notification to the Commission of Awards at Arbitration and Recommendations of Conciliator	128
B. Competition Regulation of Liner Conferences under RIMT/IRRIMT	129
I. Definition of Liner Conferences	129
1. Definition of Liner Conferences	129
2. Definition of Liner Conference Agreements	130
3. Definitions of Other Forms of Agreements in Liner Services	131
II. Filing Requirements on Liner Conferences	132
1. General Provisions on Liner Shipping Undertakings	132
a. Filing of Operation	132
b. Filing of Freight Rates	133
c. Filing of Liaison Office and Resident Representative	135
2. Specific Provisions on Liner Conferences	136
a. Article 22 RIMT and Article 32 IRRIMT	136
b. MOC-Notice 2007	136
III. Legal Nature of Liner Conferences and Applicability of Competition Rules	138
1. General Legitimization of Liner Conferences	138
2. Discussion of the Applicability of Competition Rules	139
a. General Competition Rules	139
b. RIMT and IRRIMT	139

c. MOC-Notice 2007	143
C. Conclusion	144
Chapter V: Regulatory Procedure	147
A. Procedural Rules in the EU: Reform and Application	147
I. Regulation 4056/86 in Relation to Regulation 17	147
II. Regulation 4056/86 in Relation to Regulation 1/2003	148
1. Regulation 1/2003: Modernization of Community Procedural Rules	148
a. The Need for Reform: From Regulation 17 to Regulation 1/2003	148
b. Main Features of Regulation 1/2003	151
2. Self-Regulation in Regulation 4056/86: From Notification in Regulation 17 to Legal Exception in Regulation 1/2003	155
III. System of Legal Exception and Monitoring Procedure in Regulation 4056/86	157
1. Ex Post Regulation in the System of Legal Exception	157
a. Undertakings' Responsibility of Self-Assessment	158
b. The Competition Authorities' Competence in <i>ex post</i> Control	158
c. The European Commission's Findings of Inapplicability	159
2. Block Exemption in Article 29 of Regulation 1/2003	159
3. Monitoring Procedure in Regulation 4056/86	160
a. Article 7 of Regulation 4056/86	161
b. Article 8 of Regulation 4056/86	164
IV. Enforcement of Procedural Rules on Liner Conferences	166
1. The European Commission as Enforcement Organisation	166
2. Initiation of Proceedings: From Regulation 4056/86 to Regulation 1/2003	167
a. The European Commission's Own Initiative	167
b. Complaints	168
c. Clearance Requests	170
3. Powers of Investigation	171
a. Investigative Powers	171
b. Information Request on NCAs	172
c. Information Request on Undertakings	172
d. On-the-Spot Investigation	174
e. Interview and Statements	175
f. Sector Enquiry	175
g. Confidentiality and Professional Secrecy in Article 28 of Regulation 1/2003	175
4. The Right to be Heard	176
5. Cooperation between Authorities and Courts: Community and Member States	177
a. Cooperation between the European Commission and NCAs	177

b. Cooperation with National Courts	178
6. Commission Decisions	179
a. Cease-and-Desist Orders	179
b. Interim Measures	180
c. Commitments	181
d. Publication	181
7. Fines	181
a. Categories of Fines	181
b. Addressees	182
c. “Non-criminal” Nature and Limitation Periods	182
d. Amount of Fines and Determination	183
8. Judicial Review	184
B. China’s Procedural Rules of Competition Regulation on Liner Conferences	186
I. Initiation of Investigation	186
II. Investigation Authorities and Investigation Committee	188
1. Ministry of Communications (MOC)	188
2. A New Regulatory Authority: Ministry of Transport	188
3. Investigation Authorities	189
III. Investigation Procedure	189
1. Initiation and Duration of Investigation	189
2. Right and Obligation of a Person under Investigation	190
3. Scope of Investigation	190
4. The Right to be Heard	191
5. Consultative Experts	191
6. Administrative Decision and Legal Remedy	192
a. Comparison with the General Penalty Provisions	192
b. Legal Remedy	193
C. Conclusion	195

Chapter VI: Future Perspectives after the Change of the

Regulation Regime	197
A. Liner Shipping beyond the Expiration of Block Exemption in the EU	197
I. Incompatibility of Regulation 4056/86 with Articles 81 and 82 EC:	
A Substantive Review	197
1. Decision Practice and Systematic Review	197
a. Restrictive Interpretation in Decision Practices	197
b. A Systematic Review in the Light of Articles 81 and 82 EC	198
2. Economic or Technical Advantage	200
a. General Review	200
b. Liner Conferences	202
3. A Fair Share of Benefits for Consumers	206
a. General Review	206
b. Liner Conferences	207
4. Indispensable Nature of the Restrictions on Competition	208

a. General Review	208
b. Liner Conferences	210
5. No Substantial Elimination of Internal Competition	212
a. General Review	212
b. Liner Conferences	212
6. External Competition in Relation to Abuse of Collective Dominance	212
a. General Review	212
b. Liner Conferences	214
II. Beyond Regulation 1419/2006	218
1. Regulation 1419/2006	219
2. Block Exemption for Consortia: Regulation 823/2000	220
a. General Review	220
b. Scope of Application and Definition	221
c. Block Exemption	222
d. Conditions and Obligations	223
3. Guidelines on the Application of Article 81 EC to Maritime Transport Services	225
a. General Introduction	225
b. The Information Exchange System	226
B. Liner Conferences after the Adoption of the Anti-Monopoly Law in China	237
I. Antitrust Investigation in Practice: Investigation of the Terminal Handling Charges (THC)	237
1. Introduction	237
2. Background of the THC Investigation	238
3. The Investigation Process	240
4. The THC Decision	244
5. Comment on the THC Investigation	245
a. Substantive Aspects	246
b. Procedural Aspects	252
II. Anti-Monopoly Law	254
1. Introduction	254
2. General Overview	256
a. Aim and Principles	256
b. Extraterritorial Application	259
3. Substantive Rules of “Anti-Monopoly”	260
a. General Overview	260
b. Monopoly Agreements	263
c. Abuse of Dominant Position	264
d. Liner Conferences	265
4. Anti-Monopoly Investigation	268
a. Anti-Monopoly Authorities	268
b. Investigation Procedures	269
c. Liner Conferences	270
5. Legal Liability	271

a. Administrative Sanctions and Liability for Civil Damages...	271
b. Liner Conferences.....	272
6. Legal Remedy.....	273
C. Conclusion.....	273
Chapter VII: Conclusion.....	275
Bibliography.....	279
Table of Legislations, Cases and Decisions.....	299
The European Community.....	299
Regulations.....	299
Table of Cases.....	301
Decisions of the European Commission.....	305
The People's Republic of China.....	306
Legislations, Notices and Decisions.....	306
Other Judicial Cases.....	311

Abbreviations

Abs.	Absatz
AG	Advocate General
AML	Anti-Monopoly Law of the PRC [中华人民共和国反垄断法]
APEC	Asia-Pacific Economic Cooperation
Art.	Article
CCP	Chinese Communist Party [中国共产党]
cf.	compare
CFI	Court of First Instance
cit.	cited
CJV(s)	contractual joint venture(s)
Co.	Company
COSCO	China Ocean Shipping Company [中国远洋运输集团]
CSA	China Shippers' Association [中国对外贸易经济合作企业协会]
DWT	deadweight tons
EATA	Europe Asia Trade Agreement
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECOSOC	Economic and Social Committee
E.C.R.	European Court Reports
ECU	European Currency Unit
ed., eds.	editor, edition; editors, editions
EEC	European Economic Community
e.g.	exempli gratia, for example
EG	Europäische Gemeinschaft
EJV(s)	equity joint venture(s)
ELAA	European Liner Affairs Association
ESC	European Shippers' Council
<i>et al.</i>	et alii
etc.	et cetera
<i>et seq.</i>	et sequens

EU	European Union, Europäische Union
EUROS	European Ship Register
EWG	Europäische Wirtschaftsgemeinschaft
f., ff.	following
FEFC	Far Eastern Freight Conference
fn.	footnote
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GRT	gross registered tons
GT	gross tons
<i>ibid.</i>	ibidem
ICC	Interstate Commerce Commission (the U.S.)
IRRIMT	Implementation Rules of Regulation on International Maritime Transportation [国际海运条例实施细则]
JV(s)	joint venture(s)
LAUC	Law Against Unfair Competition [反不正当竞争法]
Ltd.	Limited
MFN	Most-Favoured-Nation
MOC	Ministry of Communications [交通部]
MOC-Notice 7/2002	Notice on Strengthening the Supervision and Administration of International Maritime Transport [关于加强对国际海运经营活动监督管理的公告]
MOC-Notice 9/2002	Notice on Launching the Investigation of THC [关于开展码头作业费问题调查的公告]
MOC-Notice 2007	Notice on Strengthening Supervision on Liner Conferences and Freight Discussion Agreements [关于加强对班轮公会和运价协议组织监管的公告]
MOFCOM	Ministry of Commerce [商务部]
MOFTEC	Ministry of Foreign Trade and Economic Cooperation [对外贸易经济合作部]
NCA's	national competition authorities
NDRC	National Development and Reform Commission [国家发展和改革委员会]
NITL	National Industrial Transportation League
No.	Number
NPC	National People's Congress [全国人民代表大会]
NSC	National Supreme Court [最高人民法院]
NVOCC(s)	non-vessel operating common carrier(s)
OECD	Organization for Economic Cooperation and Development
O.J.	Official Journal of the European Communities
ORC	original receiving charges

OSRA	the U.S. Ocean Shipping Reform Act of 1998
p., pp.	page, pages
para., paras.	paragraph, paragraphs
PRC	People's Republic of China [中华人民共和国]
PRCPM	Provisional Regulation on Curbing of Pricing Monopolies [制止价格垄断行为暂行规定]
Q.B.D.	High Court, Queen's Bench Division
rec.	recital
RIMT	Regulation on International Maritime Transportation [国际海运条例]
Rn.	Randnummer; Reference Number
RMB	Ren Min Bi (Chinese currency "Yuan")
SAIC	State Administration for Industry and Commerce [国家工商行政管理总局]
S.D.N.Y.	United States District Court for the Southern District of New York
sec.	section
SETC	State Economic and Trade Commission [国家经济贸易委员会]
SinoChart	China National Chartering Corporation [中国租船公司]
SinoTrans	China National Foreign Trade Transportation Corporation [中国对外贸易运输公司]
SOEs	State-owned enterprises
SSE	Shanghai Shipping Exchange [上海航运交易所]
TAA	Trans-Atlantic Agreement
TACA	Trans-Atlantic Conference Agreement
TEUs	20-foot equivalent units
THC	terminal handling charges
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTAD Liner Code	United Nations Convention on a Code of Conduct for Liner Conferences
U.S. (USA)	United States (of America)
v, v.	versus
VOCC(s)	vessel operating common carrier(s)
vol.	volume
w.f.r.	with further reference
WTO	World Trade Organization

Introduction

Liner shipping services can be defined as relatively high-value traffic essentially carried by container ships, roll-on/roll-off vessels and the remaining classic twin-deck ships, supplied by either shipping companies or ship operators, whereby ships operating on a continuous basis along definite trade routes according to fixed, pre-announced schedules and calling at specified advertised harbours offer what is often referred to as common carrier services.¹ Liner shipping is a highly concentrated sector with the top 20 liner carriers accounting for approximately 72% of world container capacity in 2002, while the top 15 liner carriers accounting for 86% in 2005.² This concentration is even more dramatic when considering that the top five carriers account for 50% of the total fleet and order book.³ This oligopolistic structure of the liner shipping market⁴ is closely related to the organisation of the liner shipping industry through its history. The liner conference is the most important organisational form which has a significant influence on the competitive structure of the liner shipping market.⁵

¹ For more details, see *Brodie*, Commercial Shipping Handbook (2006), p. 219 ff.; *Brooks*, Sea Change in Liner Shipping: Regulation and Managerial Decision-Making in a Global Industry (2000), p. 2 ff.; *OECD*, Final Report on Competition Policy in Liner Shipping (2002), p. 14; *Sullivan*, The Marine Encyclopaedic Dictionary (1996), p. 257; *White*, International Trade in Ocean Shipping Services: the United States and the World (1988), p. 19.

² *Global Insight/WIP/ISL*, The Application of Competition Rules to Liner Shipping (2005), paras. 106 ff. Cf. *OECD*, Final Report on Competition Policy in Liner Shipping (2002), p. 15.

³ *Ibid.*

⁴ As early as in 1980, *Bernhard J. Abrahamsson* was of the opinion that the very nature of liner shipping services consists in the oligopolistic market structure. In respect of explicit or tacit collusion as well as cartelisation in this sector, liner shipping industry is not different from other industries. For more details see *Abrahamsson*, International Ocean Shipping: Current Concepts and Principles (1980), p. 119 ff. This argument gains confirmation, almost 30 years later, by the European legislator in the review and repeal of block exemption for liner conferences in 2006, see the 3rd Recital of Regulation 1419/2006.

⁵ The other forms of organisation or cooperation among shipping lines include mergers of individual carriers, consortia, alliance, stabilization agreements as well as discussion or talking agreements. For more details on description and distinctness of such various organisational forms, see *OECD*, Report on Regulatory Issues in International Maritime Transport (2002); *OECD*, Final Report on Competition Policy in Liner Shipping

In the United Nations Convention on a Code of Conduct for Liner Conferences⁶ (the UNCTAD Liner Code), a liner conference is defined as “a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services”.⁷ It follows from this definition that a liner conference is a typical cartel, or so-called “hard-core” cartel,⁸ which restricts or eliminates the internal competition among the member carriers primarily through arrangements like common freight rates, capacity arrangements as well as penalties on non-compliance. Furthermore, the anti-competitive effects of liner conferences also have external aspects. On one side, outsiders or independents are attacked by using “fighting ships” or attracted by being offered favourable conditions for cooperation. On the other side, measures such as loyalty agreements or rebate systems are used in order to strengthen the control over shippers as customers and eliminate malpractices like secret rebates or individual service contracts of individual member carriers.⁹

However, the debates on whether competition rules shall be applicable to liner conferences and how such rules concerning liner conferences shall be implemented both in substantive and in procedural meaning have lasted as long as the history of liner conferences.¹⁰ Confronted with a market situation of “cut-throat competition” in the 1870s, the first liner conference was established on the UK – Calcutta (India) route, which started its operation in 1875.¹¹ The aim of this conference was to control competition amongst its members and to reduce competi-

(2002); *Dinger*, The Future of Liner Conferences in Europe (2004), p. 27 ff.; *Parameswaran*, The Liberalization of Maritime Transport Services (2004), p. 35 ff.

⁶ The United Nations Convention on A Code of Conduct for Liner Conferences, concluded at Geneva on 6 April 1974, in: 1334 United Nations – Treaty Series (1983), pp. 15–43.

⁷ The first paragraph in Chapter I of Part One of the UNCTAD Liner Code.

⁸ *Basedow*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1546, Rn. 35; *Benini/Bermig*, The Commission Proposes to Repeal the Liner Conference Block Exemption (2006), p. 44; *Jaspers*, The TACA Judgment: Lessons Learnt and the Way Forward (2004), p. 34.

⁹ For a general introduction of the structure of liner conferences as well as their anti-competitive characteristics, see *Dinger*, The Future of Liner Conferences in Europe (2004), p. 43 ff.; *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 18 ff.; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 16 ff.

¹⁰ For the historical overview of the emergence and development of liner conferences, see *Dinger*, The Future of Liner Conferences in Europe (2004), p. 21 ff.; *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 15 ff.; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 3 ff.

¹¹ *Herman*, Shipping Conferences (1983), p. 7 ff.; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 22.

tion from outsiders.¹² With the establishment of instruments like common tariffs as well as sailings arrangements and the introduction of further measures like loyalty agreements or rebates or a refund system, the model of liner conferences spread very quickly all over the world.¹³

Complaints of such an organisational form of carriers and governmental investigations on this issue occurred at the early stage of the development of liner conferences already. The complaints came from two sources, shippers, on one side, and carriers who were not admitted to the conference on the other side.¹⁴ These complaints touched upon some of the monopolistic aspects of liner conferences, i.e. freight rates fixing, allocating sailings, pooling trade as well as fighting ships etc.,¹⁵ and then gave rise to public inquiries into the legality and justification of the existence of liner conferences by the governments on both sides of the Atlantic, namely in Britain and the U.S.¹⁶

In Britain, in 1906, the Royal Commission on Shipping Rings was appointed and came out with its report after three years in 1909. The Royal Commission's report was divided into two parts: a majority decision and a minority decision.¹⁷ The majority decision concluded that the conference system, as a whole, did not operate to the detriment of the British economy. A system of checks and balances was inherent in the conference itself, i.e. the internal competition among the member lines. Outside competition from independent carriers and the common actions taken by shippers secured the phenomenon from abusing its powers in an unreasonable manner. The majority decision recognized the advantages of the conference system, i.e. the stability of freight rates and the regularity of service, and concluded that the advantages of the conferences were substantially dependent on the tying arrangements, the deferred rebates, or some other system which was equally effective. On the contrary, the minority decision concluded that the con-

¹² *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 22.

¹³ *Ibid.* See also *Marx*, *International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 47; *Davies*, *British Shipping and World Trade: Rise and Decline: 1820–1939* (1985), p. 59.

¹⁴ *Herman*, *Shipping Conferences* (1983), p. 8 ff.; *Marx*, *International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 45 ff.

¹⁵ A classical case in Britain is *The Mogul S.S. Co. v. McGregor, Gour and Co. and Others*, [1885] 15 Q.B.D. 476. Other examples in the U.S., such as *Syndikats Rhederi, U.S. v. Hamburg-American S. S. Line et al.*, 216 F. 791 (S.D.N.Y. [1914]), *U.S. v. American-Asiatic Steamship Company, et al. and U.S. v. Prince Line Ltd., et al.*, 242 U.S. 537 [1917].

¹⁶ *Herman*, *Shipping Conferences* (1983), p. 10; *Marx*, *International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 49.

¹⁷ Report of the Royal Commission on Shipping Rings (London: HMSO, 1909), five volumes, Cd. 4668–70, 4685–86. For more details on the organisation, members and divergence in opinions of this royal commission, see *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 23; Cf. *Herman*, *Shipping Conferences* (1983), p. 11; *Marx*, *International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 50 ff. and p. 62 ff.; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 23 ff.

ference system did not necessarily supply regular and adequate services, and the stable rate was not such a big advantage because it was usually higher than competitive rates. The majority decision did not consider legislation as a solution to control the powers of the conferences, but recommended the formation of shippers' organisations for the purpose of negotiation with conferences as collective representatives of the users of conferences services. The majority decision further recommended that the Board of Trade (now the British Department of Trade) should keep conference practices under review by demanding the filing of conference agreements with it and the publication of their tariffs. Although the minority group demanded more stern action by the authorities to avoid monopoly abuses, the minority group suggested neither the abolishing of the conference system, nor any legislation which might prohibit or restrict tying devices.

In the U.S., in 1912, a Congressional Committee, the House of Representatives Merchant Marine and Fisheries Committee, under the chairmanship of Representative Joshua Alexander, undertook the task of inquiring into the modes and practices of shipping conferences. In a situation different from that for the Royal Commission on Shipping Rings in Britain, the Alexander Committee (named after its chairman) had to carry out an investigation and assessment especially against the background of the strict antitrust laws and enforcement in the U.S. Among many factors that had influence on the conclusion of the Alexander Committee, the findings of U.S. courts of antitrust enforcement on liner carriers as well shipping conferences played an essential role. It is remarkable that the U.S. Supreme Court held in *U.S. v. American Asiatic S.S. Co., et al. and U.S. v. Prince Line Ltd, et al.*¹⁸ that shipping conferences were not, *per se*, a violation of the antitrust laws. The construction of the Sherman Act prohibited only unreasonable restraint of trade. A violation of the Sherman Act is not established unless there is some proof of actual unreasonable interference with the natural course of trade. Finally, the Alexander Committee published a report¹⁹ (Alexander Committee Report) and came to the conclusion that

“shipping conferences, if honestly and fairly conducted, will bring greater regularity and frequency of service, stability and uniformity of rates, economy in cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity and equal treatment of shippers through the elimination of secret arrangements and under-handed methods of discrimination.”

The Alexander Committee Report further took into account the national industry policy and came to the conclusion that dissolving the conferences would cause

¹⁸ Judgment *U.S. v. American-Asiatic Steamship Company, et al. and U.S. v. Prince Line Ltd., et al.*, 242 U.S. 537 [1917] (Certiorari denied by the Supreme Court of the U.S., 22 January 1917).

¹⁹ House Committee on The Merchant Marine and Fisheries, 63rd Cong., 2D Sess., Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade 415–21 (1914). (Recommendations quoted in full with approval in H.R.Rep. No. 659, 64th Cong., 1st Sess. 27–31 (1916) and in S. Rep. No. 689, 64th Cong., 1st Sess. 7–11 (1916)).

direct damage to the U.S. shipping industry since it would have to operate under inferior conditions compared to other nations' fleets. Thus, the Alexander Committee Report recommended to let the conferences operate and to be exempted from the antitrust laws. However, in order to ensure "fair conduct" the Alexander Committee Report recommended government regulation. It was suggested that the Interstate Commerce Commission (ICC) should have jurisdiction over the activities of the shipping conferences operating in the foreign commerce of the U.S. The conferences should file their agreements with the ICC that would have the authority to cancel, modify, or approve those agreements. The criterion for disapproval should be based upon whether or not the agreements were detrimental to the U.S. commerce. The Alexander Committee Report also recommended that tariffs should be published; that deferred rebates and fighting ships should be outlawed; that the ICC should have the authority to investigate, on its own initiative, matters concerning these subjects; and that if needed, the ICC could order the disbanding of a conference.

It is interesting to compare the implementation of the public inquiry on both sides of the Atlantic. At the time of the Report of the Royal Commission on Shipping Rings, the beginning of the twentieth century, Britain was "the Workshop of the World" and a maritime superpower.²⁰ However, the Royal Commission's recommendations were not implemented in England, probably because of the strong position the carriers held in this maritime nation.²¹ The historical background for the Alexander Committee Report was that the U.S. was not yet a maritime power but the first industrial country that adopted antitrust rules and carried out strict antitrust enforcement. The outcome of the Alexander Committee's recommendation was the establishment of a unique system in the American antitrust environment that permitted the existence of liner conferences under a regulatory scheme.²² About two years afterwards, the Shipping Act was passed in the U.S. Congress in September 1916. The spirit of the Alexander Committee's recommendation pervaded the Shipping Act of 1916.²³

The endeavour on both sides of the Atlantic about one century ago, to try to establish a competition regulation of liner conferences, shows parallels with the subject discussed in this thesis: liner conferences under the contemporary regime

²⁰ For a historical review, see *Davies, British Shipping and World Trade: Rise and Decline: 1820–1939* (1985), p. 39 ff., especially in respect of liner conferences, see p. 58 ff.

²¹ *Herman, Shipping Conferences* (1983), p. 11; *Marx, International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 67.

²² *Herman, Shipping Conferences* (1983), p. 13; *Zerby, Regulating Ocean Shipping in the U.S.A.* (1984), p. 47 ff.; *Dinger, The Future of Liner Conferences in Europe* (2004), p. 168.

²³ *Marx, International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (1953), p. 67. The Shipping Act of 1916, 39 Stat. 728. Instead of authorizing the ICC, a new agency was established, the U.S. Shipping Board who was given the jurisdiction and power to regulate and control the shipping conferences in the foreign commerce of the U.S.

of competition regulation in the European Community (EC) and the People's Republic of China (PRC).²⁴

Like the transatlantic trade across the Atlantic, Europe-Asia trade is one of the three main trades accounting for a major market share of liner shipping traffic.²⁵ Already in 1879, the "China Conference"²⁶ has been established on this trade route. As trade between Europe and Asia grew, the "China Conference" attracted an increasing number of lines and continued to expand and finally grew into the Far Eastern Freight Conference (FEFC)²⁷ which controls several subsidiary liner conferences and has a significant influence in the liner shipping market on the Europe-Asia trade route.²⁸ On the two ends of this trade route, the regimes of competition regulation of liner conferences are, somewhat similar to the situation in the early 1900s on both sides of the Atlantic, not much in accordance with each other.

The EC, since its founding in 1957, aims at establishing a system ensuring that competition in the internal market is not distorted.²⁹ Today, the EC has a very comprehensive system of competition law with its competition theories, enactments, enforcement and many remarkable decisions of individual cases. Competition regulations on liner shipping industry implement, on one side, the general EC competition rules;³⁰ on the other side, the enactments on liner conferences as well

²⁴ In this thesis, the term "PRC" is used excluding the Special Administration Areas of Hong Kong and Macau.

²⁵ Parameswaran, *The Liberalization of Maritime Transport Services* (2004), p. 34.

²⁶ The so-called "China Conference" was named "Agreement for the Working of the China and Japan Trade, Outwards and Homewards". This liner conference was set up by six shipping lines, five British and one French. The document was signed on 29 August 1879.

²⁷ By the early 1900s the FEFC consisted of three main conferences, the Far East Outward Conference, the Far East Homeward Conference, and the Straits Homeward Conference, with members from Britain, France, China, Germany, Japan, Austria, Holland, Denmark, Russia and Italy among the members of the various Conferences that were the constituent parts of the FEFC. The FEFC continued to grow, and in the mid-1970s had 28 Members from 18 states. The consolidation in the liner shipping industry and the investment required for containerisation have reduced the number of members to the current 15 Lines which represent the major trading nations in Asia and Europe. In 2002 it was estimated that the Lines had a slot total of 147 fully cellular vessels with a capacity of 630,500 on board slots, operating on the trades between Asia and Europe, and carried 6,075,000 TEUs in total on the trade.

²⁸ The FEFC is now the largest conference worldwide and covers the region of North Europe, the Mediterranean, and Asia from the Northern border of Myanmar to the north of Japan. For more details see *von Hinten-Reed/Chipty/Morton*, *A Study of the Impact of FEFC* (2004).

²⁹ Article 3(g) EC.

³⁰ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, "French Merchant Seamen"), [1974] E.C.R. 359, in this case the ECJ affirmed for the first time that the "fundamental rules of the EC Treaty" are applicable to the sector of transport in general and hereby also to the maritime transport sector. ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, "Nouvelles Frontières"), [1986]

as related case law constitute an essential part of the sector-specific regulation and significantly contribute to the development of the EC competition law as a whole.³¹ In the PRC as a big developing country in the course of transformation from the previous soviet model of a planned economy, the substantive competition legislation began only with the introduction of the “socialist market economy” in 1993.³² Confined by the transformation process as well as the fundamental political and economical order, the development of competition legislation in the PRC has followed a tortuous course both in the area of general competition rules and in that of sector-specific competition regulation. Until now, it can still hardly be argued that a systematic competition regime has been established in the PRC. The same holds also for sector-specific competition regulation of liner conferences.³³

It is interesting to note that the present background for comparison of competition regulation between the EC and the PRC is different from the one on both sides of the Atlantic in the early 1900s. The PRC is a maritime giant for its big national merchant fleet.³⁴ However, the industry policy of “national champion” has not realized the dream of the Chinese to be a maritime power. The EC pursues a strict competition policy while its liner shipping industry has reached a leading position in the whole industry around the world.³⁵ Nevertheless, further significant

E.C.R. 1425, in this case the ECJ further declared that the competition rules constitute part of the general rules of the EC Treaty and are applicable to maritime transport. For more details, see below Chapter II A. III.

³¹ As regards the enactments, Regulation 4056/86 on liner conferences and other regulations for maritime industry such as consortia etc. belong to the important block exemption regulations pursuant to Article 81(3) EC and constitute essential part of the secondary competition rules of the EC. As regards the effects of the case law, a significant example is ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafrá-Lines A/S v. Commission*), [2000] E.C.R. I-1365. In this case, the ECJ not only confirmed the application of Article 82 EC on collective dominance from the point of view of the development of Community competition rules, but also directly refers to the interpretation of collective dominance in respect of liner conferences. For more details, see below Chapter VI A. I. 6. b.

³² For an overview of the Chinese competition legislation, see below Chapter II B. II. 1.

³³ For more details, see below Chapter II B. I. 2.

³⁴ The statistic data shows that COSCO, one of the Chinese State-owned shipping enterprises, has 150 ships with 446,075 TEUs, while another big State-owned shipping enterprise, China Shipping, has 102 ships with 462,989 TEUs. Totally, the Chinese national carriers control 9.5% of the global fleet and orderbook and account for 7.2% of the whole market share in 2005. See *Global Insight/WIP/ISL, The Application of Competition Rules to Liner Shipping* (2005), paras. 109 ff. and 119 ff.

³⁵ Four out of the top five carriers worldwide are European carriers and of these four carriers, three are EU based and control 33% of global liner capacity. European carriers dominate liner shipping trades world-wide and have a strong position on all international trade routes not only on EU trades, while Chinese carriers control 9.5% of the global fleet and orderbook. There is virtually no liner shipping industry based in North America. Between 2000 and 2005, European carriers have increased their global capacity share in liner shipping. During the same period the share of Chinese, Japanese and

developments have been seen at both ends of the Europe-Asia trade route: the EC has adopted Regulation 1419/2006³⁶ on 25 September 2006 which repeals the twenty-year-old block exemption for liner conferences, while the PRC finally adopted the first Anti-Monopoly Law (AML) on 30 August 2007³⁷ which ended almost twenty-year suspicion, opposition and compromise concerning this legislative project.

This thesis on comparative analysis of liner conferences under the contemporary regime of competition regulation in the EC and the PRC is divided into seven chapters: Chapter I demonstrates the historical development of maritime policy and of the regulatory regime of liner conferences in the EC and the PRC. Chapter II centres on the relation between general competition rules and sector-specific regulation in the field of liner conferences in the two different jurisdictions, with the focus on compatibility and applicability. On this basis, the scope of application of the sector-specific regulation of liner conferences is discussed in Chapter III. Chapter IV discusses whether and how antitrust exemptions or exceptions for liner conferences are constructed in the EC and the PRC. Chapter V focuses on the procedural rules of specific regulatory regimes and casts light on the enforcement of substantive competition rules for liner conferences. In view of the ongoing development and the latest competition legislation in the EC and the PRC, Chapter VI links past and future: theoretical or empirical critiques to the existing regulation regimes are discussed from a historical view; and then a perspective for the future regulation will be discussed in the light of the new regime. Finally, a summary of this study can be found in Chapter VII.

other South East Asian carriers has decreased, although containerized exports from Far East have tripled since 1995. For more details, see European Commission Staff Working Document, *Impact Assessment*: Annex to the Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, COM (2005) 651 final of 14 December 2005, paras. 98 ff.

³⁶ Council Regulation (EC) No. 1419/2006 of 25 September 2006 repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, O.J. 2006 L 269/1.

³⁷ Anti-Monopoly Law [反垄断法], adopted at the 29th Session of the Standing Committee of the 10th NPC on 30 August 2007 and will be effective as of 1 August 2008.

Chapter I: Maritime Policy and Regulation

A. Maritime Policy and Regulation in the EU

I. The First Stage: From the Ground of the EEC to the Adoption of the UNCTAD Liner Code

1. European “Self-Regulation”

The Treaty of Rome came into force in 1958 and laid down the provisions on transport policy in Title IV of Part Two (now Title V of Part Three of the EC Treaty). Title IV contained eleven articles (Articles 74 to 84, now Articles 70 to 80 EC), only one paragraph of which was devoted to maritime and air transport, namely Article 84(2) (now Article 80(2) EC), and the rest to land transport.¹ On one side it showed the then focus of European transport policy on the various forms of land transport such as railway transport, road transport and inland waterway transport, since the six original Member States were all continental countries, who prioritized land transport services.² On the other side, it reflected the ten-

¹ For a detailed survey of legislative history and interpretation, see *Erdmenger*, Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt (1962), p. 77 ff. For more details on the origin of the European policy on maritime transport, see *Close*, Article 84(2) EEC: the Development of Transport Policy in the Sea and Air Transport Sector (1980), p. 196 ff.; *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 188.

² *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 4. See also *Basedow*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1520, Rn. 1; *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 188; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 99. There are also other arguments to explain the vagueness of transport policy in the EC Treaty of Rome. For instance, it is argued that shipping is an international business that calls for a worldwide regulation of the sector, and this prevented the EC from acting unilaterally regarding its shipping policies. Another argument is that international conventions had been created by international bodies such as the International Maritime Organisation, ratified and implemented by national governments, and to which most of the European Member States were signatories before the setting up of the EC in 1957. Cf. *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 188.

dency of self-regulation in the maritime policy, even a long time after the enlargement of the EC.³

This characteristic of self-regulation in maritime industry, especially in respect of liner conferences, derived from various historical and political reasons, and adapted and transformed itself into the later Community maritime legal framework. First, from the point of view of historical development, the European countries traditionally had a *laissez-faire* approach⁴ in the regulation of the maritime industry for a long time until the mid-1970s, which granted liner conferences and their members the freedom from the application of competition regulation.⁵

Second, in respect of the political background, this tendency of self-regulation in maritime industry was related to the strong demand and influence of political reservation of Member States, which mainly contributed to the lengthy lack of consensus on the common transport policy since the establishment of the EC.⁶ Transport in EC countries was characterised by strong intervention of Member States which argued distinctive features of the transport sector⁷ and put emphasis on controlling the main competitive aspects of the transport markets such as access, prices and capacity while indirectly trying to support national carriers and protect them from international competition.⁸

Third, this strong political influence, also in conjunction with the traditional tendency of self-regulation in maritime transport in Member States, fundamentally

³ As to the issue of “self-regulation” as an instrument for self-controlling system in the form of liner conferences, see *Abrahamsson*, *International Ocean Shipping: Current Concepts and Principles* (1980), p. 121; *Erdmenger*, *Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt* (1995), p. 390 ff. As to the “self-policing”, see *Jack*, *Self-Policing of Ocean Shipping Conferences* (1968), p. 724 ff. Cf. *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 45 ff.

⁴ For more details on the reluctance of European governments to regulate liner shipping, see *Bredima-Savopoulou/Tzoannos*, *The Common Shipping Policy of the EC* (1990), p. 62 ff. For a historical review of non-consistent development and difference of maritime shipping policy in various European countries, especially before the Second World War, see *Davies*, *British Shipping and World Trade: Rise and Decline: 1820–1939* (1985), p. 60 ff. For a brief demonstration after the Second World War, see *Erdmenger*, *Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt* (1995), p. 391 ff.

⁵ Such self-regulation is also described as “*unregulation*” with the criticism to the long historical situation in European countries in which there existed a complete lack of economic and regulatory control over carriers in respect both to the administrative regulation and to the private rules of conduct. For more details see *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 46 ff.

⁶ *Basedow*, *Verkehrsrecht und Verkehrspolitik als Europäische Aufgabe* (1987), p. 12 ff.; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), Verkehr; A., p. 1482, Rn. 1 and 2.

⁷ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), Verkehr; A., p. 1482, Rn. 1.

⁸ *Bredima-Savopoulou/Tzoannos*, *The Common Shipping Policy of the EC* (1990), p. 37 ff.; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 99. For a general review of political intervention in shipping industry, see *Ademuni-Odeke*, *Shipping in International Trade Relations* (1988), p. 217 ff.

contributed to the adaptation and transformation of the self-regulation policy into the later maritime legal framework, primarily to the regulation of liner conferences in Regulation 4056/86.⁹ In respect of the substantive provisions of Community competition rules, the legislation of Regulation 4056/86 suffered from a lack of critical analysis of the nature and activities of liner conferences.¹⁰ It has been argued that the Commission wished to obtain powers of control and sanction as soon as possible¹¹ and deliberately accelerated the legislation of Regulation 4056/86 without in-depth critical analysis as in other sectors.¹² The Commission did not have the opportunity, *vice versa*, did not need to have a comprehensive study of liner conferences from the very first and to decide what would be the best system for the implementation of Community competition rules in maritime transport. A regulation system had been set down in the 1979 Brussels Package which essentially served as acceptance and implementation of the UNCTAD Liner Code in the EC.¹³ The Commission's work was only to compose the appropriate legal music to fit the political words of the Package.¹⁴ Accordingly, Regulation 4056/86 was in line with the UNCTAD Liner Code. On the primary arguments in favour of liner conferences the conferences were accepted as traditional organization of worldwide liner shipping and received recognition as part of the EC block exemption system. In respect of the procedural provisions of Community competition rules, Regulation 17¹⁵ provided for a centralized notification system with the focus on *ex ante* competition control before Regulation 1/2003¹⁶ replaced Regulation 17 with a decentralized legal exception system with focus on *ex post* competition control.

⁹ Council Regulation (EEC) No. 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 [now 81 and 82] of the Treaty to maritime transport (liner shipping conferences), O.J. 1986 L 378/4.

¹⁰ *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 256.

¹¹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 141.

¹² Generally, on application of Article 81(3) EC, the Commission and the Community courts must look at the different possible effects that the agreement or restrictive practice in question may have in the future. As for block exemption, they must analyse both the real past effects of agreements or practices that are intended to be authorised in the future, as well as precedents of individual application of the rule to the type of agreements or practices in question. In general, the Commission will not adopt a block exemption without previously having evaluated at least once, on an individual basis, the agreement in question. The block exemptions under Regulation 4056/86, adopted by the Council following the Commission's proposal, are a notable exception. For a general survey of block exemption pursuant to Article 81(3) EC, see *Ellger*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Art. 81 Abs. 3 EGV; D., p. 434, Rn. 332 ff. For a specific analysis on Regulation 4056/86, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 298.

¹³ For more details, see below Chapter I A. I. 3.

¹⁴ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 141.

¹⁵ Council Regulation (EEC) No. 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty, O.J. 1962 13/204.

¹⁶ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003 L 1/1.

The block exemption regime in Regulation 4056/86 granted liner conferences the advantages of legal block exemption without negative clearance and insofar differentiated from the regime in Regulation 17 and anticipated the regime in Regulation 1/2003.¹⁷ To a certain extent, the characteristic of self-regulation in liner conferences resulted in that there came no remarkable changes to the procedural enforcement of Community competition rules in the maritime transport sector after the new system was adopted by Regulation 1/2003.¹⁸

2. Development of Common Policy in Maritime Transport: Inside and Outside

The formulation of a Community common policy in maritime transport started slowly and witnessed several crucial development events in the 1970s. The initial move towards the development of a European maritime policy was made after the first enlargement of the EC in 1973, with the accession of Denmark, Ireland and the United Kingdom, and with a further push by the accession of Greece in 1981.¹⁹ With the geographical change of the Community, maritime and air transport became as important as land transport. The Community maritime policy thus started to develop in 1974 and was shaped by three main objectives: the promotion of safety at sea, the protection of Community fleets against unfair practices by carriers of third countries and, above all, acceptance of the system of shipping conferences in liner trade as a way of organising the market.²⁰

Another important development was the declaration by the European Court of Justice (ECJ) in *French Merchant Seamen*.²¹ The ECJ used the opportunity in this case to resolve the long existing controversy concerning the “universality” of the EC Treaty and stated clearly that the general provisions of the EC Treaty were applicable to the totality of economic activities and also to the transport sector as a whole and, more specifically, to maritime transport,²² even though no common transport policy had been developed at that time. Consequently, another question arose. Since the fundamental and general rules of the EC Treaty are applicable to liner conferences, Community competition rules as part of the fundamental and general rules of the EC Treaty should also be applicable to the regulation of liner

¹⁷ For more details, see below Chapter V A. I. and II.

¹⁸ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1484, Rn. 5.

¹⁹ *Bredima-Savopoulou/Tzoannos*, The Common Shipping Policy of the EC (1990), p. 74 ff.; *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 188. For a detailed survey of political-economic background, see *Farantouris*, European Integration and Maritime Transport (2003), p. 79 ff.

²⁰ *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 16; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 99.

²¹ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, “*French Merchant Seamen*”), [1974] E.C.R. 359.

²² *Ibid.*, paras. 32 and 33.

conferences. This question was, however, not answered in *French Merchant Seamen* but later in *Nouvelles Frontières*.²³

Finally, it should be necessary to put the development of Community common policy in maritime transport into the context of improvement of the regulation of liner conferences. Besides the shipping legislation and antitrust enforcement in the maritime transport sector on the other side of the Atlantic,²⁴ the developing countries were increasingly dissatisfied with the traditional regime on liner conferences.²⁵ They condemned the cartelistic feature of liner conferences and strongly put forward their desire to control liner conferences and to strengthen their participation in the world maritime transport market.²⁶ The opinions and desires of the developing countries were channelled through the Secretariat General and the Maritime Transport Committee of the United Nations Conference on Trade and Development (UNCTAD) which was set up in 1964, and contributed essentially to the codification of conduct rules of liner conferences:²⁷ the UNCTAD Liner Code.²⁸

3. The UNCTAD Liner Code and the Brussels Package

The UNCTAD Liner Code was signed in Geneva on 6 April 1974. Its main feature is the cargo sharing rule of 40:40:20 which requires that those shipping lines, which are the national lines of the countries between which the trade in question is conducted, shall obtain equal shares in the freight and volume of the trade, while third country shipping lines are entitled to carry a significant part, i.e. 20%, of the

²³ ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, “*Nouvelles Frontières*”), [1986] E.C.R. 1425. For more details, see below Chapter II A. III.

²⁴ For a detailed survey of the maritime legislation in the U.S., see *Nesterowicz*, *The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping* (2005), p. 56 ff.; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 47 ff.

²⁵ *Erdmenger*, *Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt* (1995), p. 393 ff.; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), Verkehr; C., p. 1520, Rn. 2; *Brinkmann*, *Der UNCTAD-Verhaltenskodex für Linienkonferenzen* (1993), p. 20 ff. See also Declaration on the Establishment of a New International Economic Order, Resolution Adopted by the General Assembly During its Sixth Special Session 9 April–2 May 1974. General Assembly, Official Record: Sixth Special Session, Supplement No. 1 UN-Document A/9559 S. 3, 7. For more details see *Kang/Findlay*, *Regulatory Reform in the Maritime Industry* (2000), p. 157; *Ademuni-Odeke*, *Shipping in International Trade Relations* (1988), p. 15 ff.

²⁶ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 58 ff.

²⁷ *Erdmenger*, *Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt* (1995), p. 387 ff. and p. 393. For more details see *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 55 and p. 63 ff.

²⁸ As to the development history of the UNCTAD Liner Code, see *Brinkmann*, *Der UNCTAD-Verhaltenskodex für Linienkonferenzen* (1993), p. 40 ff.; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 66.

trade.²⁹ The UNCTAD Liner Code takes the form of multilateral international convention binding on those countries which decide to adopt or accede to it.³⁰

However, differences of opinions arose between the Member States of the EC, since the EC did not formally take part in the deliberations or take a position on the UNCTAD Liner Code.³¹ The Commission could not even coordinate the reaction of the Member States because of the absence of a common maritime policy at that time,³² and then the Commission lacked the necessary authority to impose a common position. In view of the possible problems of compatibility between the UNCTAD Liner Code and the EC Treaty, especially the conflict between the sharing rule of 40:40:20 in the UNCTAD Liner Code and the non-discrimination principle in the EC Treaty,³³ the Commission submitted four proposals³⁴ to the European Council with the aim of keeping Member States from signing or ratifying the UNCTAD Liner Code until a common position within the Community could be adopted. The fourth proposal of the Commission in 1979 was finally adopted and constituted the final text of Council Regulation 954/79 which was known as the Brussels Package.³⁵

The Brussels Package does not directly compel the Member States to accede to or ratify the UNCTAD Liner Code, but merely outlines a common position which all Community Member States should adopt in the case of accession or ratification

²⁹ Article 2(4) of the UNCTAD Liner Code. For a detailed survey, see *Brinkmann*, *Der UNCTAD-Verhaltenskodex für Linienkonferenzen* (1993), p. 105 ff.

³⁰ For more details on the UNCTAD Liner Code, see *Brinkmann*, *Der UNCTAD-Verhaltenskodex für Linienkonferenzen* (1993), p. 53 ff.

³¹ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 100.

³² On 30 June 1975 Belgium, France and Germany signed the UNCTAD Liner Code. However, their signature were accompanied by a declaration stating that ratification could only take place under the condition that their obligations arising out of the EC Treaty of Rome would not be violated. See *Bredima-Savopoulou/Tzoannos*, *The Common Shipping Policy of the EC* (1990), p. 75; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 100 ff.; *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 59.

³³ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1521, Rn. 5.

³⁴ The first three proposal have been published by the Commission: (1) COM (74) 1112 final of 17 July 1974; (2) COM (75) 112 final of 14 March 1975; (3) COM (75) 302 final of 17 June 1975. See *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 101, Fn. 552. The fourth proposal has been published in the Official Journal of the European Communities: Commission Proposal concerning the ratification of Member States, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 1978 C 35/3. For more details see *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 100 ff.; *Power*, *EC Shipping Law* (1992), pp. 287–288.

³⁵ Council Regulation (EEC) No. 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 1979 L 121/1.

against other contracting States of the UNCTAD Liner Code.³⁶ From the point of view of outside relations, the EC demonstrated a political gesture of goodwill towards developing countries by facilitating the entry into force of a potentially universal instrument favourable to the interests of those countries;³⁷ and at the same time the Brussels Package protects the fundamental principles of Community competition rules such as the indiscrimination principle by requiring the non-application of cargo sharing rules of the UNCTAD Liner Code within the Community and for trades between the Community and other OECD³⁸ countries.³⁹ As to inside relations, it was correctly argued that the Brussels Package became an instrument to accelerate the coordination and formulation of a common maritime policy of the Member States and the Community, and constituted the first important element of it as the UNCTAD Liner Code worked as a trigger and a pretext for the formulation of a Community common policy.⁴⁰

II. The Second Stage: 1986 Package of Regulations

1. The 1985 Commission Communication on Shipping Policy

As a Milestone, Regulation 954/79 sought to resolve the problem of incompatibility of the UNCTAD Liner Code with the EC Treaty, especially on cargo sharing rules, and laid down certain “reservations” as compulsory obligations imposed on the Member States which would ratify the UNCTAD Liner Code.⁴¹ As the first important Community maritime transport policy measure, Regulation 954/79,

³⁶ The Brussels Package aimed at delimiting the application of the cargo sharing rule of the UNCTAD Liner Code within the trade with developing countries and maintaining free economic principles in conference trades between EC and OECD countries, so that the traditional functioning of the self-regulated liner conferences and the regime of free access to cargo would not be excessively undermined by the UNCTAD Liner Code. See *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1522, Rn. 6; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 60; *Erdmenger*, in: *von der Groeben/Thiesing /Ehlermann*, Kommentar zum EU-/EG-Vertrag, Article 80 EG, p. 1983, Rn. 48; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 105. Cf. *Vermote*, The Application of the United Nations Liner Code within the European Communities (1988), p. 571 ff.

³⁷ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 60; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 102.

³⁸ The Organisation for Economic Cooperation and Development.

³⁹ See the 3rd Recital of Regulation 954/79. Also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 102.

⁴⁰ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 103.

⁴¹ For instance, according to Article 2(a) of Regulation 954/79, Article 2(4) of the UNCTAD Liner Code which lays down the cargo sharing rules of 40:40:20, is not applicable in intra-Community conference trade or in conference trade between the EC and other OECD countries which are parties to the UNCTAD Liner Code, on a reciprocal basis. See *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 107.

however, did not contain a Community common maritime policy.⁴² Furthermore, Regulation 954/79 offered no answer to the problem of potential infringement of Articles 81 and 82 EC (*ex* Articles 85 and 86). As stated in the 5th Recital of Regulation 954/79, liner conferences may still infringe Community competition rules and Community legislation covering the application of competition law to maritime transport was therefore deemed necessary for the future.⁴³ The Commission contemplated to develop a more coherent overall framework for Community maritime transport policy and submitted a proposal on 16 October 1981⁴⁴ to the European Council, but without reaction from the European Council. After the European Parliament in 1983 initiated proceedings against the European Council for inaction in respect of the development of a Community transport policy and the ECJ declared in its ruling that the European Council was in breach of the EC Treaty,⁴⁵ the Commission issued, on 19 March 1985, a Communication⁴⁶ to the European Council which was also named the “1985 Shipping Memorandum”⁴⁷ and constituted the first attempt of the Commission to develop a maritime policy and propose a framework for Community policy in a systematic way.⁴⁸ Although in the 1985 Shipping Memorandum the recession of Community maritime industry was also seriously taken into consideration, the Commission held a more constructive opinion in view of defence of the Community interest, which preferred a commercial and competitive regime rather than protectionist measures designed to counter the protectionism of third countries.⁴⁹ As a whole, the 1985 Shipping

⁴² Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1522, Rn. 6.

⁴³ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 61.

⁴⁴ Commission Proposal for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, COM/81/423 final of 13 October 1981, O.J. 1981 C 282/4.

⁴⁵ ECJ 22 May 1985, case 13/83 (*European Parliament v. Council of the European Communities*), [1985] E.C.R. 1513, para. 70. For a comprehensive and detailed survey, see *Basedow* (ed.), *Europäische Verkehrspolitik* (Tübingen: Mohr, 1987), particularly see *Erdmenger*, *Die Gemeinsame Binnenverkehrspolitik der EG nach dem Gerichtshofurteil vom 22 Mai 1985*, pp. 83–108.

⁴⁶ Commission Communication and Proposals to the Council: Progress towards a Common Transport Policy – Maritime Transport, Draft of the Council laying down the requirements in the application of Articles 85 and 86 of the Treaty, COM (85) 90 final of 19 March 1985, O.J. 1985 C 212, published also in *Bulletin of the European Communities*, Supplement 5/85.

⁴⁷ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 116 ff. For a comprehensive introduction, see *Farantouris*, *European Integration and Maritime Transport* (2003), p. 272 ff.; *Power*, *EC Shipping Law* (1992), p. 148 ff.

⁴⁸ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 116.

⁴⁹ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1522, Rn. 6. See also *Paixão/Marlow*, *A Review of the European Union Shipping Policy* (2001), p. 190; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 116.

Memorandum contained six specific proposals⁵⁰ for Council Regulation in respect of maritime transport. The discussion and the legislative endeavour on these proposals resulted in the 1986 Package of Regulations which the European Council adopted on 22 December 1986.⁵¹

2. The 1986 Package of Regulations

The 1986 Package of Regulations constituted the basis of the European maritime common policy and consisted of four Regulations.⁵² Regulation 4055/86⁵³ applied the principle of freedom to provide services solely to international maritime transport, and not to transport between ports in the same Member States.⁵⁴ The reservations concerning cabotage on the part of Member States could thus be maintained until Regulation 3577/92⁵⁵ was adopted, which aims at the gradual abolition of such restriction on the free provision of maritime cabotage services.⁵⁶ Regulation

⁵⁰ The following specific proposals were put forward in the 1985 Shipping Memorandum: (1) Draft Council Regulation concerning coordinated action to safeguard free access to cargoes in ocean trades, O.J. 1985 C 212/2; (2) Draft Council Regulation applying the principle of freedom to provide services to maritime transport, O.J. 1985 C 212/4; (3) Draft Council Decision amending Council Decision 77/587/EEC of 13 September 1977 setting up a consultation procedure on relations between Member States and third countries in shipping matters and on action relating to such matters in international organizations, O.J. 1985 C 212/7; (4) Draft Council Directive concerning a common interpretation of the concept of “national shipping line”, O.J. 1985 C 212/8; (5) Amendments to the proposal for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, O.J. 1985 C 212/9; and (6) Draft Council Regulation on unfair pricing practices in maritime transport, O.J. 1985 C 212/12.

⁵¹ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 62.

⁵² As to a general introduction to the content of the four regulations, see *Bredima-Savopoulou/Tzoannos*, The Common Shipping Policy of the EC (1990), p. 173 ff. Cf. also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1522, Rn. 7.

⁵³ Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, O.J. 1986 L 378/1.

⁵⁴ For an overview of Regulation 4055/86, see *Farantouris*, European Integration and Maritime Transport (2003), p. 224 ff.; *Power*, EC Shipping Law (1992), p. 198 ff.

⁵⁵ Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), O.J. 1992 L 364/7.

⁵⁶ For a detailed survey of Regulation 3577/92, see *Farantouris*, European Integration and Maritime Transport (2003), p. 272 ff.; *Greaves*, EC transport law (2000), p. 80 ff.; *Herzig*, Verordnung (EWG) Nr. 3577/92 des Rates zur Anwendung des Grundsatzes des freien Dienstleistungsverkehrs auf den Seeverkehr in den Mitgliedstaaten (Seekabotage) (2004); *Parameswaran*, The Liberalization of Maritime Transport Services (2004), p. 166 ff.

4057/86⁵⁷ sought to level the playing field for European carriers in relation to third country carriers with the emphasis on their unfair pricing practices. Regulation 4057/86 established a procedure under which the EC may impose, in specific circumstances, corrective (or compensatory) charges on freight rates offered by liner vessels of third countries operating on Community routes, if they have been found to cut rates due to State intervention and thus distort the shipping market.⁵⁸ Regulation 4058/86⁵⁹ allowed the Community to take coordinated action when any measures taken by a third country, or agents acting for it, limits or threatens to limit free access for Community shipping lines or vessels registered in the European Union (EU) to the maritime trade of that country.⁶⁰ The last but not least is Regulation 4056/86 which constituted the core piece of Community legislation on maritime transport and established a framework of competition rules in this sector. On the one hand, Regulation 4056/86 granted a block exemption for liner conferences from the application of Article 81(1) EC. On the other hand, it provided for procedural provisions for the application of Community competition rules to maritime transport and empowered the Commission to investigate and impose penalties against infringement of the primary Community competition rules. As a whole, the Community was trying, through the implementation of the 1986 Package of Regulations, to ensure that competition was not distorted, by providing conditions necessary to keep trades open so as to benefit transporters and shippers, and by discouraging unfair pricing practices.⁶¹

III. The Third Stage: New Dimensions and Legislation on Consortia

1. New Dimensions of Maritime Policy

After the 1986 Package of Regulations no significant further progress was made on maritime policy until June 1989 when the Commission worked out two documents in respect of different subject-matters in the maritime transport sector. The first document identified the problems faced by the Community shipping industry and contained proposals⁶² for legislative developments which included the issues

⁵⁷ Council Regulation (EEC) No. 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, O.J. 1986 L 378/14.

⁵⁸ For more details on Regulation 4057/86, see *Elsner, Wolfgang*, Unfair Pricing in Maritime Transport (1988); *Power*, EC Shipping Law (1998), p. 371 ff.; *Yi/Choi*, The Community's Unfair Pricing Practices in the Maritime Transport Sector (1991).

⁵⁹ Council Regulation (EEC) No. 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades, O.J. 1986 L 378/21.

⁶⁰ For an overview of Regulation 4058/86, see *Farantouris*, European Integration and Maritime Transport (2003), p. 253 ff.; *Greaves*, EC transport law (2000), p. 73 ff.; *Parameswaran*, The Liberalization of Maritime Transport Services (2004), p. 165 ff.; *Power*, EC Shipping Law (1998), p. 393 ff.

⁶¹ *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 190.

⁶² A future for the Community shipping industry: measures to improve the operating conditions of Community shipping, COM (89) 266 final of 3 August 1989.

of cabotage, the European Ship Register (EUROS)⁶³ and a legal definition of a shipowner, while the second document referred to the issue of subsidies which was related to the creation of a level playing field of competition.⁶⁴ Consequently, since the 1990s the Commission's effort to work out an integrated and uniform Community policy in maritime transport could be mainly viewed in two new areas: the first was the improvement on market access and competition; the second concerned the safety of shipping transport and maritime pollution.⁶⁵ Especially in relation to the first, besides the liberalization in the field of cabotage, short sea shipping⁶⁶ and the integration of ports and infrastructure,⁶⁷ a more significant legislative development in relation to liner conferences was the justification of a block exemption on consortia, which will be looked into briefly as follows.

2. Legislation on Consortia

Since consortia constitute an important stage of development of the cooperation of carriers beyond liner conferences, the Commission also emphasized the need for legislation in this field shortly after the adoption of Regulation 4056/86. The European Council raised the issue of consortia during discussions on the Commission's proposal for a competition regulation in 1984.⁶⁸ Officially, a report was submitted by the Commission in 1990 to the Council to express the necessity of a block exemption for consortia.⁶⁹ This report was followed by a proposal of the

⁶³ *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p.191 ff. For a comprehensive survey of the EUROS, see *Farantouris*, European Integration and Maritime Transport (2003), p. 182 ff.; *Power*, EC Shipping Law (1992), p. 176 ff.

⁶⁴ Guidelines on State aid to shipping companies, SEC (89) 921 final of 3 August 1989. For more details see *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 190 ff.

⁶⁵ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1523, Rn. 8 *et seq.*; *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 192 ff.

⁶⁶ For a survey of short sea shipping, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1523, Rn. 9; *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001), p. 193 ff. Generally see *Voionmaa*, Short Sea Shipping (1997), p. 172 ff.

⁶⁷ Both the legislative effort on short sea shipping and ports is related to the Commission's concern about the importance of multimodal transport operation and the reduction of pollution caused by road transport. For more details, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1523 ff., Rn. 9 and 10.

⁶⁸ *Kreis*, Liner Services: The Block Exemptions and Inter-modal Transport (1997), p. 135 ff. For an overview on the legislative history of consortia, see *Dinger*, The Future of Liner Conferences in Europe (2004), p. 65 ff.; *Power*, EC Shipping Law (1992), p. 391 ff.

⁶⁹ Report on the possibility of a group exemption for consortia agreements in liner shipping, COM (90) 260 final of 18 June 1990. For a general survey of the report, see *Power*, EC Shipping Law (1992), p. 395 ff.

Commission for an enabling Council Regulation.⁷⁰ The Council accepted the reasoning that consortia as joint-service agreements between liner shipping companies with the aim of rationalizing their operations by means of technical, operational and/or commercial arrangements could help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress. To this extent, the legalization of these agreements is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community.⁷¹ Subsequently, the Council adopted Regulation 479/92⁷² and empowered the Commission to issue a block exemption for consortia in the form of a Regulation.

The first draft of such a Regulation was published for comments by the Commission on 1 May 1994. In its final version, Regulation 870/95⁷³ was adopted by the Commission on 20 April 1995 and entered into force on 22 April 1995. In line with the provision of Regulation 479/92,⁷⁴ Regulation 870/95 had a period of validity for five years⁷⁵ and expired on 21 April 2000. In its working document,⁷⁶ the Commission came to the conclusion that Regulation 870/95 “has worked well in practice” and should be renewed with only minor modifications.⁷⁷ Consequently, Regulation 823/2000⁷⁸ was adopted on 9 April 2000 and had also a validity period of five years until 25 April 2005.⁷⁹ Before the expiration of Regulation 823/2000 the Commission adopted Regulation 611/2005.⁸⁰ In this Regulation the

⁷⁰ Proposal for a Council Regulation (EEC) of on the Application of Article 85(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between shipping companies, COM (90) 260 final of 18 June 1990, O.J. 1990 C 167/9.

⁷¹ See the 4th and 6th Recitals of Regulation 479/92.

⁷² Council Regulation (EEC) No. 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 1992 L 55/3. For a detailed survey of Regulation 479/92, see *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 66 ff.; *Kreis*, *Liner Services: The Block Exemptions and Inter-modal Transport* (1997), p. 135 ff.; *Power*, *EC Shipping Law* (1992), p. 397 ff.

⁷³ Commission Regulation (EC) No. 870/95 of 20 April 1995 on the application of Article 85(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No. 479/92, O.J. 1995 L 89/7.

⁷⁴ Article 2(1) of Regulation 479/92.

⁷⁵ Article 13 of Regulation 870/95.

⁷⁶ Working Paper of DGIV: Report on Commission Regulation No. 870/95 (28 January 1999), available online at <http://ec.europa.eu/comm/competition/antitrust/report_comm_reg_870_95_en.pdf>.

⁷⁷ *Ibid.*, paras. 144–145.

⁷⁸ Commission Regulation (EC) No. 823/2000 of 19 April 2000 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2000 L 100/24.

⁷⁹ Article 14 of Regulation 823/2000.

⁸⁰ Commission Regulation (EC) No. 611/2005 of 20 April 2005 amending Regulation (EC) No. 823/2000 on the application of Article 81(3) of the EC Treaty to certain cate-

Commission upheld the block exemption for consortia on the one hand, and supported an extension of Regulation 823/2000 for another five years. On the other hand, the Commission considered the yet pending review of Regulation 4056/86 and required some amendments with the aim of making “Regulation 823/2000 more suitable for its purpose”.⁸¹ With the adoption of Regulation 611/2005, the validity period of Regulation 823/2000 was extended to 25 April 2010.

IV. The Fourth Stage: Review of Regulation 4056/86 and Adoption of Regulation 1419/2006 and Regulation 1490/2007

1. The OECD Report 2002

A very important trigger for the Community’s initiative to review Regulation 4056/86 is the OECD Final Report on Competition Policy in Liner Shipping 2002 (the OECD Report 2002).⁸² In this report the OECD examined the development of the sector of liner shipping and especially the current situation in an economic analysis. The OECD considered that the sector of liner shipping is not any more “unique” than other industries and rejected its enjoyment of more favourable treatment in respect of the competition regulation.⁸³ The OECD came to the conclusion that there is no evidence that antitrust exemptions for price fixing and rate discussions provide benefits which outweigh their disadvantages for transport users, and recommended its member countries to consider removing antitrust exemptions for price fixing and rate discussions.⁸⁴

Additionally, the OECD Report 2002 recognised the necessity and legitimacy of some forms of cooperation between carriers such as global alliances and consortia. As a second-best option, it was recommended that governments should review their existing legislation in such a way as to create conditions favourable to confidential individual contracts.⁸⁵ After consultation with both sides of carriers and shippers, the OECD Report 2002 particularly put forward four points in respect of the legislative recommendation, i.e. 1) both sides agree to the concept of direct negotiations between shippers and carriers; 2) both sides, based on their acceptance of the U.S. Ocean Shipping Reform Act of 1998 and individually ne-

gories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2005 L 101/10.

⁸¹ The 3rd Recital of Regulation 611/2005.

⁸² *OECD*, Final Report on Competition Policy in Liner Shipping (2002). See European Commission Discussion Paper of 16 June 2004 on Review of Regulation 4056/86, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/review_4056.pdf>, paras. 4–5. For a detailed survey of the consideration factors for the review necessity, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 144 ff.

⁸³ *OECD*, Final Report on Competition Policy in Liner Shipping (2002), para. 187.

⁸⁴ *Ibid.*, paras. 201 ff. See also *Stragier*, Recent Developments in EU Competition Policy in the Maritime Sector (2002), p. 9.

⁸⁵ *Stragier*, Recent Developments in EU Competition Policy in the Maritime Sector (2002), p. 9.

gotiated rates and conditions, are not averse to contractually protecting (and rendering confidential) key elements of those negotiations; 3) both sides are relying less on collectively agreed rates and conditions; 4) both sides view that carriers can and should seek to coordinate with each other the operational aspects of providing liner services. Furthermore, the OECD Report 2002 worked out three principles on which the future competitive organisation of maritime transport market should be based: freedom to negotiate, freedom to protect contracts, and freedom to coordinate operations.⁸⁶

2. The Review of Regulation 4056/86

The Commission initiated the review of Regulation 4056/86⁸⁷ in its Consultation Paper on 27 March 2003 (the Consultation Paper 2003).⁸⁸ In the Consultation Paper 2003 the Commission justified the review pointing to changes in market conditions, developments in other jurisdictions, international developments and the modernisation of the procedural enforcement of Community competition rules.⁸⁹ It should also be noted that, besides the OECD Report 2002 and the reasoning in the Consultation Paper 2003, the acceleration of liberalisation in the transport sector had already been required in the Lisbon Agenda⁹⁰ which the Commission would have to follow.⁹¹

⁸⁶ OECD, Final Report on Competition Policy in Liner Shipping (2002), paras. 205–215. See also Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1526, Rn. 12.

⁸⁷ The documents in relation to the review of Regulation 4056/86 are available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>>. For a detailed survey of the review of Regulation 4056/86, see *Schmidt*, Formalisierte Ineffizienz: Globaler Seeverkehr in der Brüsseler Zwangsjacke? (2003); *Schmidt*, Europäisches Kartellrecht im globalen Kontext: Grenzen exterritorialer Anwendung am Beispiel der international Linienschiffahrt (2004); *Schmidt*, Wunderdroge oder Büchse der Pandora: EG-Kartellrecht pur im globalen Linienschiffahrtsverkehr (2005); *Schmidt*, Behauptungen ohne Beweis: Harte Kritik am Weißbuch der Europäischen Kommission zur VO 4056/86 (2005); *Schmidt*, Totale „Deregulierung“ des internationalen Seeverkehrs mit der EU? (2006).

⁸⁸ See Commission Press Release IP/03/445 of 27 March 2003: Commission starts consultation on application of competition rules to maritime transport. European Commission Consultation Paper of 27 March 2003 on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/en.pdf>>.

⁸⁹ Commission Consultation Paper of 27 March 2003 on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, paras. 14–28.

⁹⁰ The Lisbon Agenda, European Council, March 2000, SN/100/1/100.

⁹¹ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1527, Rn. 13; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 144.

The process of the review would take three steps:⁹² 1) information collection including a survey of public opinion, a technical working paper and the organisation of public hearing for interested parties; 2) a White or Green Paper of the Commission concerning an in-depth study of subject matters and the preliminary policy conclusions; 3) a proposal for the amendment to the existing liner shipping legislation and consequently the adoption of a new Regulation.

After receipt of initial public contributions in response to the Consultation Paper 2003 and the public hearing,⁹³ the Commission elaborated a Discussion Paper⁹⁴ and then the White Paper.⁹⁵ The White Paper pointed out the changes of market conditions and technology since the adoption of Regulation 4056/86 and discussed whether the justification of a block exemption in Regulation 4056/86 is still valid in the current market situation. Special emphasis was put on the role of independent carriers who had significantly contributed to outside competition and had become more and more important. The Commission also recognised in the White Paper that forms of cooperation between carriers and shippers such as consortia and global alliances gained more importance. The White Paper also highlighted the significant growth of individual confidential contracting between carriers and shippers by means of individual service contracts.⁹⁶

In conclusion, the Commission found that the liner conference block exemption no longer fulfilled the four cumulative conditions of Article 81(3) EC which are necessary for it to remain valid. While proposing to repeal the block exemption laid down in Regulation 4056/86, the White Paper also considered possible alternatives, such as the so-called discussion agreements which allow members of liner conferences and outsiders to organise their competition on the market in relation to freight rates and other service arrangements in a flexible manner. In response to the White Paper, the European Liner Affairs Association (ELAA) put forward a

⁹² *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 145. See also *Stragier*, Recent Developments in EU Competition Policy in the Maritime Sector (2002), p. 10 ff.

⁹³ On 4 December 2003, the Competition Directorate General of the Commission held a public hearing on the review of Regulation 4056/86. Documents related to the public hearing are available online at <<http://ec.europa.eu/comm/competition/antitrust/others/maritime/>>.

⁹⁴ Commission Discussion Paper of 16 June 2004 on Review of Regulation 4056/86, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/review_4056.pdf>.

⁹⁵ Commission Press Release IP/04/1213 of 13 October 2004: Commission adopts White Paper on liner shipping conferences. White Paper of 13 October 2004 on the review of Regulation 4056/86, applying the EC competition rules to maritime transport (2003/COMP/18).

⁹⁶ White Paper of 13 October 2004 on the review of Regulation 4056/86, applying the EC competition rules to maritime transport (2003/COMP/18), para. 5. *Hjalmarsson/Lista*, EU Competition Law and Maritime Transport (2005), p. 3.

proposal⁹⁷ for a detailed information exchange system to enable the improvement of capacity planning both for the short and long term.⁹⁸ However, shippers, represented by the European Shippers' Council (ESC),⁹⁹ were opposed to the ELAA Proposal with the view that the existing block exemption for consortia has allowed for cooperation necessary for the supply of reliable services by carriers.¹⁰⁰ The Commission took a more moderate approach by recognising that some parts of the ELAA Proposal seemed to comply with Community competition rules,¹⁰¹ and endeavouring by drafting Guidelines to work with carriers to develop a possible alternative information exchange system.¹⁰²

3. Adoption of Regulation 1419/2006

Though confronted with much criticism and debates around the abolition of the block exemption and the introduction of an alternative regime, a Proposal for a Council Regulation repealing Regulation 4056/86¹⁰³ was submitted on 14 December 2005 by the Commission to the European Council for adoption. After the

⁹⁷ *ELAA*, Proposal for a New Regulatory Framework for the Liner Shipping Industry (2005). This proposal is based on the ELAA Proposal 2004, see *ELAA*, Review of Regulation 4056/86: Proposal for a New Regulatory Structure (2004).

⁹⁸ *Evans*, The Future Regulatory Framework for Liner Shipping (2006), p. 6.

⁹⁹ *ESC*, ESC Response to the ELAA Proposal for a New Regulatory Framework for the Liner Shipping Industry (2005).

¹⁰⁰ *Evans*, The Future Regulatory Framework for Liner Shipping (2006), p. 6.

¹⁰¹ Commission: Issues raised in discussions with the carrier industry in relation to the forthcoming Commission Guidelines on the Application of Competition Rules to Maritime Transport Services, available online at <http://ec.europa.eu/competition/antitrust/legislation/maritime/issues_paper_shipping.pdf> (September 2006), paras. 74 ff.; see also *Evans*, Competition Developments Affecting the Maritime Sector (2005), p. 4; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 146, Fn. 790.

¹⁰² Such Guidelines should explain how Community competition rules apply to a possible information exchange system in this sector and should help smooth the transition for liner shipping carriers to a more competitive environment. See *Evans*, The Future Regulatory Framework for Liner Shipping (2006), p. 10 ff. As to the attitude of the European Commission, see Commission Memo: Proposal to repeal block exemption for liner shipping conferences – Frequently Asked Questions (MEMO/05/480 of 14 December 2005); Commission Press Release: Competition: Commission proposes repeal of exemption for liner shipping conferences (IP/05/1586 of 14 December 2005); Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services (COM (2005) 651 final of 14 December 2005).

¹⁰³ Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, COM (2005) 651 final of 14 December 2005.

European Parliament issued in July 2006 a report which supported the Commission's proposal,¹⁰⁴ the European Council agreed unanimously on 25 September 2006 to repeal Regulation 4056/86 and to adopt Regulation 1419/2006.¹⁰⁵ According to Regulation 1419/2006, a transitional period of two years was provided for until the final ending of the block exemption laid down in Regulation 4056/86 takes effect on 18 October 2008.¹⁰⁶ This transitional arrangement is intended to allow carriers to adapt to the new situation and to give time to the Member States to review their international obligations, on the one hand. On the other hand, the Commission paid close attention to the possible conflict of law between different jurisdictions. Although the Commission was of the opinion that the risk of a conflict of international laws was unlikely,¹⁰⁷ it has put much effort into bilateral contacts with other jurisdictions of not only the Community's major trading partners such as the U.S., Canada and Japan but also the developing countries such as India and China, and explained its repealing the block exemption for liner conferences throughout the review process,¹⁰⁸ since it would be the first jurisdiction to take this move. As an interim measure prior to the publication of the guidelines before the expiration of the transitional period, the Commission published an "issues paper" in October 2006 discussing the main questions that the possible system of information exchange agreements might raise in relation to the application of Community competition rules.¹⁰⁹ On 14 September 2007, the Commission published a draft of the Guidelines on the application of Article 81 EC to maritime transport services,¹¹⁰ and adopted the final version¹¹¹ on 1 July 2008 as an integral part of the Commission's Action Plan to implement the Integrated Maritime Policy.¹¹²

¹⁰⁴ Commission Memo: Repeal of block exemption for liner shipping conferences – frequently asked questions, MEMO/06/344 of 25 September 2006.

¹⁰⁵ For a survey of the impact of Regulation 1419/2006 on the EC liner industry, see *Schmidt*, EU-Kartellrecht nunmehr pur im internationalen Seeverkehr (2007).

¹⁰⁶ Article 1 of Regulation 1419/2006.

¹⁰⁷ *Benini/Bermig*, The European Commission Proposes to Repeal the Liner Conference Block Exemption (2006), p. 47 ff.

¹⁰⁸ *Ibid.* For more details on the Commission's activities in legislative explanation and information exchange with other jurisdictions, see *Evans*, The Future Regulatory Framework for Liner Shipping (2006), p. 11 ff.

¹⁰⁹ Commission: Issues raised in discussions with the carrier industry in relation to the forthcoming Commission Guidelines on the Application of Competition Rules to Maritime Transport Services, available online at <http://ec.europa.eu/competition/antitrust/legislation/maritime/issues_paper_shipping.pdf> (September 2006).

¹¹⁰ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3.

¹¹¹ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2008 C 245/2. For a detailed survey of the Guidelines, see below Chapter VI A. II. 3.

¹¹² See Commission Press Release IP/08/1063 of 1 July 2008: Antitrust: Commission adopts Guidelines on application of competition rules to maritime transport services. See also Commission Press Release IP/07/1463 of 10 October 2007: An ocean of opportunity: Commission proposes Integrated Maritime Policy for the EU, and Commis-

4. Adoption of Regulation 1490/2007

In accordance with Regulation 1419/2006, the Member States which are party of the UNCTAD Liner Code¹¹³ will be prevented from fulfilling their obligations under this Code and others will no longer be in a position to ratify, approve or accede to this Code. Then it comes to the question of the legal status of Regulation 954/79¹¹⁴ in the Community legal system, which will consequently become inapplicable.¹¹⁵ On 30 January 2007, the Commission put forward a proposal relating to repealing Regulation 954/79.¹¹⁶ After consulting the European Economic and Social Committee,¹¹⁷ the European Parliament and the European Council adopted jointly Regulation 1490/2007¹¹⁸ on 11 December 2007 to repeal Regulation 954/79 with effect from the end of the transition period provided for in Regulation 1419/2006, that is to say on 18 October 2008.¹¹⁹

B. Maritime Policy and Regulation in China

The development of China's maritime policy and legislation has been a slow, tortuous and frustrating process, and reflected the corresponding characteristics of the whole country's transformation and evolution in politics and economies: from

sion MEMO/07/403 of 10 October 2007: Questions and Answers on an Integrated Maritime Policy for the European Union.

¹¹³ By now seventeen Member States of the EC are party of the UNCTAD Liner Code. They are Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Italy, Malta, the Netherlands, Norway, Portugal, Romania, Slovakia, Spain, Sweden and the UK. For the impact on the European relationship with third countries after the abolition of Regulation 4056/86 and Regulation 954/79, see *Munari*, Liner Shipping and Antitrust after the Repeal of Regulation 4056/86 (2009), pp. 53–55.

¹¹⁴ For a detailed analysis of Regulation 954/79, see above Chapter I A. I. 3.

¹¹⁵ The 5th Recital of Regulation 1490/2007. See Commission's Proposal for a European Parliament and Council Regulation repealing Council Regulation (EEC) No. 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, COM (2006) 869 final – 2006/0308 (COD) of 30 January 2007, p. 3.

¹¹⁶ Commission's Proposal for a European Parliament and Council Regulation repealing Council Regulation (EEC) No. 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, COM (2006) 869 final – 2006/0308 (COD) of 30 January 2007.

¹¹⁷ Opinion of the European Economic and Social Committee on the "Liner Conferences – United Nations Convention", COM (2006) 869 final – 2006/0308 (COD), O.J. 2007 C 256/62.

¹¹⁸ Regulation (EC) No. 1490/2007 of the European Parliament and of the Council of 11 December 2007 repealing Council Regulation (EEC) No. 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 2007 L 332/1.

¹¹⁹ The 5th Recital and Article 2 of Regulation 1490/2007.

socialist planned economy to socialist market economy, from self-isolation through the Open Door Policy to positive globalisation. The following analysis starts with a chronological description of the development of national maritime policy and legislation. This includes three stages: from the founding of the PRC in 1949 to the end of the Cultural Revolution in 1977; from the initiation of the Open Door Policy in 1978 to the accession of China into the World Trade Organization (WTO) in 2001; the development after China's WTO accession, focusing on the prevailing legislation and regulation on international maritime transport. A further research perspective is given to China's ratification of international conventions, since their legal status and application are not unquestionable.

I. China's Maritime Transport Industry: 1949–1977

After its founding, the PRC, just as the former Soviet Union and other traditional socialist countries, carried out a maritime policy under the socialist planned economy. In addition to the traditional interpretation of the socialist planned economy, China put particular emphasis on self-reliance which constituted a basic principle of China's maritime policy.¹²⁰ As a consequence, the early stage of China's maritime policy and the development of the maritime sector continued this national protectionist orientation and the rules of the socialist planned economy, which was also decisive for the future development of China's ocean fleet until the transformation period and after the WTO accession.

In this period, the whole national maritime industry was in fact operated by the State, since the government and enterprises in the socialist planned economy were the combination of policy subject and object.¹²¹ The main aim and function of China's maritime policy during this period primarily consisted in the protection and full support for the national ocean fleet.¹²² The State controlled every aspect of its maritime activities. None of the major maritime nations of the world, with the exception of the former Soviet Union, could approach the extent of China's comprehensive control over maritime matters.¹²³ Two aspects well demonstrate the characteristics of China's maritime policy in this period: the first is the initiation stage marked by the international cooperation and the charter of foreign vessels; the second dealt with a developing stage characterized by the establishment of a Chinese merchant fleet.¹²⁴

¹²⁰ "Self-reliance" means that a country should mainly rely on the strength and wisdom of its own people, control its own economic lifelines, make full use of its own resources, work hard, increase production, practice economy and develop its national economy step by step and in a planned way. See *Heine, China's Rise to Commercial Maritime Power* (1989), p. 1. *Mo, Shipping Law in China* (1999), p. 3.

¹²¹ *Sun/Zhang, The Chinese Shipping Policy* (1999), p. 93.

¹²² Cf. *Mo, Shipping Law in China* (1999), p. 2. Cf. *Sun/Zhang, The Chinese Shipping Policy* (1999), p. 93.

¹²³ *Heine, China's Rise to Commercial Maritime Power* (1989), p. 2.

¹²⁴ *Sun/Zhang, The Chinese Shipping Policy* (1999), p. 93.

1. Initiation of International Maritime Transport

On 1 October 1949, the PRC was established in Mainland China and the government of the Republic of China took refuge in Taiwan. Most Chinese vessels had either escaped to Taiwan or been seriously damaged or destroyed.¹²⁵ In 1950, the PRC flag merchant fleet consisted of only 77 ships of 1,000 gross tons (GT) or more and most of these were unserviceable.¹²⁶ Meanwhile, the western countries implemented a trade embargo against China. In order to develop maritime transport, on 1 November 1949, the Ministry of Communications (MOC) was set up by the Central Government of the PRC. In accordance with the Directive on the Unity of Shipping and Port Management,¹²⁷ the MOC was directly responsible for the management of the State-owned shipping company, shipping business and the control of freight rates.¹²⁸

However, the newly established PRC had no ability to organize its own maritime fleet.¹²⁹ So the initial development of maritime transport was based on cooperation with other socialist countries. For example, on 15 June 1951, China and Poland set up the Chinese-Polish Joint Stock Shipping Company in Tianjin¹³⁰ and the vessels flew the Polish flag.¹³¹ In July 1951, the former Czechoslovakia signed an agreement with China and was entrusted to operate two ocean-going vessels.¹³² Apart from the international cooperation in shipping services, the Chinese government chartered also foreign-flag vessels.¹³³ The China National Chartering Corporation (SinoChart) which was set up in 1955 was responsible for chartering

¹²⁵ *Heine, China's Rise to Commercial Maritime Power* (1989), p. 9; *Lauriat, China Shipping* (1983), p. 85; *Li/Ingram, Maritime Law and Policy in China* (2002), p. 2; *Muller, China as a Maritime Power* (1983), p. 58. In 1949, before the founding of the PRC, there were about 116 State-owned and private-owned shipping companies in China with a combined shipping capacity of about 1.16 million tonnes. Most of them were small companies running inland and short-distance transportation. The ocean-going vessels of the country had then a combined shipping capacity of only 120,000 tonnes. See *Mo, Shipping Law in China* (1999), p. 13.

¹²⁶ *Muller, China as a Maritime Power* (1983), p. 58.

¹²⁷ Directive on the Unity of Shipping and Port Management [关于统一航务港务管理的指示], issued by the Financial and Economic Committee of the Government Affairs Department on 26 July 1950.

¹²⁸ Article 3(2) No. 6 of the Directive on the Unity of Shipping and Port Management.

¹²⁹ *Sun/Zhang, The Chinese Shipping Policy* (1999), p. 93.

¹³⁰ *Ibid.*, p. 94.

¹³¹ In 1950s, a large proportion of the Polish merchant fleet engaged primarily in the China trade, acting in effect as the China's international fleet. In 1955, 24 Polish ships were so employed, a figure that declined to 14 by 1959. For more details, see *Roe, Chinese-Polish Co-operation in Liner Shipping* (2002).

¹³² The so-called entrustment of operation meant the Chinese vessels were operated by Czechoslovakia with full power, China only manned a certain number of seafarers. For the financial administration, Czechoslovakia settled accounts annually, and took 3% of the total revenue for the service of operation. See *Sun/Zhang, The Chinese Shipping Policy* (1999), p. 94.

¹³³ *Heine, China's Rise to Commercial Maritime Power* (1989), p. 10.

vessels on behalf of the China National Foreign Trade Transportation Corporation (SinoTrans).¹³⁴ By means of cooperation with socialist countries and chartering foreign vessels, China's international maritime transport developed rapidly. In 1958, the volume of foreign trade carried by sea totalled 11.58 million tonnes and was five times more than in 1952.¹³⁵

2. Establishment and Development of the National Maritime Merchant Fleet

Despite rapid increase of foreign trade at the end of the 1950s, only 20% of the total cargo volume was shipped by Chinese carriers. This resulted in losing a large amount of foreign currency.¹³⁶ Therefore, it was necessary to establish a Chinese national merchant fleet. In April 1961, as a State-owned shipping enterprise, the China Ocean Shipping Company (COSCO) was set up.¹³⁷ Meanwhile, the Chinese government made a shipping policy switch: from chartering foreign vessels to purchasing second hand vessels.¹³⁸ In 1975, the tonnage of the ocean-going fleet totalled more than five million and in 1976 the total volume shipped by the Chinese fleet accounted for about 70% of the total foreign trade volume. This not only ended the period of relying on chartering foreign vessels for ocean transport, but also laid a solid foundation for the later economic reforms to promote China's shipping industry. However, under the planned economy which could not reflect the real market demand, the Chinese national merchant fleet was in fact controlled by the State. The whole fleet was made up of ageing vessels, of an unsuitable composition, outmoded technology, rigid management and lack of economic vigour and market competition.¹³⁹

3. The First Battle with Liner Conferences

At the end of the 1950s, China began to charter more foreign vessels, because the severance of commercial relations with Japan led to increased trade with remoter lands. In 1960 the repatriation of Overseas Chinese from Indonesia caused another

¹³⁴ SinoTrans was established in 1955 under the Ministry of Foreign Economic Relations and Trade. After the socialization of private industrial and commercial industries was accomplished in 1956, all shipping companies existing before the founding of the PRC were merged into SinoTrans. Therefore, SinoTrans and its subsidiaries became the single general agency for import and export transport in China. For more details on the history of SinoTrans, see *Lu*, Research on the International Freight Forwarders (2004); *Gu*, Practice of the Foreign Trade Transport (1986), p. 13; *Heine*, China's Rise to Commercial Maritime Power (1989), p. 10; *Sun/Zhang*, The Chinese Shipping Policy (1999), p. 94.

¹³⁵ *Sun/Zhang*, The Chinese Shipping Policy (1999), p. 95.

¹³⁶ *Ibid.*

¹³⁷ For more details, see *COSCO*, COSCO History.

¹³⁸ In 1963, the Chinese government decided to purchase second hand vessels with the floating capital of the Bank of China to develop an ocean shipping fleet. See *Sun/Zhang*, The Chinese Shipping Policy (1999), p. 95.

¹³⁹ *Sun/Zhang*, Chinese Shipping Policy and the Impact of its Development (2002), p. 9 ff.

burst of chartering. Heavy imports of grain in subsequent years, together with a switch in Chinese trade from the former Soviet Union (with which much trade had gone by land) to more distant trade partners, brought about further chartering. Foreign shipping, especially conference lines were utilized more frequently.¹⁴⁰ At that time, the liner conferences in maritime transport had been in existence for almost a century, while the newly born PRC had neither a strong national merchant fleet nor experience of competition regulation of liner conferences. However, the Chinese government's monopoly of the foreign trade put it in a strong position for hard bargaining over freight rates upon the trades to and/or from Chinese ports.¹⁴¹ The shipping recession in 1957 made the international freight rates for the lease of vessels and liner freight rates decrease sharply. But the freight rates for China were high due to the monopoly of certain liner conferences.¹⁴² In order to protect Chinese shippers' interests, the Chinese government battled fiercely over freight rates with liner conferences to and from Chinese ports. As to coastal transport, the Chinese government ordered on 12 February 1958 to repeal unfair tariffs which liner conferences settled for the transport of Chinese cargoes and to implement new tariffs adopted by China.¹⁴³ In relation to ocean-going routes, liner conferences were forced to reduce freight rates on the Far-East/European lines by about 30% in 1959, until 1966 when COSCO adopted the "China Ocean Shipping Tariff" and the first battle of the Chinese government with liner conferences ended.¹⁴⁴

II. Development of Maritime Policy: 1978–2001

Since the introduction of the reform policy in 1978, China began to carry out a series of reform measures, primarily in the economy, and started a slow transformation from the traditional *Socialist Planned Economy* through the *Socialist Commodity Economy* to the *Socialist Market Economy*. The 14th National Congress of the Chinese Communist Party (CCP), held in 1992, announced that China planned to implement a socialist market economy¹⁴⁵ and clearly pointed out the

¹⁴⁰ For more details, see *Sun/Zhang*, *The Chinese Shipping Policy* (1999), p. 94 ff.; *Sun/Zhang*, *Chinese Shipping Policy and the Impact of its Development* (2002), p. 7 ff.

¹⁴¹ *Donnithorne*, *China's Economic System* (1967), p. 264. For a detailed survey of the tariff wars between China and liner conferences, see *Sun/Zhang*, *Chinese Shipping Policy and the Impact of its Development* (2002), p. 7.

¹⁴² *Sun/Zhang*, *The Chinese Shipping Policy* (1999), p. 94.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, pp. 94–95; *Sun/Zhang*, *Chinese Shipping Policy and the Impact of its Development* (2002), p. 7.

¹⁴⁵ "The purpose of the socialist market economic system, which China is going to establish, is, under the macro-control of the socialist state, to give full play to the basic role of the market in the allocation of resources; to ensure that economic activities are carried out in accordance with the law of value and adapted to the changes in relations between supply and demand; to use the lever of price and the competition mechanism to allocate resources to the places where they can produce the best economic results; to

significance of the market mechanism for the development of the national economy.¹⁴⁶ The second amendment to the Constitution of the PRC,¹⁴⁷ approved on 29 March 1993, states that “[t]he State implements a system of socialist market economy.”¹⁴⁸ China ultimately will abandon its planned economy (and that means, administrative management of the national economy) and replace it with a market economy (in which a market mechanism allocates resources and economic development, but under the State’s macroeconomic administration).¹⁴⁹

This transformation process covers all aspects of the Chinese economic system, especially the national industry policy, reform of State-owned enterprises (SOEs), opening access to markets, rebuilding of a legal system and acceleration of legislation on the economy administration. The dynamic process of transformation has led to and will continue to bring forth fundamental changes and restructuring of China’s socialist regime both in the economy and in politics. As part of this transformation, China’s maritime transport policy was revised and reformed, while China implemented a vigorous trade policy.¹⁵⁰ Consequently, it is necessary to look into the development of maritime policy and legislation in the period from the introduction of the reform policy in 1978 to China’s WTO accession in 2001, especially into the general industry policy in the maritime transport sector, the separation of state administration and SOEs, the efforts in legislation and administrative measures for opening access to markets, and finally the development of the Chinese national maritime fleet.

implement the system of selecting the superior and eliminating the inferior so as to give pressure and impetus to the enterprises; and to promote the timely adjustment of production and demand by taking advantage of the sensitivity of the market to various economic signals.” See *Jiang, Zemin*, Address at the Meeting of the 14th National Congress of the Communist Party of China (18 October 1992).

¹⁴⁶ *Wang*, The Prospect of Antimonopoly Legislation in China (2002), pp. 213–214.

¹⁴⁷ Constitution of the PRC [中华人民共和国宪法], adopted at the 5th Session of the 5th NPC and promulgated for implementation by the Proclamation of the NPC on 4 December 1982, and effective as of 4 December 1982. In 1988, 1993, 1999 and 2004, the Constitution of the PRC was revised and amended four times.

¹⁴⁸ Article 15 of the Constitution of the PRC (1982) provided that “[t]he State practices economic planning on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market. Disturbance of the orderly functioning of the social economy or disruption of the State economic plan by any organization or individual is prohibited.” According to the second amendment to the Constitution of the PRC (1993), it shall be revised to: “[t]he State implements a system of socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order.”

¹⁴⁹ *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 201 ff.

¹⁵⁰ *Cass/Williams/Barker*, China and the Reshaping of the World Trade Organization (2003), p. 2.

1. Industry Policy and Reform of SOEs in Maritime Transport Sector

a. General Review of Development

In 1974, a Chinese international container line service started trial operation on the route between China and Japan.¹⁵¹ On 26 September 1978, the COSCO's regular container line business started. A containership, the *PING XIANG CHENG*, under COSCO's Shanghai Branch sailed from Shanghai with goods in containers to Sydney, Australia, marking the beginning of China's international container liner service.¹⁵² China began to participate in the meetings held by the Comité Maritime International in 1974, and has been active in the international regulation of maritime and shipping matters ever since.¹⁵³ After two decades of effort, China had become a significant shipping country in the 1980s.¹⁵⁴ By the end of the 20th century, the total tonnage of the Chinese international maritime fleet was 36 million DWT, ranking fifth in the world. The China Ocean Shipping Company is amongst the ten top liner operators in the world, while the China Shipping Group is among the top 20. The competitive capability of Chinese international shipping enterprises in the international shipping market was significantly increasing.¹⁵⁵

In this period, the national maritime policy focused on the reform of the State-owned shipping enterprises for international maritime transport services. The concrete industry reform measures and the separation of governmental administration and enterprise management progressed gradually and constituted a continuous national policy in the maritime transport sector. As a whole, this gradual process could be divided into five steps: (1) releasing power and making the enterprises more beneficial (1978–1984); (2) reforming the system of profit and taxation (1984–1986); (3) changing the system of business responsibility through operation by contract (1987–1991); (4) transforming the operational system of enterprises (1991–1995); and (5) experimenting with establishing of a modern enterprise system (1995 up to now).¹⁵⁶

b. Industry Policy

The economic reform and transformation since 1978 had contributed significant changes to the national policy regarding state shipbuilding and purchasing vessels. In 1981, the Chinese government decided that shipping enterprises which were independent accounting units able to repay loans, including basic investments for buildings and vessels, were no longer financed out of the state budget; state investments in these enterprises were transformed into bank loans.¹⁵⁷ Later as the enterprises had difficulties repaying these loans, the central government decided in

¹⁵¹ *Gu*, Practice of the Foreign Trade Transport (1986), p. 103.

¹⁵² *COSCO*, COSO History.

¹⁵³ *Mo*, Shipping Law in China (1999), p. 3.

¹⁵⁴ *Ibid.*, p. 14.

¹⁵⁵ *Sun/Zhang*, Chinese Shipping Policy and the Impact of its Development (2002), p. 16.

¹⁵⁶ For more details see *Sun/Zhang*, Chinese Shipping Policy and the Impact of its Development (2002), p. 10 ff.

¹⁵⁷ *Sun/Zhang*, The Chinese Shipping Policy (1999), p. 96.

1984 that banks would provide low interest loans for building and purchasing vessels, extend the time limit for repayment and reduce taxes.¹⁵⁸

c. Separation of Governmental Administration and SOEs Management

The separation of governmental administration and enterprise management is a focus of reform of SOEs. According to the Reform Plan of the State Council (1998),¹⁵⁹ the MOC was reorganized and the shipping enterprises controlled by the MOC, i.e. COSCO, were separated from the MOC. In compliance with the Rules of Competence, Organization Construction and Personal Administration¹⁶⁰ of 18 June 1998, a merger of COSCO under the MOC and the Foreign Shipping Group¹⁶¹ under the former Ministry of Foreign Trade and Economic Cooperation (MOFTEC) was carried out and the reorganized COSCO Group was independent of the MOC and the MOFTEC, especially in respect of operation management, personal and financing administration.

Chinese administration of international maritime shipping enterprises changed from direct to indirect control. The administration shall serve the national maritime fleet by researching and issuing industry strategy, gathering and publishing market information, and promoting technical improvement. However, this separation of governmental administration and enterprise management and the independence of SOEs concern only the relation between the great SOEs and their previous superior ministries. All SOEs are still controlled by the central government, i.e. the State Council, and serve as tools to control the domestic market and to compete on the international market.

2. Sector Administration and Legislation in the Maritime Transport Sector

a. Administration Reform and Strengthening of Legislation

In the previous planned economy, administrative decisions and State intervention were the main measures used to regulate industry and its activities in China.¹⁶² That was true also for the maritime transport industry. Chinese maritime policy relied largely on administrative decisions and documents – the so-called *Red Title Document* – which required no formal procedure for adoption and could be changed flexibly according to political and social changes.¹⁶³ This was criticised as lack of transparency, legal certainty and predictability.¹⁶⁴ With the reforms in

¹⁵⁸ *Ibid.*

¹⁵⁹ Reform Plan of the State Council 1998 [国务院机构改革方案(1998年)], adopted at the 1st Session of the 9th NPC on 10 March 1998.

¹⁶⁰ Rules of Competence, Organization Construction and Personal Administration for the MOC [交通部职能配置、内设机构和人员编制规定] was adopted by the State Council on 18 June 1998.

¹⁶¹ 外运集团.

¹⁶² *Li/Ingram*, Maritime Law and Policy in China (2002), p. 5.

¹⁶³ *Ibid.*, p. 2.

¹⁶⁴ *Ibid.*, p. 4

the maritime shipping industry, especially the separation of governmental administration and enterprise management, China's international shipping policy-making and enforcement changed gradually but significantly. The functional ministries have lost the competence to manage the previous SOEs directly, but concentrate on general industry administration and strategic instruction as well as policy and operational support. This is increasingly carried out in the form of laws, administrative regulations and rules,¹⁶⁵ which makes Chinese administration of maritime shipping more and more transparent. Several formal laws have been adopted in this field during this period (1978–2001); such laws override administrative regulations and rules.¹⁶⁶

The first law was the Maritime Traffic Safety Law,¹⁶⁷ which, after years of preparation by a drafting committee established under the MOC, was adopted on 2 September 1983. The second was the Maritime Code¹⁶⁸ of 7 November 1992. The third was the Law of Special Procedure for Maritime Proceedings¹⁶⁹ of 25 December 1999.

The Maritime Traffic Safety Law primarily deals with the administrative provisions on traffic safety regulation and covers inspection and registration of vessels, personnel on vessels and installations, measures for safety protection, transport of dangerous goods, as well as sea rescue. The Law of Special Procedure for Maritime Proceedings provides for the jurisdiction of Chinese Maritime Courts and the particular procedural provisions¹⁷⁰ for maritime proceedings on the basis of the Law on Civil Procedure;¹⁷¹ it has no substantive provisions or procedural rules concerning competition regulation of liner conferences.

The most important legislation is the Maritime Code. The preparation of this law and the legislative discussion dated back to 1952 and has lasted nearly forty years.¹⁷² The first draft was completed in 1963. However, the legislative process

¹⁶⁵ *Heine*, China's Rise to Commercial Maritime Power (1989), p. 2.

¹⁶⁶ For more details see Chapter I B. II. 2.

¹⁶⁷ Maritime Traffic Safety Law [海上交通安全法], adopted at the 2nd Session of the Standing Committee of the 6th NPC on 2 September 1983 and effective as of 1 January 1984.

¹⁶⁸ Maritime Code [海商法], adopted at the 28th Session of the Standing Committee of the 7th NPC on 7 November 1992 and effective as of 1 July 1993.

¹⁶⁹ Law of Special Procedure for Maritime Proceedings [海事诉讼特别程序法] adopted at the 13th Session of the Standing Committee of the 9th NPC on 25 December 1999 and effective as of 1 July 2000.

¹⁷⁰ These provisions primarily deal with general matters, jurisdiction, preservation of maritime claims, maritime injunction, preservation of maritime evidence, maritime security, proceeding procedures, procedure for constitution of limitation fund for maritime claims, procedure for registration and satisfaction of claims, procedure for interpellation of maritime liens.

¹⁷¹ Law on Civil Procedure [民事诉讼法], adopted at the 4th Session of the 7th NPC on 9 April 1991, effective on the same date, amended at the 30th Session of the Standing Committee of the 10th NPC on 28 October 2007, effective on 1 April 2008.

¹⁷² *Zhu*, The Maritime Code of the People's Republic of China (1993), p. 176; *Mo*, Shipping Law in China (1999), p. 15.

was interrupted because of the Cultural Revolution from 1966 to 1976. The final draft was adopted in 1992 by the Standing Committee of the 7th National People's Congress (NPC) and the Maritime Code came into force on 1 July 1993.

The Maritime Code has 15 chapters and 278 articles and provides a basic framework for the general administration in the field of maritime transport.¹⁷³ After six articles containing general provisions in the first Chapter, the other fourteen chapters deal with the following topics:

- Vessels;
- Crew;
- Contract of Carriage of Goods by Sea;
- Contract of Carriage of Passengers by Sea;
- Charter Parties;
- Contract of Sea Towage;
- Collision of Vessels;
- Salvage at Sea;
- General Average;
- Limitation of Liability for Maritime Claims;
- Contract of Maritime Insurance;
- Limitation of Time for Maritime Claims;
- Conflicts of Law;
- Supplementary Provisions.

Notwithstanding these efforts of Chinese legislation, in contrast to China's pursuit of a continuous and consistent maritime policy aiming at opening market and competition, China's maritime legislation is not systematic. Most provisions set out only a general framework and provide no concrete rules for implementation. Therefore, their enforcement is difficult. They had to be supplemented by a host of regulations dealing with opening the market, market access, cargo reservation, port services as well auxiliary services. A brief overview will be given in the following sections.

b. Market Opening and Market Access

Market access and national treatment are the major components of the important adjustments in China's international shipping policy. The Chinese government adopted and promulgated a series of measures concerning market access and national treatment while complying in principle with the general practices in international maritime transport markets.

In April 1985, the Chinese government adopted a regulation¹⁷⁴ allowing foreign shipping enterprises to access, after government approval, the market of Chinese international transport in the form of joined ventures. On 20 June 1990, the MOC

¹⁷³ Zhang, Recent Maritime Legislation and Practice in the People's Republic of China (1994), p. 274.

¹⁷⁴ Provisional Measures on the Administration of International Shipping Companies [《从事国际海运船舶公司的暂行管理办法》], issued and effective on 11 April 1985 by the MOC, abolished on 1 March 2003.

issued the Provisions on the Administration of International Liner Services,¹⁷⁵ according to which foreign international shipping companies were allowed to engage in the operation of international liner shipping services in Chinese ports. As to national treatment, there would be no discrimination. In 1995 the MOC and the former MOFTEC jointly issued the Notice on the Establishment of Chinese Shipping Companies Wholly Foreign-Owned by Foreign Shipping Companies¹⁷⁶ and laid down concrete provisions on the qualifications for application, scope of operation, registration procedure and founding capital as well as administrative approval procedures. This Notice was partly revised by the Interim Measures for the Examination and Approval of Wholly Foreign-funded Shipping Companies.¹⁷⁷ In 1997 the MOC and the Ministry of Railways jointly issued the Rules on Administration of International Multimodal Container Transportation.¹⁷⁸ These Rules allowed foreign investment in the form of Sino-Foreign joint-ventures for international multimodal transportation services.

c. Cargo Reservation

“Preference cargo” is cargo reserved for national flag vessels in international trade either as a direct result of government involvement or indirectly because of the financial sponsorship of a program or guarantee provided by the government. China as the largest developing country carried out a dual system, i.e. cargo reservation and non-cargo reservation. Until the 1980s, China had national cargoes transported mainly by national vessels. Under this regime, Chinese foreign trade cargoes were allocated by the relevant central government departments. The individual shipping company just implemented the authorities’ instruction. At the same time, the Chinese government signed contracts with relevant countries on the basis of bilateral trade and transport agreements which included clauses on cargoes reserved for Chinese vessels. During this period, shipping enterprises were also encouraged to get cargoes by themselves, but for the national merchant fleet the cargo share of foreign trade was still 60%.

In 1988, the Chinese government abolished the policy of having national cargo reservation. National shipping companies all turned to get cargo through market practices, and the cargo owners could choose their carriers freely. Tariffs were left to be decided by the market. Now, only seven of fifty-one bilateral maritime

¹⁷⁵ Provisions on the Administration of International Liner Shipping [国际班轮运输管理规定], issued by the MOC on 20 June 1990 and effective as of 1 July 1990, abolished on 1 March 2003.

¹⁷⁶ Notice on the Establishment of Chinese Shipping Companies Wholly Foreign-Owned by Foreign Shipping Companies [关于外国船公司在华设立独资船务公司有关问题的通知], issued and effective on 12 December 1995 by the MOC and the MOFTEC jointly.

¹⁷⁷ Interim Measures for the Examination and Approval of Wholly Foreign-funded Shipping Companies [外商独资船务公司审批管理暂行办法], issued and effective on 28 January 2000 by the MOC and the MOFTEC jointly.

¹⁷⁸ Rules on Administration of International Multimodal Container Transportation [国际集装箱多式联运管理规则], issued by the MOC and the Ministry of Railway jointly on 14 March 1997 and effective on the same date, abolished on 2 December 2003.

agreements between China and other countries maintain cargo sharing.¹⁷⁹ Chinese authorities feel that cargo reservation clauses in bilateral agreements often are difficult to execute.¹⁸⁰ In view of these difficulties, China officially declared in 1996 that it would not include cargo sharing in future bilateral maritime agreements,¹⁸¹ and it has adhered to this commitment since.

d. Port Services

In 1985, the State Council issued the Interim Regulation on Preferential Treatment of Sino-Foreign Joint-Ventures in Port Construction¹⁸² which allowed and encouraged foreign investment in the form of Sino-Foreign Joint-Venture into port construction and commercial management.

From 1 April 1992, the Chinese government unified the port dues, loading and discharging fee, there was no discriminative treatment between Chinese and foreign operators. On 21 January 1994, the new port dues regulation (foreign trade part) was officially promulgated by the MOC. All vessels, Chinese or foreign registered, paid the unified port dues. Thus foreign vessels enjoyed national treatment for port services and the utilization of port facilities in Chinese harbours. In July 1992, the MOC promulgated a series of rules for market access at ports, by, e.g. allowing Chinese and foreign companies or investors to cooperate in operating loading and unloading, cargo storage, packing and unpacking and relevant domestic road transport.

By the end of 2001, China had opened more than 140 ports to foreign-flag vessels. Foreign tramps are free to enter these ports. If a shipping company wants to offer liner service for a particular sea route, it must obtain in advance the approval of the MOC, but this applies as well to domestic as to foreign carriers. At ports in China, foreign vessels have been afforded national treatment in all services, including, e.g., utilization of port equipment and supply of fuel and water. At present, almost all of the major container ports in China have been developed with the investment of foreign capital.

e. Auxiliary Services

As regards auxiliary services, besides the Provisions on the Administration of the International Shipping Agency¹⁸³ of 2 March 1990, the State Council issued the Provisions on the Administration of International Maritime Container Transport

¹⁷⁹ Agreements with Zaire, Algeria, Argentina, Bangladesh, Thailand, Brazil, and the U.S.

¹⁸⁰ *Li/Cullinane/Yan/Cheng*, Maritime Policy in China after WTO (2005), p. 80.

¹⁸¹ MOC, Report of China's Shipping (1999), Chapter VI. See also Article 4 (3)(a) of Agreement on Maritime Transport between the European Community and its Member States, of the one part, and the People's Republic of China, of the other part (EC Council Doc. No. 8388/1/02 REV 1, 30 September 2002).

¹⁸² Interim Regulation on Preferential Treatment of Sino-Foreign Joint-Ventures in Port Construction [关于中外合资建设港口码头优惠待遇的暂行规定], promulgated by the State Council on 30 September 1985 and effective on the same date.

¹⁸³ Provisions on the Administration of the International Shipping Agency [国际船舶代理管理规定], issued by the MOC on 2 March 1990 and effective as of 1 April 1990, abolished on 1 March 2003.

Services¹⁸⁴ on 5 December 1990. These Provisions set out the process of approval of establishing international container transport enterprises, and also allowed foreign investors to establish international container handling enterprises in Chinese ports in the form of joint ventures; foreign investors were also allowed to set up inland container freight terminals. As to national treatment, there would be neither discrimination nor privileges. The relevant legislation on auxiliary services issued afterwards includes the Measures on Approval of International Freight Transport Agencies with Foreign Investment¹⁸⁵ of 22 February 1995 which was repealed by the Rules on Approval of International Freight Transport Agencies with Foreign Investment¹⁸⁶ of 9 September 1996. Other relevant legislation includes the Regulation on Waterway Transportation,¹⁸⁷ the Implementation Rules of Regulation on Waterway Transportation,¹⁸⁸ the Implementation Rules on Provisions on Administration of International Container Transportation at Sea¹⁸⁹ as well as the Rules on Administration of International Multimodal Container Transportation.

3. The Chinese National Maritime Fleet

The Chinese government has exhibited a high degree of consistency in building a strong national merchant marine. It has not deviated from supplying funds over the past quarter century for the purchase of new and second-hand ships and for building and modernizing shipyards and ports, despite the economic and political upheavals that have racked China. Neither has the government lost sight of its objective of reducing and eventually eliminating chartering of foreign-owned ships so that foreign exchange can be conserved. That it has not been successful as yet¹⁹⁰ is due primarily to the imbalance between China's burgeoning growths in her foreign trade and the slower though substantial rate of growth of COSCO's owned fleet. The China Ocean Shipping Company, as a super-large-scale enter-

¹⁸⁴ Provisions on the Administration of International Maritime Container Transport Services [海上国际集装箱运输管理规定], promulgated by the State Council on 5 December 1990 and effective on the same date, amended on 18 April 1998, abolished on 1 January 2002.

¹⁸⁵ Measures on Approval of International Freight Transport Agencies with Foreign Investment [外商投资国际货运代理企业审批办法], issued by the MOFTEC on 22 February 1995 and effective on the same date, abolished on 9 September 1996.

¹⁸⁶ Rules on Approval of International Freight Transport Agencies with Foreign Investment [外商投资国际货物运输代理企业审批规定], issued by the MOFTEC on 9 September 1996 and effective on the same date.

¹⁸⁷ Regulation on Waterway Transportation [水路运输管理条例], promulgated by the State Council on 12 May 1987 and effective as of 1 October 1987, amended on 3 December 1997.

¹⁸⁸ Implementation Rules of Regulation on Waterway Transportation [水路运输管理条例实施细则], issued by the MOC on 22 September 1987 and effective as of 1 October 1987, amended on 6 March 1998.

¹⁸⁹ Implementation Rules on Provisions on Administration of International Container Transportation at Sea [海上国际集装箱运输管理规定实施细则], issued by the MOC on 9 June 1992 and effective as of 1 July 1992, abolished on 1 January 2002.

¹⁹⁰ *Heine, China's Rise to Commercial Maritime Power* (1989), pp. 2–3.

prise, is representative of China's national maritime carriers which remain SOEs.¹⁹¹

Although China's national maritime carriers, i.e. primarily the COSCO Group and the China Shipping Group, operate general cargo ships and container ships in numerous liner services on world trade routes, they have never been a member of a liner conference or, thus far, sought membership in such a conference. In 1981, *Peng Deqing*,¹⁹² the Minister of the MOC, was quoted as advocating that Chinese ocean freight rates should be lowered so as to make them even more competitive on international trade routes.¹⁹³ He acknowledged that lower freight rates would result in lower profits per unit of cargo. But he also pointed out that lower freight rates could attract a larger cargo volume and give COSCO better operating flexibility to meet frequent changes in international shipping rates. The COSCO's freight rates average about 15% below liner conference rates. But on certain foreign trade routes where COSCO is trying to establish a service the percentage may be greater. Shipping freight rate conferences could not be expected to extend membership to COSCO under those conditions.¹⁹⁴

The Chinese merchant fleet includes ships flying the Chinese national flag and Chinese ships under flags of convenience. Many Chinese-owned vessels are registered in foreign countries and flying the national flags of those countries. Some foreign-owned vessels might have registered as Chinese vessels and were flying the Chinese flag. Gross registered tons (GRT) is only one of indications to assess a country's shipping capacity. The real capacity of the Chinese merchant fleet is reflected exhaustively only in the ownership of vessels.

Chinese flagging out started in the 1950s. As a result of western embargo policies, Chinese trade was carried by joint venture companies set up with socialist partners such as Poland, Czechoslovakia and Albania. By the 1960s, China had built up its own fleet, under its national flag, although a small number of vessels were still flagged out in order to seize trading opportunities with countries China had not as yet established diplomatic relations with.¹⁹⁵ With the implementation of the Reform Policy in the 1980s, the flagging out of Chinese controlled vessels took massive dimensions and momentum, particularly since the reform of China's tax regime in the 1990s.¹⁹⁶

In 1974, China's fleet ranked twenty-third in size in the world; but by the end of 1984, China owned 1262 vessels with total 9,300,358 GT, and ranked ninth in

¹⁹¹ In 2000 COSCO has been entitled by the Chinese government as one of super-large-scale enterprises that are important to national interest, people's livelihood and national security. See *Cai*, China's State-Owned Enterprises and Reform of the Central COSCO Appointed New Leadership (2000).

¹⁹² 彭德清.

¹⁹³ Ten Measures for Developing China's Shipping Business, *Jingji Cankao* Newspaper, 16 December 1981.

¹⁹⁴ *Heine*, China's Rise to Commercial Maritime Power (1989), p. 3.

¹⁹⁵ *Haralambides/Yang*, Flagging Out: A New Chinese Shipping Policy (2003), pp. 14–15.

¹⁹⁶ *Ibid.*, p. 13.

size in the world's shipping community.¹⁹⁷ By the end of 1999, the international merchant vessels registered in China (with the exception of those registered in Hong Kong) amounted to 1,888 with a total cargo-carrying capacity of 16.8 million tonnes. The merchant fleet with flags of convenience registered by Chinese carriers in foreign countries consisted of 540 vessels with a total cargo-carrying capacity of about 20 million tonnes. The Chinese international merchant fleet, if vessels flying flags of convenience were included, was made up of 2,400 vessels with a total capacity of more than 36 million tonnes, which was 5.3% of the world merchant fleet and ranked China fifth in the world.¹⁹⁸ By the end of 2000, the rank of the Chinese international merchant fleet in the world still was the fifth with 2,525 vessels with a total cargo-carrying capacity of more than 37 million tonnes, which still was 5.3% of the world merchant fleet.¹⁹⁹ In 2002, China ranked fourth in importance among maritime countries and territories, after Greece, Japan and Norway in terms of DWT.²⁰⁰ The growth in volume of China's waterborne cargo in 2002 kept pace with that of the national economy. Nationwide, the overall volume of cargo moved by waterway transport reached 1420 million tons, and the turnover of cargo reached 2751.06 billion ton/km, increases of 6.8% and 5.9% respectively since 2001. Three hundred million tonnes were carried by ocean shipping and the cargo turnover in ocean shipping reached 2173.27 billion ton/km. Thus the waterways volume and turnover amounted to 9.6% and 54.5% respectively of the volume and turnover for China's entire transport system.²⁰¹ These figures show the increasing trend in the volume of China's waterborne transportation.²⁰²

III. Development and Legislation after China's WTO Accession

1. China's WTO Accession

a. A History Review

China was one of the twenty-three original Contracting Parties to the General Agreement on Tariffs and Trade (GATT) in 1948. However, after the defeat of the Kuomintang nationalist forces by Chinese communist forces in 1949, the nationalist government in Taiwan withdrew from the GATT. Although the new government in Peking never recognized this withdrawal decision, socialist China officially remained outside the multilateral trading system for over forty years. In 1986, China applied to the GATT to resume its status as a GATT Contracting

¹⁹⁷ The China Ocean Shipping Company, *Materials on International Shipping* (1985), cited in *Zhang, Shipping Law in China* (1990), p. 2.

¹⁹⁸ *MOC, Report of China's Shipping* (1999).

¹⁹⁹ *MOC, Report of China's Shipping* (2001).

²⁰⁰ UNCTAD, *Review of Maritime Transport* 2003, p. 33.

²⁰¹ *MOC, Report of China's Shipping* (2002).

²⁰² *Li/Cullinane/Yan/Cheng, Maritime Policy in China after WTO* (2005), p. 77.

Party and declared its willingness to renegotiate the terms of its membership.²⁰³ After the founding of the WTO in 1996, China continued the multilateral negotiation to access to the WTO. At first, they were unsuccessful, and in 1995, at the conclusion of the Uruguay Round, a new deal was sealed, the WTO was established and China, once again, remained outside.²⁰⁴ The whole negotiation surrounding China's accession to the WTO was hard, complicated and tedious, and took almost fifteen years in all, during which the WTO came into being.²⁰⁵ On 11 December 2001, China became the 143rd member of the WTO.²⁰⁶ China as the sixth largest economy in the world, representing a population of some 1.3 billion people, and reflecting a unique political and economic system, a hybrid of Marxism and free-market principles, joined the rules-based international trading system of the WTO.²⁰⁷

b. China's Specific Accession Commitments on Maritime Transport Services

Maritime transport services are an important but far from completed part of the WTO's negotiations on trade in services. Since 1990, China began to participate actively in the negotiations on this sector in the frame of its accession negotiations and submitted the Preliminary Specific Commitments on Maritime Transport Services and its revised editions in 1991, 1993 and 1997 respectively.²⁰⁸ Although marathon negotiations among the WTO Member States had no satisfactory results

²⁰³ *Dong*, *Chinas Beitritt zur WTO* (2003), p. 82; *Gertler*, *China's WTO Accession – the Final Countdown* (2003), p. 55.

²⁰⁴ *Cass/Williams/Barker*, *China and the Reshaping of the World Trade Organization* (2003), pp. 1–2.

²⁰⁵ *Ibid.* The GATT Working Party on China's Status, which was established in March 1987, was converted into a WTO Working Party on the Accession of China with the coming into being of the WTO in 1995.

²⁰⁶ *WTO*, Accession of the People's Republic of China, Decision of 10 November 2001 (Doc. No. WT/L/432, 23 November 2001).

²⁰⁷ *WTO*, Protocol on the Accession of the People's Republic of China (Doc. No. WT/L/432, 23 November 2001). *WTO*, Report of the Working Party on the Accession of China (Doc. No. WTO/ACC/CHN/49, 1 October 2001). For a detailed survey of the China's WTO accession, see *Cass/Williams/Barker*, *China and the Reshaping of the World Trade Organization* (2003); *Dong*, *Chinas Beitritt zur WTO* (2003); *Gertler*, *China's WTO Accession – the Final Countdown* (2003); *Jackson/Feinerman*, *China's WTO Accession Survey of Materials* (2001); *Kong*, *China's WTO Accession: Commitments and Implications* (2000); *Kong*, *Enforcement of WTO Agreements in China: Illusion or Reality?* (2003); *Mattoo*, *China's Accession to the WTO: the Services Dimension* (2003); *Yang/Cheng*, *The Process of China's Accession to the WTO* (2001); *Yang*, *China's WTO Accession: The Economics and Politics* (2000).

²⁰⁸ *Bai/Wang*, *China's Shipping and Port Companies Facing the Challenges of the WTO* (2001), p. 22; *Huang*, *The Impact of China's WTO Accession on Chinese Maritime Transport Services* (2001), p. 15; *Zhang/Zhang*, *WTO and Legal System of Chinese Maritime Transport Services* (2003), p. 12; *Wang*, *The Negotiations on Maritime Transport Services under the GATT/WTO* (2000), p. 36.

in this sector,²⁰⁹ China has made clear and definite commitments, especially regarding market access and national treatment.²¹⁰ In consistence with these general commitments, China made also specific commitments on maritime transport services which cover the three pillars included in the schedules of the maritime transport services during the Uruguay Round negotiations. These are international maritime transport, maritime auxiliary services, and access to and use of port services.

As far as international maritime transport is concerned,²¹¹ foreign investors are permitted to establish joint ventures (JVs) in the forms of equity joint ventures (EJVs) and contractual joint ventures (CJVs) in China and enjoy national treatment there. However, foreign investment in these JVs shall not exceed 49%. Moreover, the chairman of the board of directors and the general manager of these JVs shall be appointed by the Chinese side.²¹²

As for auxiliary services, foreign investors are permitted to establish EJVs and CJVs in China to engage in auxiliary services for international maritime transport and enjoy national treatment. Foreign investors are permitted to own a majority in these JVs except for those engaging in international maritime agency services, in which foreign investment shall not exceed 49%.²¹³

By entry into the WTO, China took additional commitments relating to the access to and use of port services. Accordingly, China makes available, on reasonable and non-discriminatory terms and conditions, the following port services to international maritime transport suppliers: pilotage; towing and tug assistance; provisioning, fuelling and watering; garbage collecting and ballast waste disposal; port captain's services; navigation aids; shore-based operational services essential

²⁰⁹ For more details, see *Parameswaran*, *The Liberalization of Maritime Transport Services* (2004), p. 246 ff.

²¹⁰ In China a prevailing opinion argues that China's specific commitments on maritime transport services go beyond the average openness standard of most WTO Member States.

²¹¹ Due to sovereignty, economic concerns and other reasons, cabotage trade is only open to national carriers in most countries. By entry into the WTO, China has made no commitments on cabotage. According to *Maritime Code*, cabotage services between Chinese ports shall be undertaken by ships flying the national flag of the PRC, except as otherwise provided for by laws or administrative rules and regulations (Article 4 of *Maritime Code*). Although foreign fleets do not enjoy, without the approval of competent authorities, the right of cabotage, they may gain entry even to this market by establishment of a joint venture. According to Article 2 of *Regulations on Ship Registration*, vessels owned by Sino-foreign JVs shall be registered in China and fly the Chinese flag. So any foreign maritime services provider may engage in China's coastal transportation by simply establishing a commercial presence. See *Li/Cullinane/Yan/Cheng*, *Maritime Policy in China after WTO* (2005), pp. 80–81.

²¹² *WTO*, Trade in services – the People's Republic of China – schedule of specific commitments (Doc. No. GATS/SC/135, 14 February 2002), Section 11, Item A.

²¹³ *Ibid.*, Section 11, Item H.

to ship operations; facilities for emergency repairs; and anchorage, berth and berthing services.²¹⁴

c. MFN Exemptions in View of Maritime Transport Services

In accordance with Article II GATS and the Annex of Article II Exemption, China has made two exemptions at its accession. The first MFN exemption concerns the establishment of JVs or wholly foreign-owned shipping subsidiaries engaging in usual business in China. That is, “[t]he parties concerned may, through bilateral agreement, establish entities to engage in usual business in China either as JVs or wholly-owned subsidiaries subject to the Chinese laws on JVs and on foreign capital enterprises for ships owned or operated by carriers of the parties concerned”.²¹⁵

The second exemption concerns cargo sharing agreements. Up to now China has signed 54 bilateral maritime agreements, of which seven agreements contain a cargo sharing clause, namely those with Algeria, Argentina, Bangladesh, Brazil, Thailand, the U.S., and Zaire. The countries who have signed such agreements with China shall not apply for the MFN but fulfil the bilateral promises on cargo sharing within the effective duration of the agreements concerned.²¹⁶ In 1996, China officially undertook that it would sign no more bilateral maritime agreements containing a cargo sharing clause.²¹⁷ Like many other countries, China is also a party to the UNCTAD Liner Code, which incorporates the cargo sharing rule of 40:40:20.²¹⁸ It is, however, argued that since none of the Chinese national merchant fleet, namely neither COSCO nor China Shipping, have yet participated in any liner conferences, the 40:40:20 cargo sharing principle does in practice not apply in China.²¹⁹

Chinese literature²²⁰ generally agrees that the Chinese shipping market has been opened to a larger degree than that of the average WTO Member States, especially

²¹⁴ *Ibid.*, Section 11, Item A.

²¹⁵ WTO, Trade in services – the People’s Republic of China – final list of Article II (MFN) exemptions (Doc. No. GATS/EL/135, 14 February 2002).

²¹⁶ *Ibid.*

²¹⁷ This commitment was released in the Answer to the Inquiry of the European Community in the Uruguay Round Negotiations of Trade in Services and the Minutes of Talks on Maritime Transport Service between the People’s Republic of China and the European Community and has been fulfilled as of 1996. Cf. MOC, Report of China’s Shipping (1999), Chapter VI: China’s Shipping Services and the WTO.

²¹⁸ Article 2 of the UNCTAD Liner Code.

²¹⁹ Li/Cullinane/Yan/Cheng, Maritime Policy in China after WTO (2005), p. 80. Here it refers only to the liner shipping companies of Chinese Mainland, except Hong Kong’s.

²²⁰ Li, The WTO, Shipping Industry and Foreign Exchange (2002), pp. 20–21; Li, Impact of WTO Accession on China’s Shipping Companies (2000), p. 6; Wei/Yu/Liu/Hu, The Research on Impact to Domestic Shipping Market After China Acceding to the WTO (2001), pp. 1–2; Xu/Yan/Zhen, Impact of the WTO Accession on the Development of China’s Shipping Industry and Countermeasures (2002), p. 14; Xu, The WTO and Chinese Maritime Legal System (2004), p. 29; Zhang, The WTO and Adjustment of China’s Shipping Policy (1999), pp. 12–13.

in the fields of cargo sharing arrangement and national preferences such as restrictive access to government and/or strategic cargoes and cargo reservation.²²¹ The protective policy prevalent in China's shipping market until the 1980s had already been largely relaxed in the 1990s. In 1988, a Complementary Notice of Reform of Chinese International Maritime Transport Regulations was issued by the State Council.²²² In accordance with this Complementary Notice, the cargo sharing policy was to be abolished, which means first of all the abolishment of the national preference.²²³ Now, many advocate that the Chinese government should restrict the carriage of so-called government and/or strategic cargoes to the State-owned fleet as a means of strengthening national security, and maintaining transport capability and capacity, as well as of promoting the State-owned maritime fleet and supporting State-owned shipping enterprises.²²⁴ Until now China has no clear regulations to define "government" and "strategic" cargoes, neither broadly nor narrowly. In practice, however, the cargo that belongs to or is important for government activities, national security and military actions is always assigned to State-owned shipping enterprises, e. g. COSCO.²²⁵ But there are no corresponding transparent legal rules on market access to so-called "government" and "strategic" cargoes.

2. Maritime Legislation

In order to comply with China's WTO commitments on maritime transport services, China has adopted maritime legislation, ranging from international shipping services and investment to port operations.²²⁶ At the same time, previous maritime legislation in conflict with China's WTO commitments has gradually been revised or abolished.²²⁷

²²¹ These measurements have been generally regarded as regular impediments to trade in maritime transport services. For more details see *Parameswaran*, *The Liberalization of Maritime Transport Services* (2004), pp. 50–69.

²²² Complementary Notice of Reform on Chinese International Maritime Transport Regulation [关于改革我国国际海洋运输管理工作的补充通知], issued by the Leading Committee for Entry Regulation of the State Council on 26 July 1988.

²²³ *Xu*, *The WTO and Chinese Maritime Legal System* (2004), p. 29.

²²⁴ *Ibid.*, p. 30; *Zhang/Zhang*, *WTO and Legal System of Chinese Maritime Transport Services* (2003), p. 14.

²²⁵ The China Ocean Shipping Company, as State-owned shipping enterprise founded on 27 April 1961, is the largest ocean carrier in China and serves as the pioneer of China's shipping industry.

²²⁶ For a detailed survey of Chinese maritime legislation after its WTO accession, see *Liu*, *China's International Maritime Legislation after its Accession to the WTO* (2005).

²²⁷ The following maritime legislation has been abolished: Provisions on the Administration of International Maritime Container Transport Services [海上国际集装箱运输管理规定] of 5 December 1990, Provisional Measures on the Administration of International Shipping Companies [对从事国际海运船舶公司的暂行管理办法] of 11 April 1985, Provisions on the Administration of the International Shipping Agency [国际船舶代理管理规定] of 2 March 1990, Provisions on the Administration of International Liner Shipping [国际班轮运输管理规定] of 20 June 1990, Implementation Rules on

a. Administrative Regulations on International Maritime Transportation

aa. Regulation on International Maritime Transportation (RIMT)

The first maritime legislation after China's accession to the WTO was the Regulation on International Maritime Transportation²²⁸ (RIMT). The RIMT includes seven chapters with 61 articles and lays down provisions concerning the operating activities of international maritime transport services from and to the ports of the PRC as well as of auxiliary services for international maritime transport.²²⁹

"International maritime transport services" are mainly activities of shipping companies engaged in international transport services and berthing in China's ports. Their subjects are vessel operating common carriers (VOCCs) and non-vessel operating common carriers (NVOCCs).²³⁰ "Auxiliary services for international maritime transport services" include international shipping agency, international ship management, loading and unloading, storage and warehousing of international maritime cargo, container station and yard services, etc.²³¹

While international shipping services must apply for permission,²³² such services as non-vessel operating services,²³³ international liner services,²³⁴ international shipping agency,²³⁵ and international ship management²³⁶ need only to comply with registration rules.

Provisions on the Administration of International Container Transportation at Sea [海上国际集装箱运输管理规定实施细则] of 1 July 1992, and Administrative Measures on Permanent Representative Offices of Foreign Waterway Transportation Enterprises [外国水路运输企业常驻代表机构管理办法] of 16 October 1997.

²²⁸ Regulation on International Maritime Transportation [国际海运条例], promulgated by the State Council on 11 December 2001, and effective as of 1 January 2002.

²²⁹ Article 2(1) RIMT.

²³⁰ Cf. *Wang*, China's Rules on Shipping (2002), p. 31.

²³¹ Article 2(2) RIMT.

²³² To be engaged in international shipping services, an application and the relevant documents shall be submitted to the MOC. The MOC shall, within 30 days from the date of acceptance of the application, decide to grant or not to grant permission (Articles 5 and 6 RIMT).

²³³ According to the RIMT, "non-vessel operating services" mean international maritime transport services in which a NVOCC accepts cargo from the shipper as a carrier, issues its own bills of lading or other shipping documents, procures through an international shipping operator the carriage of goods by sea against payment of freight by the shipper, and assumes the responsibilities of a carrier (Article 7(2) RIMT). A NVOCC shall make an application for the registration of bills of lading to the MOC and pay surety bond (Articles 7 and 8 RIMT).

²³⁴ Article 17 RIMT.

²³⁵ Articles 9 and 10 RIMT.

²³⁶ Articles 11 and 12 RIMT. The application for international ship management services shall be submitted only to the communications department on the provincial level.

bb. Implementation Rules of Regulation on International Maritime Transportation (IRRIMT)

The RIMT is very general, partly liable to misunderstanding, or hard to be carried out in practice. In respect of these drawbacks and the necessity for further interpretation and implementation, the MOC adopted Notices on the implementation of the RIMT on 27 December 2001, 19 February 2002 and 14 May 2002 and further issued the implementation rule on 23 January 2003, the Implementation Rules of Regulation on International Maritime Transportation (IRRIMT).²³⁷

The IRRIMT contain seven chapters including 70 articles, covering most of the areas in the RIMT,²³⁸ but excluding the filing of tariffs,²³⁹ loading and unloading, storage and warehousing of international maritime freight, container station and yard services.²⁴⁰ They emphasize further market liberalization. For instance, according to Articles 3(5), 11, 12 and 25 IRRIMT, a foreign NVOCC may conduct non-vessel-operating services from and to Chinese ports through entrusting its agents within Chinese territory. The IRRIMT were supplemented by a Notice on its implementation,²⁴¹ providing samples for written applications and designating the media of publication.²⁴²

cc. Relation between the RIMT, the IRRIMT and the Maritime Code

One of the legal bases of the RIMT and the IRRIMT is the Maritime Code, which has been in force since 1 July 1993. Article 6 of the Maritime Code provides:

“All matters pertaining to maritime transport shall be administered by the competent authorities of transport and communications under the State Council. The specific measures governing such administration shall be worked out by such authorities and implemented after being submitted to and approved by the State Council.”

²³⁷ Implementation Rules of Regulation on International Maritime Transportation [国际海运条例实施细则], promulgated by the MOC on 20 January 2003, and effective as of 1 March 2003.

²³⁸ For example, Article 3 IRRIMT provides the definitions of such important terms included in the RIMT as non-vessel operating services, agreements of liner conferences, etc.

²³⁹ The RIMT has a provision on tariff filing, namely Article 20. According to Article 68 IRRIMT, the detailed rules on tariff filing shall be laid down by the MOC. However, such a stipulation on tariff filing has not yet been adopted by now. In 1996 the MOC promulgated the Implementation Rule on the Tariff Filing of International Container Liner Services [国际集装箱班轮运输运价报备制度实施办法]. The Rules shall be applicable, however, only to the tariff filing of the international liner services from and to the ports of Jiangsu Province, Zhejiang Province and Shanghai.

²⁴⁰ Such auxiliary services within port areas as loading and unloading, storage and warehousing of international maritime freight, container station and yard services shall be regulated by laws and regulations on port management (Article 69 IRRIMT).

²⁴¹ Notice on Implementation of the IRRIMT [关于实施国际海运条例实施细则的公告], issued by the MOC on 21 March 2003.

²⁴² For more details, see below Chapter IV B. II. 1. a.

The RIMT and the IRRIMT are administrative rules regulating the administrative legal relationship arising out of the governmental administration of international shipping business rather than the private legal relationship between market entities arising out of business practices. The RIMT and the IRRIMT therefore should be categorized as public maritime law.²⁴³

The RIMT and the IRRIMT demonstrate the Chinese Government's policy of integrating deregulation and regulatory administration of international shipping business; they also reflect the commitments made by the Chinese government during the negotiations for entry into the WTO, establish a series of systems in relation to administration of international shipping business in a market economy, lay down rules in respect of investigation and disciplinary measures in case of conduct detrimental to fair competition in the international shipping market, and set out penalties for violations of the RIMT and the IRRIMT.²⁴⁴

The enactment of the RIMT and the IRRIMT is an important move adopted by the Chinese government subsequent to its entry into the WTO. It has changed the long-standing situation of international shipping regulations and rules in China being insufficient, low-ranking and lacking authority, and has marked a step forward in the legal administration of international shipping business. The RIMT and the IRRIMT are a piece of legislation which combines deregulation and regulatory administration and is expected to have a far-reaching impact on the development of the Chinese international shipping industry.²⁴⁵

b. Provisions on the Administration of Foreign Investment in International Maritime Transportation

Two years after China's accession to the WTO, the Provisions on the Administration of Foreign Investment in International Maritime Transportation were released as a joint ministerial order of the MOC and the PRC Ministry of Commerce (MOFCOM).²⁴⁶ The Provisions contain 19 articles, stipulating detailed requirements and procedures for foreign investment in and operation of international maritime transport services and auxiliary services within China's territory.²⁴⁷

As regards international maritime transport, the Provisions on the Administration of Foreign Investment in International Maritime Transportation determine that the authorities in charge of the approval and administration of foreign investment in international maritime transport are the MOC and the MOFCOM as well as their authorized agencies.²⁴⁸ As regards the enterprises engaged in international

²⁴³ Yu/Wang, *Integration of Deregulation and Regulatory Administration: Some Comments on the RIMT* (2003), p. 569.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*, p. 570.

²⁴⁶ Provisions on the Administration of Foreign Investment in International Maritime Transportation [外商投资国际海运业管理规定], promulgated by the MOC and the MOFCOM on 25 February 2004, and effective as of 1 June 2004.

²⁴⁷ Article 2 of the Provisions on the Administration of Foreign Investment in International Maritime Transportation.

²⁴⁸ Article 3 of the Provisions on the Administration of Foreign Investment in International Maritime Transportation.

maritime transportation, the Provisions on the Administration of Foreign Investment in International Maritime Transportation provide for three different categories: 1) enterprises engaging in international shipping services, international shipping agency services, international ship management services, loading and unloading of international shipments and international maritime container freight station and container yard services; 2) enterprises engaging in international maritime cargo warehousing services; and 3) enterprises offering routine services for the vessels owned or operated by the investor. Enterprises operating in the first category may only be established as joint ventures, while those operating in the latter two categories may also be established as wholly foreign-owned enterprises.

c. Legislation on Ports

The Law on Ports²⁴⁹ has a very narrow and specific scope of application. It includes rules on the planning and construction of ports, port operations, safety and supervisory administration of ports, and some supplementary provisions. The Law on Ports provides port development policies and regulations that cover administration and operations. However, as a statute enacted by the Standing Committee of the NPC, the Law on Ports provides only insufficient rules for its practical implementation. Therefore, the Provisions on the Administration of Port Operations²⁵⁰ were issued by the MOC. The Provisions on the Administration of Port Operations elaborate application requirements and procedures for port operations and other administrative rules as well as rules on the supervision and punishment of illegal activities in port operations. The Provisions on the Administration of Port Operations were later supplemented by a Notice²⁵¹ on their implementation concentrating on a detailed explanation of the administrative system and clarifying conflicting rules on the competence of different authorities for the licensing of port operations.

IV. International Convention and the UNCTAD Liner Code

1. Reasons for China's Ratification of International Maritime Conventions

It is one of the principles of China's foreign policy to work within international law and to respect commonly accepted international practice.²⁵²

There are four reasons for China to adopt international maritime conventions and practices. First, since China's Open Door Policy, foreign trade with more and

²⁴⁹ Law on Ports [港口法], adopted at the 3rd Session of the Standing Committee of the 10th NPC and promulgated on 28 June 2003, effective as of 1 January 2004.

²⁵⁰ Provisions on the Administration of Port Operations [港口经营管理规定], promulgated by the MOC on 15 April 2004, effective as of 1 June 2004.

²⁵¹ Notice on Implementation of Provisions on the Administration of Port Operations [关于实施港口经营管理规定有关问题的通知], released by the MOC on 18 May 2004 and effective as of the same date.

²⁵² *Li/Ingram*, *Maritime Law and Policy in China* (2002), p 6.

more countries and regions has grown dramatically. To meet the needs of its steadily developing foreign trade, China needs not only an expansion of its fleet, but also a globally recognized maritime legal system. Secondly, an attractive environment for foreign investors has to be established, not only in terms of its foundation, but with a corresponding superstructure as well. To achieve this, laws and regulations concerning foreign investment, particularly joint-ventures, taxation and technology transfer are important. Shipping-related laws and regulations also constitute a very important component of China's economic legislation. Thirdly, the implementation of international conventions has to be given priority for both economic and political reasons. As is widely recognized, one of the existing problems in the global maritime industry is that conventions adopted by international organizations have not been implemented adequately, properly and identically by the contracting States, especially by less developed countries. As a member country of the International Maritime Organisation, it is also in China's interest to implement these conventions properly through its maritime legislation. Finally, this is an attempt to unify international maritime law and practice. Shipping is an international business, operated and to some extent regulated internationally. There is no doubt that international action is generally more effective than national action, especially in the context of prevention of marine pollution.²⁵³

2. Legal Status and Applicability of International Maritime Conventions Ratified by China

The legal status and applicability of international maritime conventions ratified by China depends upon the manner in which international treaties are implemented in the Chinese domestic legal system. To understand this, it is necessary to have an overview of the statute hierarchy of the Chinese legal system.

a. General Review of Chinese Legal System

The hierarchy of legislation in the Chinese legal system has been determined in the Legislation Law²⁵⁴ which provides for five levels: (1) the Constitution of the PRC; (2) basic laws or laws promulgated by the NPC or its Standing Committee;²⁵⁵ (3) administrative regulations²⁵⁶ of the State Council; (4) local decrees by

²⁵³ *Ibid.*, pp. 6–7.

²⁵⁴ Legislation Law [立法法], adopted at the 3rd Session of the Standing Committee of the 7th NPC on 15 March 2000, and effective as of 1 July 2000. For a detailed survey of law-making before the adoption of the Legislation Law in China, see *Tanner*, *The Politics of Lawmaking in Post-Mao China* (1999); *Otto/Polak/Chen/Li* (eds.), *Law-Making in the People's Republic of China* (2000).

²⁵⁵ Chapter II of the Legislation Law (Articles 7 to 55). For a detailed analysis, see *NPC*, *Legislative Consideration of the PRC Legislation Law* (2000), p. 14 ff.; *Zhou*, *Science of Legislation* (2004), p. 189 ff.

²⁵⁶ A common literal translation of *Xingzheng Fagui* [行政法规] is administrative laws and regulations but to differentiate law, *Xingzheng Fagui* should be translated as administrative regulations even though some Chinese administrative regulations play the

the people's congresses of provinces, autonomous regions and municipalities directly under the central government as well as special decrees;²⁵⁷ and (5) administrative rules by ministries and commissions under the State Council and local rules by people's governments of provinces and large cities.²⁵⁸

b. Legal Status and Applicability of International Maritime Conventions

According to the Constitution of the PRC, the Standing Committee of the NPC has the power to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states.²⁵⁹ The State Council is responsible for conducting foreign affairs and concluding treaties and agreements with foreign states.²⁶⁰

Can such treaties be directly applied or must they be implemented by domestic legislation? The Constitution of the PRC has no provisions relating to the legal status of international treaties in Chinese domestic law. Till now there are no unified rules in China concerning the legal status and the applicability of international conventions in the Chinese jurisdiction.²⁶¹ The Law on Procedures for Treaty Conclusion provides that the following "treaties and agreements" need to be ratified by the Standing Committee of the NPC: (1) political treaties such as friendship and co-operation treaties and peace treaties; (2) treaties and agreements relating to territory and boundary-delimiting; (3) treaties and agreements on judicial assistance and extradition; (4) treaties and agreements that differ from the laws of the PRC; (5) treaties and agreements whose ratification is agreed on by Contracting Parties; (6) other treaties and agreements that require ratification.²⁶² But that still does not determine the domestic applicability of these treaties.

A strange phenomenon is that many Chinese laws or regulations expressly state the prevalence of the international treaty in case of conflict between Chinese statutes and an international treaty. Thus under Article 268(1) of the Maritime Code,

role of law in the area where no national laws are available or applicable. See *Luo*, Chinese Law and Legal Research (2005), p. 110.

²⁵⁷ Articles 63 to 70 of the Legislation Law. For an overview, see *NPC*, Legislative Consideration of the PRC Legislation Law (2000), p. 107 ff.; *Zhou*, Science of Legislation (2004), p. 215 ff.

²⁵⁸ Articles 71 to 77 of the Legislation Law. For an overview, see *NPC*, Legislative Consideration of the PRC Legislation Law (2000), p. 126 ff.; *Zhou*, Science of Legislation (2004), p. 211 ff.

²⁵⁹ Article 67(14) of the Constitution of the PRC. The Constitution of the PRC distinguishes treaties and agreements. For the sake of convenience, the term "treaty" or "agreement" in this paper refers to any international legal instrument unless otherwise indicated in the context.

²⁶⁰ Article 89(9) of the Constitution of the PRC.

²⁶¹ *Zhu*, The Applicability of International Maritime Conventions in Chinese Jurisdiction From the View of Case Law (2002), p. 123.

²⁶² Article 7 of the Law on Procedures for Treaty Conclusion [缔结条约程序法], which was adopted at the 17th Session of the Standing Committee of the 7th NPC on 28 December 1990 and effective on the same date.

“[i]f any international treaty concluded or acceded to by the PRC contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the PRC has announced reservations.” Similar provisions can be found in many other laws such as the General Principles of Civil Law,²⁶³ the Law on Civil Procedure²⁶⁴ and the Law of Special Procedure for Maritime Proceedings²⁶⁵ etc. In view of such provisions, it could be argued that in case of disagreement between an international treaty provision that allows no reservation and the relevant Chinese statutory provision, the international treaty provision shall prevail over the relevant domestic statutory provision in application.²⁶⁶ In the meantime, however, such provisions in Chinese law suggest that an international treaty is applied only when the relevant domestic statute is inconsistent with it. If a Chinese domestic statute is consistent with the international treaty then local courts would apply Chinese law. In other words, framers of these laws aimed at promoting the position that domestic law continues to play the main role when the issue concerned is covered by both an international treaty and a domestic law.²⁶⁷ As regards maritime legislation, it could be argued that international maritime conventions ratified by China prevail over Chinese domestic laws relating to shipping only in case of conflict.²⁶⁸

However, this interpretation is not in compliance with practices in Chinese courts, which show a preference for direct application or automatic incorporation of international treaties. In some cases, the Supreme People’s Court has instructed regional courts to apply directly the provisions of international treaties. But, court rulings are not a source of law in the Chinese legal system; therefore, they do not really resolve the problem.

²⁶³ General Principles of Civil Law [民法通则], adopted at the 4th Session of the 6th NPC on 12 April 1986, and effective as of 1 January 1987. Article 142(2) of the General Principles of Civil Law provides, “[i]f any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations.”

²⁶⁴ Article 236 of the Law on Civil Procedure provides, “[w]here the provisions of international treaties which the PRC has concluded or to which the PRC is a party are different from those of this law, the former shall apply, except those clauses to which the PRC has made reservation.”

²⁶⁵ Article 3 of the Law of Special Procedure for Maritime Proceedings provides, “[w]here international conventions entered into or acceded to by the PRC have provisions concerning foreign-related maritime actions which are different from those contained in *Law on Civil Procedure* and this Law, the provisions of such international conventions shall apply except those on which the PRC has made reservations.”

²⁶⁶ Zhu, *The Applicability of International Maritime Conventions in Chinese Jurisdiction From the View of Case Law* (2002), p. 124 ff.

²⁶⁷ Kong, *Enforcement of WTO Agreements in China: Illusion or Reality?* (2003), pp. 139–140.

²⁶⁸ Zhu, *The Applicability of International Maritime Conventions in Chinese Jurisdiction From the View of Case Law* (2002), p. 124 ff.

Chinese legislation tends to implement international treaty obligations through transformation into domestic law. For instance, Chapter II of the Maritime Code, which deals with maritime mortgages and liens, adopts almost directly the provisions of the 1967 Convention on Maritime Liens and Mortgage. Chapter IV on contracts for the carriage of goods by sea adopts the provisions of the Hague-Visby Rules with due consideration of the Hamburg Rules. Chapter V on contracts of carriage of passengers by sea adopts the provisions of the 1974 Athens Convention. Chapter VIII on collision at sea adopts the provisions of the 1910 Collision Convention. Chapter IX on salvage adopts the substantial provisions of the 1989 International Convention on Salvage. Chapter X on limitation of liability for maritime claims adopts the substantial provisions of the 1976 Convention on Limitation of Liability.

In Chinese literature a prevailing argument holds that the applicability of ratified international conventions could only be realized through domestic legislation.²⁶⁹ This corresponds to the practice of Chinese legislation and with the fact that, after China's WTO accession, WTO rules must be implemented in China through corresponding domestic legislation.²⁷⁰ This raises two more questions: Chinese domestic legislation does not or not fully and effectively implement the provisions of some international conventions. This inevitably results in the non-application of these international conventions. This results in the second question: How can resulting conflicts between China's commitments in these international conventions and their implementation in China's jurisdiction be resolved? The second question is beyond the scope of this thesis. However, the first question is closely related to the applicability of the UNCTAD Liner Code in the Chinese jurisdiction and necessitates a further analysis in relation with the sector-specific regulation regime for liner conferences in the following section.

c. The UNCTAD Liner Code

In respect of liner conferences, it is especially noteworthy to clarify the legal status and the applicability of the UNCTAD Liner Code in China. The UNCTAD Liner Code was ratified by China on 23 September 1980 and came into effect on 6 October 1983 for the PRC. As regards the applicability of the UNCTAD Liner Code in China's domestic jurisdiction, there are two points to be made.

²⁶⁹ *Kong*, The Consequent Implementation and the Applicability of the WTO Legislations (2001). For a general survey of the legal status and applicability of international conventions in China's domestic jurisdiction, see *Li*, Chinese Legislation, International Conventions and International Law (1993); *Li*, The Legislative Effects of International Conventions on Chinese Domestic Jurisdiction (1993); *Wang*, The Applicability of International Conventions in Chinese Domestic Jurisdiction (1993); *Wang*, The Legal Status of International Conventions in Chinese Jurisdiction (1994).

²⁷⁰ *Cao/Wang*, The Applicability of WTO Agreements in Chinese Jurisdiction (2001). This argument was also clearly supported by the relevant Chinese law-makers. See the speech "Negotiation Issues on China's Accession to WTO" of Mr. *LI Shishi* at the Meeting of China's International Law on 11 January 2002. Mr. *LI Shishi* was the deputy leader of Delegation of China's Accession to WTO, Deputy Director of the Legal Affairs Office of the State Council.

The first refers to China's reservation by the ratification of the UNCTAD Liner Code. One of the most important substantive provisions of the UNCTAD Liner Code is the cargo sharing principle of 40:40:20.²⁷¹ In respect of this requirement, China's ratification of the UNCTAD Liner Code was accompanied with one and also the only one reservation that her bilateral shipping arrangements will supersede the provisions of the UNCTAD Liner Code. It is a measure of China's maritime self-interest that the government sees no inconsistencies in ratifying the UNCTAD Liner Code while continuing to follow a policy of carrying as much of its ocean-going foreign trade as possible in Chinese-flag ships.²⁷² To this extent, the cargo sharing principle of 40:40:20 under the UNCTAD Liner Code has practically not been applied in Chinese regulation practices and will continue to remain inapplicable.²⁷³ However, as declared above in relation to the changes of China's policy on cargo reservation,²⁷⁴ China did not stick to a strict enforcement of national cargo reservation after 1988 and officially abolished this policy in 1996.

The second point directly deals with the implementation of the UNCTAD Liner Code through Chinese domestic rules. As clarified in the preceding analysis,²⁷⁵ an international convention can be applied in China only through domestic legislation and enforcement. Therefore, two questions must be answered. The first question is whether there is a Chinese domestic statute which specifically serves to implement the provisions of the UNCTAD Liner Code. Up to now, there exist neither a law or an administrative regulation nor individual provisions in China's maritime legislation, which clearly demonstrate that their legislative aim is the implementation of the UNCTAD Liner Code. Therefore, the answer to the first question is negative.

The second question is whether the provisions of the UNCTAD Liner Code have been implemented through scattered individual provisions of several laws or administrative regulations. The main legal institutions of the UNCTAD Liner Code, such as the requirement of common or unique freight rates, cargo reservation, loyalty agreements, capacity arrangements and consultation machinery etc., have never been regulated in Chinese maritime legislation in a strict meaning. Even on the antitrust exemption of liner conferences as a principal rule accepted in the UNCTAD Liner Code, there is no provision in Chinese maritime legislation, which directly and unequivocally provides for such an antitrust exemption. In this sense, it is necessary to note Article 32(1) IRRIMT which requires that the agreements of liner conferences which cover the trade to and from Chinese ports should be filed with the MOC within a certain period. This provision implies indirectly that liner conferences are not prohibited but permissible under the condition of filing by the MOC. In other words, the antitrust exemption of liner conferences is also accepted in China. But this is not a direct implementation of the UNCTAD

²⁷¹ Article 2 of the UNCTAD Liner Code.

²⁷² Heine, *China's Rise to Commercial Maritime Power* (1989), p. 3.

²⁷³ MOC, *Report of China's Shipping* (1999), Chapter VI: China's Shipping Services and the WTO.

²⁷⁴ See above Chapter I B. II. 2. c.

²⁷⁵ See above Chapter I B. IV. 2. b.

Liner Code, but an indirect acceptance of a general rule for liner conference exemptions which were adopted around the world at that time.²⁷⁶

In respect of implementation of the UNCTAD Liner Code, it should specifically refer to the definition of “agreement of liner conference” in Article 3(14) IRRIMT. The IRRIMT serve to implement the RIMT and Article 3 IRRIMT lays down the definitions of relevant terms used in the RIMT and the IRRIMT. According to Article 3(14) IRRIMT, “agreements of liner conferences” include all kinds of agreements concluded between members of a liner conference or between liner conferences, as defined in the UNCTAD Liner Code. This definition only mentions the title of the UNCTAD Liner Code, but neither repeats the wording of the definition of liner conferences in the UNCTAD Liner Code²⁷⁷ nor does it provide a further description of its own. In the meanwhile, neither in the RIMT or the IRRIMT nor in the Maritime Code is there any mention of the UNCTAD Liner Code or repetition of its provisions. To this extent, this definition can only be interpreted as a borrowing from the text of the UNCTAD Liner Code, but not as a legislative implementation.

Further in respect of jurisdiction practices, there is as yet no judgment of Chinese courts which deals with the issue of competition regulation of liner conferences. A possible interpretation from the perspective of judicial practice also cannot help to clarify the applicability of the UNCTAD Liner Code. As a whole, it should consequently be correct to argue that the UNCTAD Liner Code does not constitute a legal source applicable for the regulation of liner conferences in China, although China has ratified this international convention and obviously deviated from her previous reservation on cargo sharing.

C. Conclusion

The development of maritime policy shall be understood under the political and economical background. The EC was established as a supranational organisation of Member States. In respect of the traditional “self-regulation” in maritime industry and the strong political requirement of Member States for regulation reservation, the development of the common policy in maritime transport has seen a transformation from separation to concentration since the competence of the Community in this field was confirmed. Nevertheless, the common industry policy shall comply with the fundamental economic order of the Community, namely the market economy on the basis of private ownership, which is held to be the economic constitution of the EC. In contrast, the maritime policy of China originated in her socialist planned economy and was characterised by high concentration. The development of maritime policy after the introduction of the reform policy and during the transformation towards the “socialist market economy” shows the

²⁷⁶ *Lan*, *The Antitrust Exemptions of Liner Conference* (2006), p. 46. Cf. also *Yang*, *A Comparative Analysis of the Liner Conference Regulation in Several Countries* (2004).

²⁷⁷ See Chapter I of Part One of the UNCTAD Liner Code.

orientation of liberalisation policy which has led to a gradual deregulation and more freedom of competition both for the domestic and international markets. However, the “national maritime fleets” still enjoy privileges, because the socialist market economy has and shall maintain the same principles of the economic order prevailing under the previous planned economy, namely State ownership and the market dominance of SOEs.

The relation between industry policy and competition policy as well as the choice of regulation regime should be taken into consideration. The common policy of maritime transport is part of the Community industry policy and shall serve to contribute to the realization of the fundamental aims of the EC, especially to build up a system ensuring that competition in the common market is not distorted. Under this requirement, the European law-makers prefer pro-competition policy instead of protectionism. This could be shown especially in the review of Regulation 4056/86 and the pioneering advance in regulation of liner conferences by repealing the antitrust exemption. The competition policy of China could find its origin after the economic reform at the end of the 1970s. Under the socialist economic order in China, the competition policy applies as an instrument for implementation of certain national industry policy, but not on the contrary. In spite of the measures of gradual liberalisation in the domestic and international maritime transport markets, the Chinese authorities lack the experience of competition regulation in the sense of free market competition and prefer the function of the administrative control through SOEs. Particularly in respect of international liner shipping market, the “national champion” stands in the focus of Chinese maritime policy, but not an effective competition regime.

Chapter II: General and Sector-Specific Competition Rules in Force

A. Community Competition Rules in Maritime Transport and Regulation 4056/86

Competition rules and transport policy are essential parts of the EC Treaty.¹ Article 3(1)(f) and (g) EC states that:

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

...

(f) a common policy in the sphere of transport;

(g) a system ensuring that competition in the internal market is not distorted;”

The rules on transport are contained in Title V of Part Three of the EC Treaty, of which Article 80(2) EC (*ex* Article 84(2)) is relevant for maritime transport, while Community competition rules are laid down in Title VI of Part Three of the EC Treaty, primarily Articles 81 and 82 EC (*ex* Articles 85 and 86).² Now it is generally accepted that Community competition rules, i.e. principally Articles 81 and 82 EC, apply in general to all economic sectors with a narrow exception such as for agriculture and for certain fields of transport.³ However, during the initial development stage of the EC, there was no certain answer to the question whether the Community transport rules, especially Article 80(2) EC, allowed for the application of other general Treaty provisions, in particular Community competition

¹ Kreis, *European Community Competition Policy and International Shipping* (1990), p. 411.

² For a historical and systematic view of the legislation of community rules on transport, see Erdmenger, *Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt* (1962), particularly p. 50 ff.

³ Article 36 EC (*ex* Article 42) explicitly precludes the application of Community competition rules to the field of agriculture. See Basedow, in: Immenga/Mestmäcker, *EG-Wettbewerbsrecht Kommentar* (2007), Verkehr; A., p. 1482, Rn. 1; Greaves, *EC Maritime Transport Policy and Regulation* (1992), p. 125. For a general survey, see Ritter/Braun, *European Competition Law* (2004), p. 12 ff.; Jones/Sufrin, *EC Competition Law* (2008), p. 109 ff.

rules, to the maritime transport sector.⁴ This question was characterised by the politicization of Community competition rules and finally settled by Community case law.

I. Politicization of Community Competition Rules in Maritime Transport

In respect of the politicization of Community competition rules in the maritime transport sector, two aspects should be taken into account: (1) the political willingness and concessions of the Member States during the development of a common policy in maritime transport; and (2) the Commission's efforts to formulate the competition policy and legislation on maritime transport.

As mentioned above,⁵ the politicization of Community law in the maritime industry as part of the transport sector occurred at the very beginning of the EC Treaty in 1957, since the maritime transport sector gained no policy importance until after the accession of the United Kingdom, Ireland and Denmark in 1973.⁶ The strong demand and influence of political reservation of the Member States on the transport policy based on the so-called "theory of distinctive feature of the transport sector"⁷ caused the lengthy lack of consensus on the common transport policy, especially on the maritime transport policy. This led also to the uncertainty of the direct application of Community competition rules to maritime transport, since the Member States then emphasized to control the main competitive aspects of transport markets such as the access, prices and the capacity in order to indirectly support national carriers and protect them from international competition.⁸

It is convincingly argued that the Commission's efforts to formulate the competition policy in the maritime transport sector till the adoption of Regulation 4056/86 were centred upon the recovery at all costs of the powers lost in 1962 after the adoption of the Council Regulation 141.⁹ In order to recover from the Council powers for active implementation of competition regulation, the Commission made a number of fundamental concessions to the maritime authorities of the Member States. One of the most important concessions was the authorization of the block exemption for liner conferences. The lack of critical analysis of the activities of traditional liner conferences, both in view of competition law and empirical study, might result from the Commission's perception that the results of

⁴ *Erdmenger*, Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt (1995), p. 388 ff.; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 147.

⁵ For more details see above Chapter I A. I.

⁶ *Kreis*, European Community Competition Policy and International Shipping (1990), p. 414.

⁷ For more details see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1482, Rn. 1.

⁸ *Ibid.*, p. 1482, Rn. 1 and 2; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 99.

⁹ Cf. Chapter II A. II. See also *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 256.

negotiations with the Council were inevitable as to the wishes of the Commission to obtain powers of control and sanctions as soon as possible.¹⁰ The Commission did not have the opportunity to start from scratch and to reconsider what would be the best system to implement Community competition rules in maritime transport, but gave legal form to the liner conference system's *status quo* which had been already accepted in the 1979 Brussels Package. To this extent, both the substance and the form of Regulation 4056/86 are defective.¹¹

II. Regulation 17 and Regulation 141

The politicization of Community competition rules, which led to the prolonged lack of a common transport policy and the unsettled competition policy,¹² had also an influence on the procedural provisions of Community competition rules, primarily on the legislation of Regulation 17 and Regulation 141.

Regulation 17 was adopted by the Council in February 1962 and laid down the fundamental and detailed rules for the implementation of Articles 81 and 82 EC. However, the adoption of Regulation 17 did not settle the dispute over the general application of Community law. Therefore, in November 1962, the Council adopted Regulation 141¹³ which excluded the application of Regulation 17 to “agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets”¹⁴ and to “the abuse of a dominant position, within the meaning of Article 82 EC, within the transport market”.¹⁵ These provisions mainly reflected the intention of the then European legislator to exempt the application of the primary Community competition rules in their entirety to the transport industry including the maritime transport sector.¹⁶ Taking into account the “distinctive features of transport sector”, the

¹⁰ *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 256.

¹¹ *Ibid.*

¹² *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1482, Rn. 2.

¹³ Council Regulation (EEC) No. 141 of 26 November 1962 exempting transport from the application of Council Regulation No. 17, O.J. 1962 124/2751. For a detailed survey of Regulation 141, see *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 52 ff.

¹⁴ This provision matched the restriction practices mentioned in Article 81(1)(a) to (c) EC. To this extent, it should be argued that the exemption of application of Regulation 17, which Regulation 141 provided for, did not cover the restrictions laid down in Article 81(1)(d) and (e) EC. See *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1150 Rn. 22; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 56.

¹⁵ Article 1 of Regulation 141.

¹⁶ This interpretation was supported by the preamble of Regulation 141. See *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1150 Rn. 22 w.f.r. in Fn. 41.

competition rules governing this sector should be different from those laid down for other sectors of the economy, i.e. the general Community competition rules.¹⁷ Unlike transport by rail, road and inland waterway, which could envisage the competition legislation within a foreseeable period, there was no time limit fixed for the sectors of maritime and air transport.¹⁸

III. Development by Community Case Law

The first judicial effort to settle the dispute over the general applicability of Community law was made by the ECJ in *French Merchant Seamen*.¹⁹ The Commission considered that the French legal provisions on the manning of sea-going vessels were incompatible with Article 39 EC (*ex* Article 48) and Regulation 1612/68²⁰ insofar as they inhibited the free movement of workers within the Community.²¹ The question whether the primary Community law should apply to the transport sector, including maritime transport, was put forward for the first time before the ECJ. In its ruling the ECJ stated that the “fundamental rules of the Treaty” are applicable to the transport sector in general and hereby also to the maritime transport sector. The ECJ examined the place of Title V of Part Three of the EC Treaty in the general system of the Treaty and the place of Article 80(2) EC (*ex* Article 84(2)) within Title V, and declared that the primary Community rules are of such paramount importance that their application may be precluded or restricted “only as a result of express provision in the Treaty”.²² In view of Article 70 EC (*ex* Arti-

¹⁷ Cf. the 1st Recital of Regulation 141.

¹⁸ Cf. the 2nd Recital of Regulation 141. As regards transport by rail, road and inland waterway, Article 3 of Regulation 141 provided for a time limit till 31 December 1965, which was extended by Regulation 165/65 till 31 December 1967 and then by Regulation 1002/67 till 30 June 1968. Consequently, Regulation 1017/68 was adopted on 19 July 1968 and laid down special rules for the application of Community competition rules in the field of transport by rail, road and inland waterway. The sectors of maritime and air transport were excluded from the scope of Regulation 1017/68.

¹⁹ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, “*French Merchant Seamen*”), [1974] E.C.R. 359. For an overview of this case, see *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 39 ff.

²⁰ Council Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, O.J. 1968 L 257/2.

²¹ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, “*French Merchant Seamen*”), [1974] E.C.R. 359, paras. 4 and 5.

²² *Ibid.*, paras. 17 to 22. Such an express provision was done only in the field of agriculture. Under Article 36 EC (*ex* Article 42), the competition rules apply “only to the extent determined by the Council within the framework of Article 37(2) and (3) EC (*ex* Article 43(2) and (3)) and in accordance with the procedure laid down therein, account being taken of the objective set of in Article 33 EC (*ex* Article 39)”. Such a restriction does not exist in the provisions on transport in Title V of Part Three of the EC Treaty, even though these provisions, namely Articles 70 to 80 EC, provide for a special policy on transport, which has the “distinctive features” in accordance with Article 71(1) EC.

cle 74) in conjunction with Articles 2 and 3 EC, the ECJ emphasized that the fundamental rules of the Treaty applicable to the whole complex of economic activity are of prime importance.²³ Therefore, the provisions relating to the common transport policy should not restrict the application of the primary Community rules to the transport sector, but implement and comply with them.²⁴ Finally, the ECJ held that although the rules on transport in Title V of Part Three of the EC Treaty (ex Title IV of Part Two) are not applicable to sea and air transport until the Council has decided otherwise, the primary Community rules shall apply to sea and air transport as well as to any other means of transport.²⁵

In response to the ECJ ruling in *French Merchant Seamen*, another question arose as to whether Community competition rules could be categorized as the “fundamental and general rules of the Treaty” and applicable to the transport sector. This question was not answered until 1986 in *Nouvelles Frontières*.²⁶ In this case the ECJ confirmed its ruling in *French Merchant Seamen*²⁷ and stated that the economic sectors could be excluded from the competition rules only by an express provision in the Treaty.²⁸ The ECJ declared that the competition rules constitute part of the general rules of the Treaty and are applicable to transport.²⁹ The case of *Nouvelles Frontières* dealt with the application of Community competition rules to air transport, with which the sector of sea transport together constitutes the main content of Article 80(2) EC. Therefore, the general rules of the EC Treaty, especially the primary Community competition rules are also applicable to maritime transport.³⁰

However, the above ECJ rulings had at first little practical effects on maritime transport, *inter alia* liner conferences, since neither Regulation 17 nor Regulation

See Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1482, Rn. 1.

²³ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, “*French Merchant Seamen*”), [1974] E.C.R. 359, para. 24.

²⁴ *Ibid.*, para. 25.

²⁵ *Ibid.*, para. 32.

²⁶ ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, “*Nouvelles Frontières*”), [1986] E.C.R. 1425.

²⁷ For more details see Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1483, Rn. 3.

²⁸ ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, “*Nouvelles Frontières*”), [1986] E.C.R. 1425, para. 40.

²⁹ *Ibid.*, para. 42. See also Erdmenger, in: *von der Groeben/Thiesing/Ehlermann*, Kommentar zum EU-/EG-Vertrag, Article 80 EG, p. 1975, Rn. 21 *et seq.*; Rabe, Wettbewerbs- und Seeschiffahrtspolitik der EG (1994), p. 1; Werner, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 797.

³⁰ Erdmenger, in: *von der Groeben/Thiesing/Ehlermann*, Kommentar zum EU-/EG-Vertrag, Article 80 EG, p. 1975, Rn. 21 *et seq.*; Rabe, Wettbewerbs- und Seeschiffahrtspolitik der EG (1994), p. 1; Werner, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 797.

1017/68³¹ provided for procedural rules for the application of Articles 81 and 82 EC to maritime transport. At that time there were no available sector-specific procedural provisions concerning the direct application of Articles 81 and 82 EC to maritime transport. Therefore, the Commission did not make any concrete decisions on competition issues in the field of maritime transport immediately after the above ECJ rulings and directly in line with them.³² This lack was finally remedied by Regulation 4056/86 with more detailed secondary procedural rules for the application of Community competition rules to maritime transport.

IV. Regulation 4056/86: Incompatibility with the EC Treaty from the Legislative Point of View

As stated above, one of the essential backgrounds for the adoption of Regulation 4056/86 is the legal declaration that the primary Community competition rules are applicable to the maritime transport sector. Therefore, the primary Community competition rules, principally Articles 81 and 82 EC, constitute the standard for a correct interpretation of Regulation 4056/86.³³ However, Regulation 4056/86 grants the block exemption to anti-competitive practices of liner conferences without any time limit, which constitutes a unique treatment of the maritime transport sector.³⁴ Therefore, it is necessary to analyze the compatibility of Regulation 4056/86 with the EC Treaty, especially with Community competition rules.³⁵ Here is only a brief examination from the legislative point of view. A detailed analysis can be found in Chapter VI A. I.

One legal basis of Regulation 4056/86 is Article 83 EC (*ex Article 87*),³⁶ which require that appropriate regulations or directives shall be laid down by the Council to give effect to the principles set out in Articles 81 and 82 EC. Correspondingly,

³¹ Council Regulation (EEC) No. 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, O.J. 1968 L 175/1. For a detailed survey of Regulation 1017/68, see *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 59 ff.

³² Another possibility, to use Article 85(2) EC (*ex Article 89(2)*) as legal basis against restriction practices, was not either utilized by the Commission. See *Werner*, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 797 ff.

³³ *Lang*, Current Issues in EC Maritime Competition Law (1993), p. 406; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 95. For a critical opinion, see *Kröger*, Current Issues in EC Maritime Competition Law (1993), p. 426.

³⁴ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1546, Rn. 35; also Cf. *Dinger*, The Future of Liner Conferences in Europe (2004), p. 95; *Faull*, Competition Policy in the Maritime Field (1995), p. 5.

³⁵ For a general review on the incompatibility of Regulation 4056/86 with Article 81(1) EC from the very beginning, see *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 55 ff.

³⁶ The first sentence of the Preamble of Regulation 4056/86 in comparison with Article 83(1) EC. See also *Neegenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1171, Rn. 68.

two points are to be respected with regard to the provisions contained in such regulations:³⁷

The regulations or directives ... shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

However, Regulation 4056/86 grants the block exemption to the very forms of anti-competitive practices of liner conferences, such as price fixing, capacity arrangements, loyalty agreements, which are the so-called “hard core cartels” and in principle fall within the infringement scope of Article 81 EC.³⁸ The legalization of the liner conference block exemption by Regulation 4056/86 allows for the fundamental infringement of Community competition rules and gave rise to serious doubt as to whether Regulation 4056/86 could fulfil the aim of Article 83 EC and comply with it.³⁹

Another legal basis of Regulation 4056/86 is Article 80(2) EC (*ex* Article 84(2)), which allows the Council to “decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport”.⁴⁰ However, it is questionable whether Article 80(2) EC could restrict the application of the primary Community competition rules and in this way support the legalization of the block exemption for liner conferences.⁴¹ As to the relation between Article 80(2) EC and Articles 81 and 82 EC, in *French Merchant Seamen*, the ECJ held the following opinion, which was also confirmed in *Nouvelles Frontières*.⁴²

³⁷ For a detailed survey of the relation between Article 83 EC and Articles 81 and 82 EC, see *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 157 ff.

³⁸ See *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1546, Rn. 35.

³⁹ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 158; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1546, Rn. 35.

⁴⁰ The first Sentence of the Preamble of Regulation 4056/86 in comparison with Article 80(2) EC. For more details, see *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 158; *Negenman*, in: *Schröter/Jakob/Mederer*, *Kommentar zum Europäischen Wettbewerbsrecht* (2003), p. 1171 Rn. 68; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., Rn. 63; *Werner*, *Eine Wettbewerbsverordnung für den Seeverkehr* (1987), p. 799.

⁴¹ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1547, Rn. 36.

⁴² ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, “*Nouvelles Frontières*”), [1986] E.C.R. 1425, para. 44.

Whilst under Article 84(2) (now Article 80(2) EC), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV of Part Two of the Treaty (now Title V of Part Three of the EC Treaty) relating to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty.⁴³

Therefore, Article 80(2) EC simply restricts the application of the provisions contained in Title V of Part Three of the EC Treaty to the sectors of sea and air transport. It cannot, however, exclude the application of the general rules of the EC Treaty, particularly the primary Community competition rules, to sea and air transport.⁴⁴

In conclusion, neither Article 83 EC nor Article 80(2) EC could provide sufficient legal basis for the block exemption laid down in Regulation 4056/86,⁴⁵ which, from the legislative point of view, lead to the incompatibility of Regulation 4056/86 with the primary Community competition rules.

B. General and Sector-Specific Competition Rules in Maritime Transport in China

I. Regime of Competition Regulation in Maritime Transport

1. Critique of Maritime Legislation in China

As concluded from the above overview of China's maritime policy and legislation, Chinese legislation pursues a gradual and continuous policy in favour of market opening and competition. It endeavours to accelerate legislation on maritime transport and to strengthen its enforcement under the motto of establishing a socialist constitutional state ruled by law. However, the goal of a complete legal framework for administration and regulation in the maritime transport sector has not been reached. Present legislation is widely scattered and far from systematic.⁴⁶ As regards types of legislation, there are several laws within the meaning of the

⁴³ ECJ 4 April 1974, case 167/73 (*Commission v. French Republic*, "French Merchant Seamen"), [1974] E.C.R. 359, para. 32.

⁴⁴ *Ibid.*, paras. 30–32; ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others*, "Nouvelles Frontières"), [1986] E.C.R. 1425, paras. 42–45. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 159 ff.; *Townley*, The Liner Shipping Block Exemptions in European Law (2004), p. 113; *Erdmenger*, in: *von der Groeben/Thiesing/Ehlermann*, Kommentar zum EU-/EG-Vertrag, Article 80 EG, p. 1975, Rn. 23.

⁴⁵ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr, C., p. 1547, Rn. 37. See also *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1174, Rn. 76; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 139 ff.

⁴⁶ For more details, see *Ma*, China's International Maritime Policy and Shipping Legislation (2003), p. 11 ff.

Legislation Law, many administrative regulations adopted by the State Council, and numerous administrative rules and notices issued and enforced by the MOC alone or in cooperation with other ministries or commissions. These statutes are often contradictory, and such conflicts usually cannot simply be resolved by considering the status of the conflicting statutes in the legal hierarchy.⁴⁷

Especially in respect of competition regulation of liner conferences, which is the central topic of this thesis, a regime of competition regulation of liner conferences, including both general and specific competition rules, must be clarified, before an analysis from the perspective of competition law can be carried out. Therefore, it is necessary to identify the specific competition rules which apply in the maritime market, primarily to liner conferences. Then the general competition rules in force must be analyzed to clarify their applicability to the specific issue of liner conferences.

2. Competition Regulation relating to Liner Conferences

The main competition provisions on liner conferences are given in the RIMT and the IRRIMT. A further relevant legal document is the Notice on Strengthening Supervision on Liner Conferences and Freight Discussion Agreements⁴⁸ (MOC-Notice 2007) issued by the MOC on 12 March 2007. The MOC-Notice 2007 was the result of the four-year investigation of the MOC in the *Terminal Handling Charges (THC)* case.⁴⁹ In the following, a brief introduction of the relevant provisions will be given, so as to give an image of the sector-specific regulation regime on liner conferences.

a. RIMT

The RIMT has no special provisions on competition with regard to liner conferences. But the few relevant articles cover both substantive and procedural provisions on liner shipping. The substantive provisions are Articles 22, 24 and 27 RIMT. The procedural provisions mainly refer to administrative investigation and settlement in Chapter V of the RIMT.

The RIMT does not directly refer to the question whether or not an exemption of liner conferences from general competition rules is allowed, but states in Article 22 RIMT:

“Photocopies of liner conference agreements, service operational agreements and freight rate agreements concluded between international shipping operators engaged in international liner shipping services in which Chinese ports are involved shall be filed with the competent communications department of the State Council within 15 days from the date of conclusion of such agreements.”

⁴⁷ *Ma*, China's International Maritime Policy and Shipping Legislation (2003), p. 12 ff.

⁴⁸ Notice on Strengthening Supervision on Liner Conferences and Freight Discussion Agreements [关于加强对班轮公会和运价协议组织监管的公告], Doc. No. MOC 10/2007, issued by the MOC on 12 March 2007.

⁴⁹ For more details see below Chapter V B. I.

A further provision relating to competition is Article 24 RIMT which mainly refers to mergers and acquisitions between international shipping operators. Article 24(1) RIMT requires that agreements on mergers or acquisitions among international shipping operators shall be submitted for examination and approval to the MOC. Further substantive and procedural provisions on this regulatory examination and approval are given in Article 24(2) RIMT.⁵⁰

Article 27 RIMT is the main substantive competition provision which directly refers to anti-competitive practices in the field of shipping transportation services. According to Article 27 RIMT, four categories of practices are prohibited:

- 1) offering lower than normal freight tariffs, i.e. tariffs below a reasonable standard, thus obstructing fair competition;
- 2) offering carriers secret commissions not listed in the accounts in order to obtain cargo;
- 3) abusing their advantageous positions and causing damage to other trading parties by discriminatory pricing or other restrictive conditions;
- 4) other conduct that causes harm to the other trading party or to the market order of international maritime transport.

It is one of the legislative improvements achieved by the RIMT that to deal with anti-competitive practices, it establishes certain procedural provisions for administrative investigation and settlement. These procedural provisions are set out in Chapter V under the title “Investigation and Settlement” (Articles 35 to 41 RIMT). Chapter V of the RIMT provides a framework of investigation and decision procedures and covers the general aspects including the conditions for the start of an investigation, the responsible authorities, the investigation committee, the scope of investigation, the rights and obligations of persons under investigation, the protection of business secrets, the criteria of competition assessment and the hearing. However, Chapter V of the RIMT does not provide for concrete and detailed rules for implementation of these procedural provisions. This defect is partially repaired by Chapter V of the IRRIMT which is also titled “Investigation and Settlement”.

b. IRRIMT

The IRRIMT implement the RIMT with more concrete and detailed provisions. This concerns also the competition provisions under the RIMT and the IRRIMT. Article 32 IRRIMT refers to Article 22 RIMT and further provides for the formality and content of the filing referred to. Liner conference agreements (Article 32(1) IRRIMT) must be filed by the representative of a liner conference on behalf

⁵⁰ According to Article 24(2) RIMT, the State Council department responsible for communications shall, within 60 days from the date of receiving merger or takeover agreements submitted by operators of international vessel transport, conduct an assessment on the basis of the State policies regarding the development of international maritime transport as well as competition in the international maritime transport market, make a decision as to whether or not to approve the merger or takeover, and notify in written form the said operators of international vessel transport.

of all its members engaging in maritime transport involving Chinese ports. A name list of the conference members must be attached.⁵¹

Supplementing Article 24 RIMT, Article 33 IRRIMT clarifies the scope of the international shipping operators mentioned in Article 24 RIMT: mergers and acquisitions subject to the examination and approval of the MOC can be those between two or more Chinese international shipping operators, on one side, or those between Chinese and foreign international shipping operators on the other side.

A further competition provision in the IRRIMT is Article 38 IRRIMT which repeats the substantive content of Article 27 RIMT but extends the scope of the subjects which are no longer limited to international shipping operators and non-vessel operators as provided in Article 27 RIMT, but include also international shipping agency operators, international vessel management operators, international maritime transport cargo storage business operators and international maritime transport container depot and stacking yard business operators.

Like the RIMT, the IRRIMT also contain a Chapter V with the title "Investigation and Settlement" (Articles 52 to 60 IRRIMT). The nine articles of Chapter V of the IRRIMT give concrete and detailed provisions to clarify and implement the procedural rules in Chapter V of the RIMT. The most important improvement in Chapter V of the IRRIMT is the precise interpretation of the criteria for competition assessment by the investigating body.⁵² Although Articles 55 and 56 IRRIMT are included in the procedural provisions, they provide further assessment criteria as a basis for the substantive competition rules in Article 27 RIMT as well as Article 38 IRRIMT. In this way, assessment by the responsible authority can be carried out with greater legal certainty and predictability.

c. MOC-Notice 2007

The MOC-Notice 2007 only contains six articles. It repeats and emphasizes the filing required by the RIMT and the IRRIMT. Article 2 of the MOC-Notice 2007 requires that liner conferences establish liaison offices and representatives within Chinese territory and carry out filing formalities by the MOC. Articles 4 to 6 and the attachment of the MOC-Notice 2007 provide for detailed rules on the filing requirements for liner conferences.

Notably, Article 1 of the MOC-Notice 2007 generally prohibits infringement of fair competition on the international shipping market and demonstrates the legal principles to which liner conferences shall be subjected. Three sets of legal rules are mentioned here: 1) the RIMT, 2) related Chinese laws, rules and regulations, and 3) the UNCTAD Liner Code. As shown above, direct applicability of the UNCTAD Liner Code in China is excluded, although the Chinese government has ratified this international convention almost twenty years ago. The "related Chinese laws, rules and regulations" referred to here are not defined further. Therefore, it must be said that the ideas of the MOC on the legal basis for regulation of

⁵¹ Article 32(2) IRRIMT refers to service operational agreements and freight rate agreements and requires that the related filing shall be carried out by the international shipping operators engaging in such agreements respectively.

⁵² See Articles 55 and 56 IRRIMT.

liner conferences are rather doubtful. This is evidenced by the actual investigation and decision of the MOC in the *THC* case.⁵³

A valuable improvement in the MOC-Notice 2007 is Article 3 which for the first time definitely requires effective consultation between liner conferences and shippers or association of shippers within Chinese territory.

II. Applicability of General Competition Rules

1. Competition Legislation: General Overview

China's attitude towards competition has undergone a gradual but undeniable reversal since the founding of the PRC in 1949.⁵⁴ Although the term "anti-monopoly" seldom appears in Chinese laws and regulations, China began to address the need to safeguard market competition at an early stage of the reform period.⁵⁵

The Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy,⁵⁶ issued by the State Council in 1980, constituted the first legislative attempt to combat monopolies, including government monopolies.⁵⁷ These Interim Provisions provided that "[i]n economic activities, apart from products which are to be exclusively traded by departments or units designated by the State, no other products may be monopolized or traded in exclusively."⁵⁸ "[I]n competition, efforts must be made to break regional blockades and departmental divisions. No region or department may blockade the market or prohibit the sale of commodities originating in other regions or department. ...In order to carry out

⁵³ For more details see below Chapter VI B. I.

⁵⁴ *Jung/Hao*, The New Economic Constitution in China (2003), p. 110.

⁵⁵ *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003), p. 19. In the past, the prevalent ideology of socialism labelled competition as the crux of capitalism's inferiority. Competition was thus not only irrelevant to the economic reality but also inherently condemned by enshrined communist ideology. With the marketization of the Chinese economy, the policy makers displayed a modified interest in competition: it was no longer considered to be unique to capitalism, but could "stimulate the economy and benefit socialism". At the same time, however, it was stressed that "competition between socialist enterprises" was "fundamentally different from that under capitalism". See *Jung/Hao*, The New Economic Constitution in China (2003), p. 111. Cf. also *Au*, Das Wettbewerbsrecht der VR China (2004), p. 39 ff. See also *Jin/Luo*, Competition Law in China (2002), p 4 ff.

⁵⁶ Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy [关于开展和保护社会主义的竞争的暂行规定], promulgated by the State Council on 17 October 1980 and abolished on 6 October 2001.

⁵⁷ *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 216. For a general overview of the Interim Provisions, see *Münzel*, Neues chinesisches Vertrags- und Wettbewerbsrecht (1981); *Münzel*, Kartellrecht in China (1988), p. 168 ff.; *Shao*, Unternehmensgruppen und Zusammenschlußkontrolle in China (1996), p. 57 f.

⁵⁸ Article 3 of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy.

competition, the departments in charge of industry, transportation, and trade must revise provisions of the existing rules and regulations which obstruct competition.”⁵⁹ These Interim Provisions also authorized the relevant regions and departments to adopt implementation measures in accordance with the spirit of the Interim Provisions that would ensure the smooth functioning of competition.⁶⁰ However, while these Interim Provisions emphasized competition, they stressed that “[c]ompetition between socialist enterprises is fundamentally different from that under capitalism. Competition under socialism is based on the common ownership of product resources and serves the socialist economy under the guidance of the state plan.”⁶¹ Moreover, these Interim Provisions were mainly just slogans rather than concrete provisions that could have been applied by judges handling competition cases.⁶²

Since the adoption of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy, legislation on competition has accelerated. A number of statutes directly relating to competition and many individual provisions in other enactments have been adopted. Before the AML was adopted by the Standing Committee of the NPC on 30 August 2007, the most important competition statutes were the Law Against Unfair Competition⁶³ (LAUC), the Pricing Law⁶⁴ and the Provisional Regulation on Curbing of Pricing Monopolies⁶⁵ (PRCPM) as well as the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.⁶⁶ Together with other basic laws such as the General Principles of Civil Law, the Criminal Code,⁶⁷ the Trademark Law,⁶⁸ the Product

⁵⁹ Article 6 of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy.

⁶⁰ Article 10 of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy.

⁶¹ The 2nd Sentence of the Preamble of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy.

⁶² *Jin/Luo*, Competition Law in China (2002), p. 6.

⁶³ Law Against Unfair Competition [反不正当竞争法], adopted at the 3rd Session of the Standing Committee of the 8th NPC on 2 September 1993 and effective on the same date.

⁶⁴ Pricing Law [价格法], adopted at the 29th Session of the Standing Committee of the 8th NPC on 29 December 1997 and effective as of 1 May 1998.

⁶⁵ Provisional Regulations on Curbing of Pricing Monopolies [制止价格垄断行为暂行规定], issued by the National Development and Reform Commission on 18 June 2003 and effective on 1 November 2003.

⁶⁶ Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [关于外国投资者并购境内企业的规定], jointly issued by six ministries together (including Ministry of Commerce, State Asset Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange) on 8 August 2006 and effective as of 8 September 2006.

⁶⁷ Criminal Code [刑法], adopted at the 2nd Session of the 5th NPC on 1 July 1979 and effective as of 1 January 1980. In 1997, 1999, 2001, 2002, 2005 and 2006, Criminal Code was revised and amended six times.

Quality Law,⁶⁹ the Advertisement Law⁷⁰ and the Bidding Law,⁷¹ these widely scattered competition rules formed some general principles,⁷² and built a framework, of competition law.⁷³

Apart from the newly adopted AML which will not come into effect until 1 August 2008, existing Chinese competition legislation consists of four groups of rules. First, competition regulations prohibiting restrictive agreements, such as the LAUC, the Pricing Law, the PRCPM and the Bidding Law.⁷⁴ Second, regulations on merger control. In this field, beside a wide range of normative documents issued by the State Council or by ministries but not in the legislative procedures provided for in the Legislation Law,⁷⁵ the most important legal enactment was the

⁶⁸ Trademark Law [商标法], adopted at the 24th Session of the Standing Committee of the 5th NPC on 23 August 1982 and effective as of 1 March 1983. In 1982, 1993 and 2001, the Trademark Law was revised and amended three times.

⁶⁹ Product Quality Law [产品质量法], adopted at the 30th Session of the Standing Committee of the 7th NPC on 22 February 1993, effective as of 1 September 1993 and amended in 2000.

⁷⁰ Advertisement Law [广告法], adopted at the 10th Session of the Standing Committee of the 8th NPC on 27 October 1994 and effective as of 1 February 1995.

⁷¹ Bidding Law [招标投标法], adopted at the 11th Session of the Standing Committee of the 9th NPC on 30 August 1999 and effective as of 1 January 2000.

⁷² For example, Article 4 of the General Principles of Civil Law provides that “[i]n civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed.” Through this provision the basic principle of market competition was established at the first time in the form of law.

⁷³ Bao, *The Economic Analysis of Antimonopoly Law* (2003), p. 206; Jin/Luo, *Competition Law in China* (2002), p. 6 ff.

⁷⁴ As regards the pro-competition, the competition rules in the Bidding Law mainly refer to the prohibition against collusion of undertakings by bidding, especially Article 32 of the Bidding Law. For other pro-competition provisions, see Articles 22, 31, 51 and 52 of the Bidding Law.

⁷⁵ For example, Decision on Deepening Reform of Enterprises and Strengthening Enterprise’s Dynamic [关于深化企业改革增强企业活力的若干规定], issued by the State Council of the PRC on 5 December 1986 and abolished on 16 Mai 1994. These Decisions put forward “encouragement of development of enterprise groups” (Article 8(1)). At the same time, however, it stipulated that “[a]s a general rule, no monopoly enterprise groups shall be established within an industry so as to carry out competition and promote technical progress.” (Article 8(2)). Another example is the Opinions on Establishment and Development of Enterprise Groups [关于组建和发展企业集团的若干意见], jointly issued by the State Commission for Economic Restructuring and the State Commission of Economic on 16 December 1987. According to Article 5 of the Opinions, “[t]he establishment of enterprise groups must be in accordance with the principle of encouraging competition and preventing monopoly. As a general rule, no national monopoly enterprise groups shall be set up within an industry, and competition between enterprise groups within the same industry shall be encouraged so as to promote technological progress and increase economic efficiency. Competition shall be introduced into an enterprises group and the member enterprises shall not only co-operate but also compete with each other. The inefficient member enterprises shall not be pro-

Rules on Merger and Acquisition of Domestic Enterprises by Foreign Investors which replaced the previous Interim Provisions for Foreign Investors for Merge with Domestic Enterprises.⁷⁶ In accordance with the requirements of the Rules on Merger and Acquisition of Domestic Enterprises by Foreign Investors that any merger or acquisition of a domestic Chinese enterprise carried out by foreign investors shall be subject to a prior declaration for anti-monopoly control, the Guideline for Anti-Monopoly Declaration by Foreign Investors in the Merger or Acquisition of Domestic Enterprises was issued by the MOFCOM on 8 March 2007.⁷⁷ Third, rules against the abuse of a dominant market position can be found in the LAUC⁷⁸ and in the PRCPM.⁷⁹ Fourth, rules against administrative anti-competitive practice. In this aspect, beside lots of normative documents prohibiting administrative anti-competitive practice, the relevant laws and normative documents include the LAUC,⁸⁰ the Decision on Strictly Prohibiting Party and Government Organs and Party and Government Cadres from Engaging in Commerce and Running Enterprises,⁸¹ the Notice on Breaking Regional Market Blockades and Further Promoting the Circulation of Commodities,⁸² and the Rules on the Prohibition of Regional Market Blockades.⁸³

tected.” A third example is the Interim Measures for Merger of Enterprises [关于企业兼并的暂行办法], jointly issued by the State Commission for Economic Restructuring, the State Planning Commission, and the Ministry of Finance as well as the Bureau of Management of State-Owned Property on 19 February 1989. Article 2(5) of these Interim Measures provided that “[m]erger of enterprises must be conducive to economies of scale while prohibiting monopoly and not harming market competition.”

⁷⁶ Interim Provisions for Foreign Investors to Merge Domestic Enterprises [外国投资者并购境内企业暂行规定], jointly issued by four ministries (including the Ministry of Foreign Trade and Economic Cooperation, the State Administration of Taxation, the State Administration for Industry and Commerce, the State Administration of Foreign Exchange) on 7 March 2003 and effective as of 12 April 2003, replaced by the Rules on Merger and Acquisition of Domestic Enterprises by Foreign.

⁷⁷ Guideline for Anti-Monopoly Declaration by Foreign Investors in the Merger or Acquisition of Domestic Enterprises [外国投资者并购境内企业反垄断申报指南], issued by the MOFCOM on 8 March 2007 and effective as of the same date.

⁷⁸ Article 6 LAUC.

⁷⁹ Articles 3, 5 to 8 PRCPM.

⁸⁰ Article 7 LAUC.

⁸¹ Decision on Strictly Prohibiting Party and Government Organs and Party and Government Cadres from Engaging in Commerce and Running Enterprises [关于严禁党政机关和党政干部经商、办企业的决定], issued by the Central Committee of the Communist Party and the State Council on 3 December 1984. This normative document requires that “[t]he leading organs of the Party and the government, especially the economic organs and their leaders, must appropriately perform their functions of leading and organizing economic construction, adhere to the principle of separation of the functions of government from that of enterprises ... They are strictly prohibited from abusing their power to engage in business, set up enterprises, seek personal gains, and harm the interests of the people in violation of the regulations of the Party and of the State.”

⁸² Notice on Breaking Regional Market Blockades and Further Promoting the Circulation of Commodities [关于打破地区间市场封锁, 进一步搞活商品流通的通知], issued by

In short, there are numerous legal rules on competition, but they are scattered throughout numerous legal enactments like laws, administrative regulations, interim provisions as well as normative documents like notices or Party-decisions. Thus a complete, specialized system of anti-monopoly legislation has not come into being.⁸⁴ The call for a codification of anti-monopoly provisions, not only from scholars in legal and economic research field, but also from the industrial branches and normal consumers or end-user, became much louder and louder, especially after China's accession to the WTO.⁸⁵

After lengthy discussion and debates, the 29th Standing Committee of the 10th NPC adopted the AML on 30 August 2007, which includes eight chapters and 58 articles. The AML will come into effect on 1 August 2008. Before this date, an Anti-Monopoly Commission will be established, which should stand directly under the State Council (Article 9 AML) and an enforcing authority in charge of concrete anti-monopoly regulation will be established on the basis of existing ministries or as an individual department under the State Council (Article 10 AML). Since the AML will not be effective until 1 August 2008 and many of the substantive and procedural instruments wait to be clarified or established, the applicability of and the relation between the AML and the sector-specific regulations on liner conferences is a matter of speculation on future development. A discussion of this topic will be found in Chapter VI of this thesis.

2. Law Against Unfair Competition (LAUC)

a. Background

The Law Against Unfair Competition (LAUC) is the first law in the sense of the Legislation Law which directly and primarily focuses on general competition rules.⁸⁶ Although it is called "law against unfair competition", it includes several

the State Council on 10 November 1990 and effective on the same date. This Notice opposed local protectionism and pointed out that production enterprises, after fulfilling the tasks of production for the allocation of products according to the state's mandatory plan and the purchase-and-sale contracts, possess the right to sell their products throughout the country. In addition, enterprises in the areas of industry, commerce, and materials and equipment may purchase the products they need independently. No region or department may set up blockades to interfere in any of these activities.

⁸³ Rules on the Prohibition of Regional Boycott in Market Economic Practices [国务院关于禁止在市场经济活动中实行地区封锁的规定], issued by the State Council on 21 April 2001 and effective on the same date.

⁸⁴ Wang, *The Prospect of Antimonopoly Legislation in China* (2002), p. 222.

⁸⁵ *Ibid.*, p. 201. For example, during the 5th Plenary Session of the 9th NPC held in March 2002, the first bill submitted was the Bill on Promulgation of Anti-Monopoly Law in Near Future, which urged the enactment of the Chinese Anti-Monopoly Law.

⁸⁶ For more critiques, see *Williams*, *Competition Policy and Law in China*, Hong Kong and Taiwan (2005), p. 166. It is argued that LAUC is primarily a consumer protection law. However, this argument fails on concrete reasoning. For the survey of the relation between the LAUC and the Law on Protection of Consumer Rights and Interests [消费者权益保护法], which was adopted at the 4th Session of the Standing Committee of the

antitrust provisions such as Articles 6 and 7.⁸⁷ The reason is the legislative history of this law. In 1987, the Legislative Affairs Bureau of the State Council collaborated with the State Administration for Industry and Commerce (SAIC) and five other authorities to draft a national competition law. However, this effort was suspended due to a sharp dispute on the aim of the legislation, substantive and procedural provisions as well as their scope of application. The debate centred on the choice of the legislative model. One model was a unified competition law including both anti-unfair competition provisions and anti-monopoly provisions. The other was two separate laws on unfair competition and on monopolies. This model won. A law against unfair competition was to be drafted and adopted first. But as the plans for an anti-monopoly law were postponed, some anti-monopoly issues then also were treated in this Law Against Unfair Competition. In early 1992, the SAIC organized a drafting committee according to the legislative plan of the Standing Committee of the NPC to draft a Law Against Unfair Competition. In cooperation with the Legislative Affairs Commission of the NPC, the Legislative Bureau of the State Council and some other authorities, the draft of the Law Against Unfair Competition was passed in on Executive Meeting of the State Council, submitted to the Standing Committee of the NPC, and finally, with some revisions, adopted by the Standing Committee of the 8th NPC on 2 September 1993.

b. Applicability to Competition Regulation of Liner Conferences

Article 1 LAUC states that this law is to safeguard the healthy development of the socialist market economy by encouraging and protecting fair competition and stopping acts of unfair competition so as to protect the legitimate rights and interests of undertakings and consumers. One of the most important developments in the LAUC is the legal definition of two relevant terms. The first is the term “undertakings” which is defined in Article 2(3) LAUC as legal persons, other economic organisations and natural persons who engage in business operations or provision of reimbursable services. The second refers to the term “unfair competition practices” which is mentioned in Article 1 LAUC. However, what is legally defined is not the term “unfair competition practices”, but the term ‘unfair competition’. According to Article 2(2) LAUC, “unfair competition” refers to practices by undertakings which are in violation of the provisions under LAUC, give rise to damage to the legitimate rights and interests of other undertakings and disrupt the social economic order. Actually, the two terms, “unfair competition” and “unfair competition practices”, are used as synonym both in LAUC and in administrative practice.

Article 2(2) LAUC is a general prohibition which determines the fundamental criteria for the examination and determination of unfair competition practice

⁸⁷ NPC on 31 October 1993 and effective as of 1 January 1994, see *Kong*, Anti-Unfair Competition Law (1998), p. 1 ff.

⁸⁷ *Jung/Hao*, The New Economic Constitution in China (2003), p. 128.

within the meaning of the LAUC.⁸⁸ The majority of commentators argues that practices, not listed as unfair competition practices in Chapter II of the LAUC but fulfilling the criteria of Article 2(2) LAUC, could also be seen as unfair competition practices and fall under the scope of application of the LAUC. This is not in accordance with the opinion of the legislator of the LAUC.⁸⁹ Article 2(2) LAUC requires unequivocally the infringement of provisions of the LAUC. This means that an unfair competition practice within the meaning of the LAUC can only be one, or a combination of the unfair competition practices, provided for in Chapter II of the LAUC under the title “Unfair Competition Practices”.⁹⁰

Chapter II of the LAUC contains 11 articles (Articles 5 to 15) which provide for 11 categories of “unfair competition practices”. Article 5 LAUC prohibits improper competition practices relating to trademark, brand name and package. Article 6 LAUC prohibits the abusive practices of public utilities and other undertakings which are assigned a monopoly by law⁹¹. Article 6 LAUC prohibits that monopolistic undertakings restrict consumers to purchase from certain undertakings designated by them so as to squeeze out other undertakings from fair competition. Article 7 LAUC prohibits governments and their departments to abuse their administrative power by restricting purchases or by limiting the free movement of goods. Articles 8 to 10 LAUC refer respectively to improper competition practice by bribery, by false advertisements or statements, and by the infringement of business secrets. Article 11 LAUC prohibits dumping sales at prices below cost with the aim of squeezing out competitors. Articles 12 to 15 LAUC refer respectively to improper competition practices in the form of tie-in sales or “rewards” for sales, by harming the business credit or reputation of competitors through fabricating and spreading false statements, or by collusion in tenders.

As demonstrated above, the application of the LAUC is limited to the improper competition practices listed in Chapter II of the LAUC. The practices of liner conferences within the meaning of competition law could hardly be considered to include these practices under LAUC. Only Article 11 LAUC might possibly be applied to the prohibition of “fighting ships” in the restrictive practices of liner conferences, but until now no administrative decision or court judgement has done this. In general, it seems that, with the possible exception of Article 11, the LAUC is not applicable here at all.

3. Price Regulation

a. Background

Before the adoption of the AML which establishes a systematic framework of antitrust law, the Chinese legislator has for a long time emphasized legislation on price regulation in respect of monopoly activities. This has several reasons. The

⁸⁸ This is the majority opinion in Chinese literature relating to LAUC, see *Kong*, Anti-Unfair Competition Law (1998), p. 50 ff.

⁸⁹ *Ibid.*, p. 8 and p. 51 ff.

⁹⁰ *Ibid.*, p. 50 ff.

⁹¹ In China, such undertakings which are assigned a monopoly by law mainly refer to state tobacco and salt monopolies which are assigned to certain state enterprises.

first is that price competition constitutes one of the fundamental aspects of competition. Secondly, the state authorities for price regulation and also the authorities for specific sectors, established under the previous planned economy, normally have much regulatory experience in price regulation. Such state authorities prefer measures of price regulation to antitrust enforcement. Thirdly, the public utilities and other big SOEs continue to control key industries and possess national monopolies. This situation and economic structure are not in conflict with the fundamental requirements of the Socialist Market Economy. However, the transformation from a planned economy to a market economy inevitably requires changing the previous rigid price determination by the state. Prices of public utilities and big SOEs continue to be set, at least to a limited extent, by the State, but increasingly in the form of legislation. Economic reforms and regulation increasingly centre on prices determined by monopolies.⁹² Finally, with the progress of economic transformation in the PRC, more and more often horizontal and vertical agreements are concluded by undertakings in order to reduce or even eliminate competition and to enlarge market profits. This has become a commonplace not only for private undertakings, but also for public utilities and SOEs. The State deviated from its previous rigid position by emphasizing so-called competitive cooperation between undertakings to avoid ruinous competition and wavered competition policy.

b. Pricing Law and Implementation Rules

According to Article 1, the Pricing Law aims at regulating price behaviour, strengthening price functions in rational resources allocation, stabilizing the general price level in the market, protecting the lawful rights and interests of consumers and undertakings, and promoting the healthy development of the socialist market economy. It is strange that Article 1 does not mention competition. Only Article 4 of the Pricing Law, which states the principles of price regulation, provides that the State shall support and promote fair, open and lawful market competition, maintain a normal price order and exercise necessary administrative and regulative control over pricing.

The Pricing Law sets out a general framework of price regulation which focuses on price administration and also includes some competition provisions. It regulates three categories of prices, i.e. market-adjusted prices, government-adjusted prices and government-set prices (Article 3). The majority of provisions in this law refers to government-guided prices and government-set prices and concentrate on their administration.⁹³ Market-adjusted prices are defined as prices fixed independently by undertakings through market competition.⁹⁴ Chapter II which mainly refers to market-regulated prices consists of twelve articles and

⁹² For example Articles 18 to 25 of the Pricing Law.

⁹³ Such provisions are mainly located in Chapter III and IV, but can also be found in Chapter II, especially Articles 9 to 13 of the Pricing Law.

⁹⁴ Article 3 of the Pricing Law.

stipulates the only detailed competition rule in the Pricing Law, i.e. Article 14 which lists eight categories of improper price behaviour as follows:⁹⁵

- 1) collusion with others to manipulate market prices, thereby infringing on the legal rights and interests of other operators or consumers;
- 2) dumping goods at prices below cost in order to squeeze out competitors or monopolise the market, thereby disrupting normal production and business order and damaging the national interest or the legal rights and interests of consumers, except in the case of fresh or seasonal products, overstocked goods, etc, where the prices are legally reduced;
- 3) to fabricate and spread news of a price rise, drive up prices and propel commodity prices to rise exorbitantly;
- 4) pricing methods which are false or open to misunderstanding to trick consumers or other operators into trading;
- 5) to provide identical commodities or services, but implement price discrimination towards other operators with equal trading conditions;
- 6) to adopt means to force up or force down prices, etc, when buying or selling commodities or providing services so as to covertly increase or lower prices;
- 7) to violate the provisions of laws or statutes to seek exorbitant profits;
- 8) other improper pricing acts which are prohibited by laws or administrative statutes.

c. Pricing Monopolies under Article 2 PRCPM

The Provisional Regulation on Curbing of Pricing Monopolies (PRCPM) was promulgated by the National Development and Reform Commission (NDRC) on 18 June 2003, in order to implement the Pricing Law.⁹⁶

The PRCPM provide for two important definitions which are not included in the Pricing Law. The first one is “pricing monopolies” (Article 2 PRCPM)⁹⁷ and

⁹⁵ Here Chinese law-maker seems to try to define the “price monopoly behavior”. However, literally speaking, it is only a definition of the “improper pricing behavior”. See *Wu*, Price-monopoly and Legislation Regulation (2006), p. 173.

⁹⁶ The PRCPM was promulgated by the National Development and Reform Commission (NDRC). The NDRC originated from the Planning Commission of the State Council which drafted the Pricing Law. Article 1 PRCPM clearly states as the aim of this Regulation, that in accordance with the Pricing Law, they are to curb pricing monopolies, promote fair competition and protect the legal rights and interests of undertakings and consumers. The release of the PRCPM was seen as an attempt of a lower level PRC administrative body to push ahead with anti-monopoly provisions and the herald of a general competition law in the PRC before the adoption of the AML in 2007. More see *Au*, Das Wettbewerbsrecht der VR China (2004), p. 256; *Wu*, Price-monopoly and Legislation Regulation (2006), p. 175.

⁹⁷ In the following provisions on prohibition of certain pricing acts, the PRCPM use the term “pricing monopolies” instead of the term “improper pricing acts” used in the Pricing Law. Neither the State Council as legislator of the Pricing Law nor the NDRC as author of the PRCPM have explained this divergence of terms. It can be seen as a typical example of the inconsistency of Chinese legislators on different levels acting at will.

the second is “market dominance” (Article 3 PRCPM). The definition of “pricing monopolies” in Article 2 PRCPM reads as follows:

“the manipulation of market-regulated prices, disruption of normal production and business order, infringement of legal rights and interest of other undertakings or consumers and infringement of public interest by undertakings through collusion or abuse of market dominance.”

This definition provides four cumulative criteria for the determination of one pricing monopoly behaviour. The first criterion is that undertakings have colluded with each other in pricing or abused a dominant position in the relevant market. Consequently, Article 4 PRCPM provides for that agreements, decisions and concerted practices constitute the forms of collusion in the sense of Article 2 PRCPM and lists four categories of pricing monopolies through collusion:

- 1) integrated determination, maintenance or change of prices;
- 2) manipulation of prices by limitation of output or supply;
- 3) manipulation of tender or auction prices; and
- 4) other forms of price manipulation.

The first criterion further refers to the definition of “market dominance” in Article 3 PRCPM. Article 2 PRCPM establishes a clear tie between dominant position and abusive practices.⁹⁸ This was for the first time in China that the causal relationship between dominant market position and abusive pricing practices was pointed out in general competition rules.⁹⁹ According to Article 3 PRCPM, market dominance by undertakings shall be judged by the market share, degree of substitutability of merchandise, and level of entry barrier for new competitors into the market. Articles 5 to 8 PRCPM state concrete provisions against pricing in abuse of a dominant market position:

- 1) Undertakings shall not use their market dominance to set limits on resale prices in their supply of merchandise to distributors. (Article 5 PRCPM)
- 2) Undertakings shall not use their market dominance to seek exorbitant profits in violation of provisions of laws and regulations. (Article 6 PRCPM)
- 3) Undertakings shall not use their market dominance to dump goods on the market below cost to eliminate or harm competitors or use commissions, subsidies or gifts etc to lower prices covertly and cause actual sale prices to fall below cost price of the merchandise. (Article 7 PRCPM)
- 4) Undertakings shall not use their market dominance to implement differential treatment for transaction prices offered to clients of equal status for identical merchandise or services. (Article 8 PRCPM)

The second criterion stated in the definition of “pricing monopolies” is the manipulation of market-regulated prices. There is a relevant difference between Arti-

⁹⁸ *Neumann/Guo*, *The Slow Boat to Antitrust Law in China* (2003), p. 19.

⁹⁹ In comparison with Articles 2 *et seq.* PRCPM, Article 6 LAUC has a very limited substantive content and a narrow scope of application in respect of the meaning and application of general competition rules. For more details see above Chapter II B. II. 2. b.

cle 2 PRCPM and Article 14(1) of the Pricing Law. The latter only speaks of the manipulation of market price. Although practically the term “market price” is to be understood in the sense of “market-regulated price” defined in Article 3(2) of the Pricing Law, a literal interpretation of the term “market prices” in Article 14(1) of the Pricing Law could not exclude the prices which exist on the market but are government-guided prices or government-set prices.

The third criterion is the disruption of normal production and business order. This term is a general expression which is used frequently in Chinese business legislation and legal documents. However, an accurate interpretation can be found neither in an official document nor in administrative practice. The fourth criterion refers to the infringement of legal rights and interests of other undertakings or consumers or the endangering of public interests. Literally, there is a same question to the third and fourth criteria. It is still unclear whether it refers to the purpose of the undertakings referred to and/or the effect of the practices concerned. A broad interpretation should be necessary that undertakings referred to have as their object or effect the disruption of normal production and business order and the infringement of legal rights and interests of other undertakings or consumers or the endangering of public interests.

d. Applicability to Competition Regulation of Liner Conferences

The applicability of competition rules in the Pricing Law and the PRCPM to liner conferences refers to two aspects. First, it refers to the scope of application of the Pricing Law and the PRCPM. Article 2 of the Pricing Law states the application to pricing within the territory of the PRC. It shall be the same to the PRCPM. If conference tariffs, which though often have been reached outside the territory of the PRC, are carried out at China’s ports, they fall under the term of “pricing within the territory of the PRC” in Article 2 of the Pricing Law.

Secondly, it refers to the unclarified legal nature of the general legitimization of liner conferences in the RIMT and the IRRIMT and consequently its relation with general competition rules such as those in the Pricing Law and the PRCPM. This will be discussed in connection with the research of legal nature of liner conferences in the RIMT and the IRRIMT.¹⁰⁰ Apart from the theoretical analysis in practice, an attitude of actual non-application should be noticed: the relation between the Pricing Law, the PRCPM and the RIMT, the IRRIMT has never been clarified by the Chinese legislator; in practice, there is no administrative decision or court judgement which touches upon the applicability of the Pricing Law and the PRCPM to liner conferences. Even in the later THC investigation, the MOC did not consider the application of the Pricing Law to conference agreements.¹⁰¹

¹⁰⁰ See below Chapter IV. B. III.

¹⁰¹ More see below Chapter VI B. I. 5.

C. Conclusion

Sector-specific regulation of liner conferences generally finds its origin in general competition rules, since the latter apply as the primary legal basis and are fundamental for the interpretation and application of individual competition provisions. That is the situation in the EU. After the politicization of Community competition rules in the maritime sector at the initial stage, the general competition rules of the EC and their procedural rules for implementation have been declared as applicable in the field of maritime transport through Community case law. On the contrary, the general competition rules in China, at least before the AML was adopted on 30 August 2007, are unsystematic and scattered over many individual laws, acts and regulations. The general applicability of such legal documents is quite restricted and their applicability to the specific issue of liner conferences could barely be established.

Although the compatibility of Regulation 4056/86 within the system of the EC Treaty could not be confirmed from the legislative point of view, Regulation 4056/86 provides for a complete competition regulation regime on liner conferences both in the sense of substantive provisions and procedural provisions. This competition regime for sector-specific regulation in liner conferences stands, at least from the original point of view favouring the generally argued economic advantages of liner conferences, in compliance with the general Community competition rules and shall serve to implement the general competition rules in the sector of liner conferences by authorizing antitrust exemption under certain conditions and obligations. In view of the weakness of the general competition rules in China, it is a typical phenomenon that the sector-specific regulations in various industrial fields are normally based on their own sector-specific competition rules and rarely connected directly with the general competition rules. This is true also for the Chinese competition regime for maritime transport, whose competition provisions are found primarily in the RIMT and the IRRIMT. However, these provisions are not functionally appropriate and efficient, and do not focus on liner conferences.

Chapter III: Scope of Application of Sector-Specific Regulation of Liner Conferences

A. Scope of Application of Regulation 4056/86

I. Objective Scope

1. Maritime Transport

Regulation 4056/86 applies “only to international maritime transport services from or to one or more Community ports, other than tramp vessel services”.¹ It follows from this combination of a general rule on application on one side and an explicit exception on the other side that Regulation 4056/86 applies to all kinds of maritime transport services including passenger services and ferry services² as well as short sea shipping, to the extent that they do not fulfil the conditions of the definition of tramp vessel services within the meaning of Article 1(3)(a) of Regulation 4056/86.³

To this extent, the definition of “maritime transport services” should be clarified. Activities other than maritime transport which are undertaken by carriers are not subject to Regulation 4056/86. Such sectors of maritime economies as fishing, oyster farming and ocean mining as well as ocean cable laying which do not deal with transport over sea do not fall within the scope of Regulation 4056/86 and the same is true for auxiliary services such as freight forwarder services, dock services as well as container-terminal operations etc.

It is correctly argued that the scope of application of Regulation 4056/86 is not determined by the main activity of the undertakings concerned or the market in which the effects of the alleged restrictive practices are felt; on the contrary, the essential consideration relates to the effective activities of the undertakings concerned and the nature of their practices.⁴ It could therefore be argued, for example,

¹ Article 1(2) of Regulation 4056/86.

² For more details see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1532 ff. Rn. 16 and particularly w.f.R in Fn. 7 and 10.

³ *Ibid.*, p. 1532 ff. Rn. 16 and particularly w.f.R in Fn. 11, 12 and 13.

⁴ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 95; cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 163. *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 88. As to the related case law, see ECJ 11 March 1997, case C-264/95 P (*Commission v. Union Internationale des Chemins de Fer (UIC)*), [1997]

that where carriers operate as inland carriers they are not subject to Regulation 4056/86. It could also be said that some of the surcharges imposed by liner conferences on shippers could not benefit from the block exemption under Article 3 of Regulation 4056/86.⁵

As a consequence of containerisation conference services have been extended to inland points and common tariffs have been established for the new feeder transport services from the 1970s onwards. In *DSVK v. FEFC*,⁶ the legality of the extension of the power of liner conferences to inland transport was formally examined for the first time. In this case, the German shippers⁷ accused the FEFC of having fixed not only the prices of maritime transport offered by its members, but also the prices of the services of port maintenance and those of inland transport within multimodal operation. At the end of the administrative proceedings, the Commission held that the block exemption contained in Article 3 of Regulation 4056/86 does not authorise the price fixing of inland transport, because, *inter alia*, the scope of the block exemption cannot be greater than the scope of the actual regulation itself.⁸

The Commission's argument in *DSVK v. FEFC* was supported by the ECJ's interpretation of the scope of application of Regulation 4056/86 in *Port of Genoa*.⁹ In this case, the ECJ stated that a service ceases to be one of maritime transport when the vessel arrives at the port or an offshore installation, and a maritime transport service does not cover transport by road of goods unloaded from the vessel.¹⁰ The Court of First Instance (CFI) confirming this argument again in

E.C.R. I-1287, para. 42; CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, "FEFC"*), [2002] E.C.R. II-1011, paras. 253, 259 and 260; CFI 17 December 2003, case T-219/99 (*British Airways plc. v. Commission*), [2003] E.C.R. II-5917, para. 171.

⁵ *Evans*, The Future Regulatory Framework for Liner Shipping (2006), p. 4.

⁶ On 28 April 1989, the Commission received a complaint from the Bundesverband der Deutschen Industrie (BDI), the Deutscher Industrie- und Handelstag (DIHT) and the Bundesverband des Deutschen Gross- und Aussenhandels (BGA), the sponsoring organisations of the Deutsche Seeverladerkomitee (DSVK, or German Maritime Shippers Council), concerning certain price fixing activities of the members of the FEFC in relation to intermodal transport. The Commission made a decision on 21 December 1994, see Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17.

⁷ Primarily by the representative of the German Maritime Shippers Council (Deutsche Seeverladerkomitee, DSVK).

⁸ Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, paras. 73–91. Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 164.

⁹ ECJ 5 October 1995, case C-96/94 (*Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl*), [1995] E.C.R. I-2883.

¹⁰ *Ibid.*, paras. 51–52.

FEFC,¹¹ further emphasized a strict interpretation of “maritime transport services” in view of the 11th Recital of Regulation 4056/86¹² and clarified that if it was accepted that multimodal transport was a single service composed of various parts, as carriers submitted in favour of applying the exemption, the opposite conclusion could be reached, that is, doubts would arise as to whether the exemption would apply.¹³

2. Exclusion of Tramp Vessel Services

Article 1(2) of Regulation 4056/86 excludes the application to tramp vessel services, which are strictly defined in Article 1(3)(a) of Regulation 4056/86:

“The transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailing where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand.”

Deriving from this definition, there are four cumulative criteria for the delimitation of tramp vessel services, namely:¹⁴

- 1) transport of goods in bulk or break-bulk;
- 2) on the basis of a voyage or time charter;
- 3) without a fixed schedule; and
- 4) under a contract where the freight rates are the result of individual negotiations.

The reasons for excluding tramp vessel services are given in the 4th Recital of Regulation 4056/86, which states that “it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions”. This implies that it should be unnecessary to apply Community competition rules to tramp vessel services given their characteristic of non-cartelization and the competitive nature.¹⁵ In historical perspective, it could be argued that the reasons for this exclusion are political rather than technical and

¹¹ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “*FEFC*”), [2002] E.C.R. II-1011, paras. 239–241 in conjunction with paras. 227–228.

¹² Namely, “in the case of inland transports organised by shippers, the latter continue to be subject to Regulation (EEC) No. 1017/68”. See CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “*FEFC*”), [2002] E.C.R. II-1011, para. 242.

¹³ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “*FEFC*”), [2002] E.C.R. II-1011, para. 262.

¹⁴ See *Ersboll*, *The European Commission’s Enforcement Powers* (2003), p. 379 ff.

¹⁵ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1534, Rn. 17; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 168.

legal, that is, that the exclusion is based on a political minimum consensus.¹⁶ According to the 4th Recital of Regulation 4056/86, the sole reason for excluding tramp vessel services from the scope of Regulation 4056/86 appears to be the presumption that this sector is very competitive.¹⁷ The definition of tramp vessel services in Article 1(3)(a) allows this presumption to be ruled out when freight rates are not freely negotiated. If the condition for free competition is not met, the reasons for the exclusion of tramp vessel services from the scope of Regulation 4056/86 are not valid.

The Commission's power directly to enforce Community competition rules depends on the existence of so-called implementing regulations. Before the modernization of procedural rules and the adoption of Regulation 1/2003, the main implementing regulation was Regulation 17, which, however, pursuant to Regulation 141 did not apply to transport services. Regulation 4056/86 lays down detailed rules for the application of Articles 81 and 82 EC to maritime transport, but with an unequivocal exception of tramp vessel services. This exclusion keeps the whole branch of tramp vessel services out of the general procedural rules concerning the application of Articles 81 and 82 EC. As a result, the Commission's immediate power to enforce Articles 81 and 82 EC will be impaired by the lack of detailed and efficient procedural rules. Furthermore, the Commission can neither carry out investigations nor impose fines.¹⁸

The modernization of procedural rules was completed with the adoption of Regulation 1/2003. Regulation 1/2003 repealed the procedural provisions contained in Regulation 4056/86 and the other sectoral implementing regulations and introduces a common set of procedural rules for all sectors. However, international tramp vessel services were at first still excluded from the scope of Regulation 1/2003.¹⁹ The ideal solution for maritime transport might be to follow the example of air transport: Regulation 3975/87²⁰ was extended to cover air cabotage within individual Member States²¹ and Regulation 1/2003 was amended to cover

¹⁶ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1172 Rn. 72 *et seq.*; see also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1534, Rn. 17; *Ersboll*, The European Commission's Enforcement Powers (2003), p. 378 ff. and p. 382; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 168.

¹⁷ Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, COM (2005) 651 final of 14 December 2005, para. 15. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 171. *Power*, EC Shipping Law (1992), p. 301.

¹⁸ *Ersboll*, The European Commission's Enforcement Powers (2003), p. 382.

¹⁹ Article 32(a) of Regulation 1/2003. This Article was deleted by Regulation 1419/2006.

²⁰ Council Regulation (EEC) No. 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, O.J. 1987 L 374/1.

²¹ Regulation 3975/87 was amended by Council Regulation (EEC) No. 2410/92 of 23 July 1992, O.J. 1992 L 240/18.

air transport between the EU and third countries.²² The Commission proposed in 2006 that Article 32 of Regulation 1/2003, which excluded tramp vessels services from its scope, should be deleted.²³ This proposal was accepted by Regulation 1419/2006. According to Article 2 of Regulation 1419/2006, Article 32 of Regulation 1/2003 was deleted and immediately invalid after Regulation 1419/2006 entered into force on 18 October 2006, while the total abrogation of Regulation 4056/86 does not take effect until 18 October 2008. In this way, tramp vessel services now fall within the scope of Regulation 1/2003 and the dilemma of the defective procedural implementation of Community competition rules has been resolved.

II. Territorial Scope

1. *International Maritime Transport*

Article 1(2) of Regulation 4056/86 delimits the application of the Regulation to *international* transport services. This means the transport services between Member States and those between Member States and third countries. In addition, it has been argued that international transport means only the transport services taking place between ports of two different countries.²⁴ This explanation complies with the wording of Regulation 4056/86 and rebuts other opinions, for example, that Regulation 4056/86 should also apply to maritime transport within an EC Member State. In this sense, a more detailed analysis of the territorial scope should include: a review of the effect on trade between Member States in the light of Community competition rules; a survey of cabotage as exclusion in the light of Community procedural rules; and a study on the exclusion of maritime transport between two ports outside the Community.

2. *Effect on Trade between Member States*

As regards the effect on trade between Member States, the 6th Recital of Regulation 4056/86 states that:

²² Regulation 1/2003 was amended by Council Regulation (EC) No. 411/2004 of 26 February 2004, O.J. 2004 L 68/1.

²³ Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, COM (2005) 651 final of 14 December 2005, para. 50 in conjunction with paras. 15 and 16.

²⁴ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 96; *Clough/Randolph*, Shipping and EC Competition Law (1991), p. 169; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr, C., p. 1537, Rn. 23; *Pernice*, Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt (1993), p. 150; *Power*, EC Shipping Law (1992), p. 300.

Whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market;

The concept of effect on trade between Member States sets out a jurisdictional limit to the prohibition laid down in Articles 81 and 82 EC.²⁵ Both the Commission and the CFI held that agreements between undertakings from different Member States which operate international maritime transport services from ports in various Member States may affect trade between Member States. In *Compagnie Maritime Belge (CEWAL)*,²⁶ the CFI first referred to the relevant case law²⁷ and certain agreements between liner conferences which had been found by the Commission to infringe Article 81 EC. The CFI confirmed the opinion of the Commission that the purpose of such agreements was to prevent companies belonging to one conference from operating as independent shipping companies in ports located in the area of activity of one of the other two conferences. The CFI took the view that these agreements partitioned the market and directly affected trade between Member States, and could also indirectly affect trade between Member States by modifying the catchment area of the ports which they covered and affecting the activities within such catchment areas. The CFI then analyzed abuses prohibited under Article 82 EC, which the Commission had found to exist. Having reviewed the relevant case law,²⁸ the CFI held that the practices by which a group of companies intend to eliminate their principal competitor from the market can, in themselves, affect the structure of competition in the common market and as a result directly affect trade between Member States. As to infringements of Article 81 EC, the CFI concluded, for the same reasons, that such abusive practices could also indirectly affect intra-Community trade.²⁹

²⁵ For more comprehensive and systematic review, see *Jones/Sufrin*, EC Competition Law (2008), p. 191 ff. and p. 339 ff.

²⁶ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201.

²⁷ Particularly, ECJ 15 December 1994, case C-250/92 (*Gøttrup-Klim and Others v. Grovwareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*), [1994] E.C.R. I-5641; ECJ 6 April 1995, joined cases C-241/91 P and C-242/91 P (*Radio Telfis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*), [1995] E.C.R. I-743, para. 69; CFI 21 February 1995, case T-29/92 (*Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) and Others v. Commission*), [1995] E.C.R. II-289.

²⁸ ECJ 4 May 1988, case 30/87 (*Corinne Bodson v. SA Pompes funèbres des régions libérées*), [1988] E.C.R. 2479, para. 24.

²⁹ See Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwat*), O.J. 1993 L 34/20, paras. 39–40 and 92–96, and CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, paras. 201–205, confirmed by ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge*

3. Cabotage

Cabotage services fall outside the definition of *international* transport services within the meaning of Article 1(2) of Regulation 4056/86. This exclusion is based on the premise that the exclusion of cabotage services is of no great practical importance, since such restrictions on competition hardly ever come within the scope of Community competition rules.³⁰ However, this presumption seems to be incorrect since there are cases in which, even on such routes, trade between Member States may be affected.³¹ Restrictions on competition may be found in transit routes connected with an intra-Community route. Thus, in certain circumstances, restrictions on competition in cabotage feeder services for the transshipment of goods destined for another country, Member State or otherwise, and ferry services within a single country but which are part of a longer voyage within the Community, could affect intra-Community trade.³²

In this respect, the ECJ held that the effects on intra-Community trade may be indirect.³³ Thus it should not be difficult to imagine situations in which the conditions contained in Articles 81 and 82 EC are fulfilled on cabotage routes. Therefore, it is not appropriate to dismiss the possibility of intervention by national authorities and the Commission in such trades, although they would have to rely on Articles 84 and 85 EC, without being able to have recourse to the more effective means of Regulation 4056/86. Similar to tramp vessel services, cabotage services were initially excluded from the scope of Regulation 1/2003. Subsequently, the European legislator held that although cabotage services often have no effect on intra-Community trade, this does not mean that they should be excluded from the scope of Regulation 1/2003.³⁴ Therefore, this exclusion in Regulation 1/2003 was repealed by Regulation 1419/2006.³⁵

4. Exclusion of Maritime Transport between Ports outside the EU

Within the meaning of Article 1(2) of Regulation 4056/86, maritime transport between non-Community ports is also excluded from the scope of Regulation 4056/86. Based on a similar presumption concerning cabotage services, the law-maker stated in the 1981 draft Regulation³⁶ that it is unlikely that maritime trans-

Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission), [2000] E.C.R. I-1365.

³⁰ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 166.

³¹ *Ibid.*, p. 167.

³² Cf. *ibid.*, p. 167.

³³ For example, ECJ 3 December 1987, case 136/86 (*Bureau national interprofessionnel du cognac (BNIC) v. Yves Aubert*), [1987] E.C.R. 4789, para. 18.

³⁴ The 13th Recital of Regulation 1419/2006.

³⁵ See Article 2 of Regulation 1419/2006 in comparison with amendment to Article 32 of Regulation 1/2003.

³⁶ Commission Proposal for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, COM (81) 423 final of 13 October 1981, O.J. 1981 C 282/4 (the 1981 draft Regulation).

port between third countries would affect trade between EC Member States.³⁷ Although such a presumption seems to be reasonable, a question might arise as to whether it is appropriate to exclude certain geographical category of maritime transport if in certain circumstances restrictive agreements relating to maritime transport between third countries might appreciably affect trade between Member States.³⁸ It could be argued that the situation in which maritime transport services between ports outside the Community have negative effects on trade between Member States should not be excluded. There are two reasons. First, according to Community case law, intra-Community trade may be affected indirectly.³⁹ Second, the jurisdiction of Articles 81 and 82 EC is not limited to conduct which occurs, geographically, within the frontiers of the EC, somehow in line with the doctrine of effects.⁴⁰ However, in respect of the procedural rules, Community competition rules could only be applied via Articles 84 and 85 EC in case the conditions of Articles 81 and 82 EC were fulfilled in accordance with the doctrine of effects.⁴¹ Because of the repeal of Regulation 4056/86, the above question will not be relevant any more.

B. Scope of Application of the RIMT and the IRRIMT

Article 2(1) of the Maritime Code defines “maritime transportation” as “maritime cargo transportation and maritime passenger transportation, including direct transportation between rivers and oceans”. A further clarification is given in Article 2(2) of the Maritime Code which states that the provisions of Chapter IV of the Maritime Code on “Maritime Cargo Transport Contract” shall not apply to maritime cargo transport services between ports of the PRC. The provisions of Chapter

³⁷ The 6th Recital of the 1981 draft Regulation.

³⁸ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 173. In addition, an argument suggested that Regulation 4056/86 should be interpreted to be applicable if there is a direct, substantial and reasonably foreseeable effect on trade between Member States. Another argument rebuts this opinion with the reasoning that the explicit expression in Article 1(2) of Regulation 4056/86 leaves no room for a wide interpretation of the scope of application. See *Clough/Randolph*, Shipping and EC Competition Law (1991), p. 170 ff.; *Rycken*, European Antitrust Aspects of Maritime and Air Transport (1987), p. 488; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 96 ff.

³⁹ See ECJ 3 December 1987, case 136/86 (*Bureau national interprofessionnel du cognac (BNIC) v. Yves Aubert*), [1987] E.C.R. 4789, para. 18.

⁴⁰ See *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 173. As regards the relation between Regulation 4056/86 and Articles 81 and 82 EC in view of extraterritorial application, see also *Dinger*, The Future of Liner Conferences in Europe (2004), p. 140 ff.; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1537, Rn. 24; Power, EC Shipping Law (1992), p. 300.

⁴¹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 173. Cf. *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1537, Rn. 24.

IV of the Maritime Code refer to international maritime cargo transportation, although the term “international” has not been used. Obviously, the Chinese legislator distinguishes national and international maritime transportation. This was avoided in the RIMT whose title clearly demonstrates its scope of application as international maritime transport services. The relevant legal terms were further defined in the IRRIMT so as to show clearly the scope of application. As to the application to liner conferences, the analysis of the scope of application under the RIMT and the IRRIMT consists of the evaluation of the objective aspect and the territorial aspect.

I. Objective Scope

Article 2(1) RIMT clearly states that the RIMT is applicable only to “international maritime transportation business operations to and from the ports of the PRC as well as auxiliary business operations relating to international maritime transportation”. This provision also applies to the IRRIMT which implement the RIMT.⁴²

The definition of “International Maritime Transportation Business Operations” includes three legal terms, i.e. “International Shipping Services”, “International Liner Shipping Services” and “Non-Vessel-Operating Services” which are defined in the RIMT and the IRRIMT.

The term “International Shipping Services” is used in the RIMT, but defined only in Article 3(1) IRRIMT, according to which “international shipping services” refer to international maritime transport services for the carriage of passenger and cargoes provided by operators using their own vessels or vessels they operate, and space or slots on vessels. International shipping services also mean activities relating to such operators’ vessels, passenger or cargo with the aim of carrying out such services. International shipping services include: signing of the relevant agreements, accepting the booking of space or slots on vessels, discussing and charging freights, issuing bills of lading and other related shipping documents, arranging loading and unloading of cargo, arranging storage and warehousing of cargo, taking delivery or delivering cargo, arranging the transshipment of cargo, and arranging the entry into and departure from ports by vessels, etc.

Similar to the term “International Shipping Services”, the term “International Liner Shipping Services” is also used in the RIMT but defined only in the IRRIMT. According to Article 3(3) IRRIMT, international liner shipping services include the international shipping services for the carriage of cargo or passengers provided between fixed ports by means of: (1) the use of owned or operated vessels; (2) the pooling of vessels; (3) the exchange or cross-chartering of space or slots on vessels; or (4) joint management.⁴³

An interesting point in the RIMT and the IRRIMT is the introduction of the concept of non-vessel-operating common carriers (NVOCCs) into China’s international maritime legislation. The concept of the NVOCC was first put into practice by the U.S. Federal Maritime Commission. In defining the term “carrier”, the

⁴² Article 2 IRRIMT.

⁴³ Article 3(3) IRRIMT in conjunction with Article 16(3) RIMT.

Chinese Maritime Code does not demand that the carrier owns a ship, in other words, “carrier” means the person by whom or in whose name a contract for carriage of cargo by sea has been concluded with a shipper.⁴⁴ There is no legal definition of “freight forwarders” and their legal status is also unclear. The business activities of freight forwarders were governed by the former Ministry of Foreign Trade and Economic Co-operation (MOFTEC), which represented the interests of shippers and was replaced in 2003 by the Ministry of Commerce (MOFCOM),⁴⁵ while the status of freight forwarders brought them within the sphere of industrial jurisdiction covered by the Ministry of Communication (MOC), which represented and represents the interests of carriers. The two ministries have never satisfactorily resolved the problem of the jurisdiction over NVOCCs.⁴⁶ Having taken account of the U.S. Ocean Shipping Reform Act of 1998 and the reality of the Chinese market,⁴⁷ the definitions of non-vessel-operating services and NVOCCs as well as the related provisions were introduced into the RIMT and the IRRIMT. In addition, the RIMT and the IRRITM divide the spheres of jurisdiction, with international maritime transport services (including NVOCCs) and auxiliary services relating to maritime transport services being regulated by the MOC,⁴⁸ and freight forwarding services by the MOFCOM.⁴⁹

Under Chinese law non-vessel-operating services mean international maritime transportation services in which a NVOCC accepts cargo from shippers as a carrier, issues its own bills of lading or other related shipping documents, procures through international shipping undertakings the carriage of cargo by sea against payment of the freight by shippers, and assumes the responsibilities of a carrier.⁵⁰ NVOCCs may conduct the following activities: (1) conclude international shipping contracts on the carriage of cargo with shippers in the name of carriers; (2) take delivery of cargo and deliver cargo in the name of carriers; (3) issue bills of lading and other related shipping documents; (4) charge freight and other service costs; (5) book space or slots on vessels with international shipping undertakings or contract with undertakings of other transportation means for the carriage of cargo; (6) pay the freight of port to port transportation or other transportation

⁴⁴ Article 42(1) of the Maritime Code.

⁴⁵ Para. 2 of the Notice on Implementation Provisions of Regulations on the Administration of International Freight Forwarding Agency Services (Revised) [关于国际货物运输代理业管理规定实施细则修订的公告], issued by the MOFCOM on 1 January 2004, and effective as of the same date.

⁴⁶ *Wang*, China's Rules on Shipping (2002), p. 32.

⁴⁷ *Yu/Wang*, Integration of Deregulation and Regulatory Administration: Some Comments on the RIMT (2003), p. 572.

⁴⁸ Article 4 RIMT.

⁴⁹ Article 4 of the Implementation Provisions of Regulations on the Administration of International Freight Forwarding Agency Services [国际货物运输代理业管理规定实施细则], promulgated by the MOFTEC on 26 January 1998, effective as of 18 February 1998, and revised by the MOFCOM on 1 January 2004.

⁵⁰ Article 7(2) RIMT.

charges; and (7) conduct unstuffing and/or cargo container consolidation as well as other related activities.⁵¹

The RIMT and the IRRIMT are applicable not only to international maritime transport but also to auxiliary business operations relating to international maritime transport. These auxiliary business operations include international shipping agency services, international ship management, loading and unloading, storage and warehousing of international shipments and international maritime container freight station and container yard services, etc.⁵² According to the IRRIMT,⁵³ undertakings engaged in auxiliary services relating to international maritime transport shall be Chinese enterprises established in accordance with Chinese law.

In short, the RIMT and the IRRIMT constitute the legal basis for regulation of liner shipping services which under these regulations include not only liner cargo shipping services, but also liner passenger shipping services. Therefore, the RIMT and the IRRIMT cover not only liner conferences for cargo, but also for passenger transportation, although the latter are of little importance for competition regulation.

II. Territorial Scope

Article 2 RIMT defines the territorial scope of application as international maritime transport and auxiliary operations to and from the ports of the PRC. The RIMT and the IRRIMT provide for two exclusions. The first refers to the exclusion of shipping services between ports of Mainland China and Hong Kong, Macau as well as Taiwan.

Article 57 RIMT prohibits foreign undertakings of international shipping services to engage, without the approval of the MOC, in shipping services between Mainland China and Hong Kong or Macau, or provide two-way direct sailings or shipping services via a third place between Mainland China and Taiwan.⁵⁴ It seems that the trade between Mainland China and Hong Kong, Macau or Taiwan is classified here as cabotage.⁵⁵ On the other hand, investors from Hong Kong, Macau and Taiwan are treated as *foreign* investors. For instance, in spite of the relations existing between Mainland China and Hong Kong, Macau and Taiwan, under Chinese law the provisions of the RIMT and the IRRIMT shall be applied *mutatis mutandis* to investment in international maritime transportation services and the auxiliary services thereof in Mainland China by investors from Hong Kong, Macau and Taiwan.⁵⁶

⁵¹ Article 3(4) IRRIMT.

⁵² Article 2(2) RIMT.

⁵³ Article 3(6) to (9) IRRIMT.

⁵⁴ Article 57 RIMT. Such a provision may be the result of taking into account the issues of sovereignty and the “one country, two systems policy” in the decision-making process. See *Wang*, China’s Rules on Shipping (2002), p. 34.

⁵⁵ *Vastine*, The CSI’s Comments on the RIMT (2002).

⁵⁶ Article 56 RIMT and Article 67 IRRIMT.

Maritime transportation between Mainland China and Hong Kong or Macau shall be administered in accordance with the RIMT by the MOC.⁵⁷ Maritime transportation between Mainland China and Taiwan shall be governed by special provisions.⁵⁸ Up to now, the MOC has not promulgated any special measures for the administration of maritime transportation between Mainland China and Hong Kong or Macau. By the authority of the State Council, the MOC has promulgated the Administrative Measures on Shipping in the Taiwan Strait,⁵⁹ which emphasizes again that the shipping in the Taiwan Strait is cabotage, namely, Chinese domestic shipping services that shall be specially governed.⁶⁰ In accordance with the Administrative Measures on Shipping in the Taiwan Strait, shipping services in the Taiwan Strait shall, on approval by the MOC, be operated by (1) shipping companies which are solely owned by Mainland China interests or Taiwan interests and which are duly registered in Mainland China or in Taiwan; and (2) shipping JVs between Mainland China and Taiwan.⁶¹ Later the MOC issued the Notice on Issues Relating to Strengthening the Supervision of Tramp Vessel Services in the Taiwan Strait⁶² and the Notice on Issues Relating to Strengthening the Su-

⁵⁷ Article 58(1) RIMT. Under the WTO framework, Mainland China has concluded the Closer Economic Partnership Arrangement (CEPA) with Hong Kong and Macau respectively, in order to strengthen trade and investment cooperation between Mainland China and Hong Kong, Macau. In CEPA, China provides service suppliers from Hong Kong and Macau with more preferential treatment than it offered foreigners in the WTO context. For example, as regards maritime transport, Hong Kong service providers are allowed to “use liner vessels serving main routes to move, without any restrictions, empty containers that they own or rent”, which has not been committed in the WTO context. In addition, investors from Hong Kong and Macau may now establish wholly Hong Kong or Macau-owned enterprises in Mainland China to engage in international ship management services, international maritime cargo warehousing, international maritime container freight station and container yard services, and non-vessel operating services. They may also establish a wholly Hong Kong or Macau-owned shipping company in Mainland China to offer such usual businesses as canvassing of cargoes, issuing bills of lading, settling freight, and signing service contracts for their owned or operated vessels (Article 17 of the Provisions on the Administration of Foreign Investment in International Maritime Transportation). Foreign shipping operators may take advantage of these preferential treatments by establishing a commercial presence in Hong Kong or Macau. That provides more options to foreign shipping operators for entry into China’s shipping service market in particular.

⁵⁸ Article 58(2) RIMT.

⁵⁹ Administrative Measures on Shipping in the Taiwan Strait [台湾海峡两岸间航运管理办法], issued by the MOC on 19 August 1996 and effective as of 20 August 1996.

⁶⁰ Article 3 of the Administrative Measures on Shipping in the Taiwan Strait.

⁶¹ Article 5 of the Administrative Measures on Shipping in the Taiwan Strait.

⁶² Notice on Issues Relating to Strengthening the Supervision of Tramp Vessel Services in the Taiwan Strait [关于加强台湾海峡两岸不定期船舶运输管理的通知], issued by the MOC on 26 November 2002 and effective as of the same date.

pervision of Container Liner Shipping Services in the Taiwan Strait⁶³ in 2002 and 2004 respectively. In the latter Notice issued in 2004, the MOC made clear that vessels engaged in international container liner shipping services may berth in ports of Taiwan and Mainland China in one voyage, which needs only to be made known to the public and to be filed with the MOC according to Article 19 RIMT, but the provision of two-way direct sailings or shipping services via a third place for the carriage of cargo between Mainland China and Taiwan is excepted.⁶⁴

In this way Chinese maritime legislation attempts to regulate not only shipping between Mainland China and Hong Kong, Macau and Taiwan (so-called "Great China"), but also shipping transportation between Taiwan and third countries. The U.S. Coalition of Service Industries indicated in its comments on the RIMT that such a provision violates the PRC's obligations under the WTO by attempting to regulate other independent members of the WTO, namely, Taiwan, Hong Kong and Macau and that such a provision creates serious complications for carriers serving both the PRC and Taiwan, by suggesting that ports in Taiwan are to be considered "ports of the PRC".⁶⁵

Although foreign undertakings of international shipping services are not entitled to engage in cabotage, they may gain entry even to this market by establishment of a JV.⁶⁶ Under Article 2 of the Regulation on Ship Registration,⁶⁷ vessels owned by Sino-foreign JVs, in which the Chinese investment exceeds 50%, shall be registered in China and fly the Chinese flag. So any foreign undertakings of international shipping services may engage in cabotage between Chinese ports by simply establishing a commercial presence within Chinese territory.

The second exclusion refers to the international maritime transport services relating to ports between third countries. In accordance with the express wording of Article 2(1) RIMT, as long as the ports of origin or destination are situated in the PRC, the transport operation is *international*. Furthermore, liner conference agreements, operational agreements, freight rate agreements and consortia will be subject to the RIMT and the IRRIMT, provided that one or more Chinese ports are involved.⁶⁸ As a result, the maritime transport between ports of third countries is excluded from the scope of the RIMT and the IRRIMT.

Apart from the above two exclusions, it should be pointed out that the provisions in the RIMT and the IRRIMT are primarily of an administrative character and contain only few competition rules. Therefore, it is not surprising that neither the RIMT nor the IRRIMT refer to extraterritorial application. However, the ports

⁶³ Notice on Issues Relating to Strengthening the Supervision of Container Liner Shipping Services in the Taiwan Strait [关于加强台湾海峡两岸集装箱班轮运输管理的公告], Doc. No. MOC 9/2004, issued by the MOC on 8 June 2004.

⁶⁴ Article 2 of the Notice on Issues Relating to Strengthening the Supervision of Container Liner Shipping Services in the Taiwan Strait.

⁶⁵ *Vastine*, The CSI's Comments on the RIMT (2002).

⁶⁶ *Li/Cullinane/Yan/Cheng*, Maritime Policy in China after WTO (2005), pp. 80–81.

⁶⁷ Regulation on Ship Registration [船舶登记条例], promulgated by the State Council on 2 June 1994, effective as of 1 January 1995.

⁶⁸ Article 35(1) and (2) RIMT.

of the PRC can be considered an effective connecting point for possible application of relevant Chinese competition rules.

C. Conclusion

The scope of application of specific regulations refers to two aspects: the objective and the territorial scope.

Objective: the application of Regulation 4056/86 is actually restricted to international cargo liner shipping transport. Passenger transport service in liner shipping is excluded. The scope of application of the RIMT and the IRRIMT covers, however, a wide range of subject-matters besides international liner shipping services. International liner shipping services within the meaning of the RIMT and the IRRIMT include not only cargo transport, but also passenger transport services.

Territorial: Regulation 4056/86, the RIMT and the IRRIMT seem to take the domestic ports as basis for the application of the regulations. Extraterritorial application of general competition rules is partly accepted by Community case law, but was not accepted in China until the AML explicitly adopted it.

Chapter IV: Exemption and Prohibition Provisions Concerning Liner Conferences

A. Exemption Provisions of Regulation 4056/86

The block exemption for liner conferences in Article 3 of Regulation 4056/86 is the main part of the substantive provisions of Regulation 4056/86. Another two block exemptions involving transport users are provided in Article 6 of Regulation 4056/86: one deals with vertical agreements between liner conferences and transport users, another deals with horizontal agreements between transport users. As regards the block exemptions, certain compulsory conditions are laid down in Article 4 of Regulation 4056/86, and several mandatory obligations are provided in Article 5 of Regulation 4056/86.

I. Definition of Liner Conferences

The “liner conference” is defined in Article 1(3)(b) of Regulation 4056/86 as follows:

“a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.”

Here the definition of a liner conference in the UNCTAD Liner Code¹ is repeated verbatim. The European legislator wanted to bring Regulation 4056/86 in line with the UNCTAD Liner Code. This is confirmed not only in the 3rd Recital of Regulation 954/79 and in the 3rd Recital of Regulation 4056/86, but also in the Commission’s decisions and the CFI’s rulings.²

¹ The first paragraph in Chapter I of Part One of the UNCTAD Liner Code.

² Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, “TAA”*), O.J. 1994 L 376/1, paras. 321 ff.; CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission, “TAA”*), [2002] E.C.R. II-875, paras. 147 ff. See Negenman, in: Schröter/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1175, Rn. 78; Basedow, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1548, Rn. 39.

Under this definition, to take advantage of the block exemption contained in Regulation 4056/86, a liner conference must fulfil three criteria:³

- 1) a liner conference is a group of two or more vessel-operating carriers which are linked by an agreement or an arrangement with each other;
- 2) for the carriage of cargo on a particular route or routes within specified geographical limits, international liner services are provided; and
- 3) liner services are provided under uniform or common freight rates.

1. Vessel-Operating Carriers under Agreement or Arrangement

The first criterion delimits the type of agreement and the type of carrier which may benefit from the block exemption contained in Article 3 of Regulation 4056/86. Accordingly, agreements between non-vessel operating carriers could not enjoy the block exemption for liner conferences. As to agreements or arrangements, Regulation 4056/86 does not lay down any requirements as regards the legal form of liner conferences or the need to comply with any formalities once they are set up. It is generally assumed that liner conferences lack the minimum essential characteristics needed to make them entities with a separate legal personality.⁴ Although in practice liner conferences are generally governed by very detailed written agreements, for the purposes of Regulation 4056/86, there is nothing to prevent a conference from being set up through a purely oral agreement of limited content or even through a gentlemen's agreement.⁵ As regards the terms of conference agreements, following the example of the UNCTAD Liner Code, the Community does not require the terms to adhere to a given model, nor do they need to be registered with any public authority.⁶

2. International Liner Services within Specified Geographical Limitation

The second criterion, to a great extent, coincides with the scope of application provided in Article 1(2) of Regulation 4056/86. With reference to "international liner services", the definition of liner conferences excludes restrictive agreements both in tramp vessel services and in cabotage services.⁷ In addition, the definition of liner conferences refers exclusively to cargo-carrying conferences. Therefore, restrictive agreements between liner companies offering passenger transport services,⁸ so-called "passenger liner conferences", are excluded from the block ex-

³ Cf. Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1548, Rn. 39.

⁴ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 189. See also unter Chapter VI, A. I. 6. b. aa.

⁵ For a general survey of the structure and organisation of liner conferences, see *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 18 ff.

⁶ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 189.

⁷ *Ibid.*, p. 192.

⁸ The 1981 draft Regulation referred to "liner services for the carriage of *cargo* or *passengers*" within the definition of conference (Article 3(1) of the 1981 draft Regulation).

emption contained in Article 3 of Regulation 4056/86, although the transport of passengers falls within the scope of the Regulation.⁹

3. Uniform or Common Freight Rates

The third criterion requires the existence of uniform or common freight rates for liner services. It constitutes the most important aspect of the definition and shows the core characteristic of liner conferences, supposed to provide stability, primarily the stability of freight rates. Such stability of freight rates is perceived as the first and most important economic advantage which liner conferences contribute to the maritime transport industry.¹⁰ Therefore, the stability of freight rates, in the form of uniform or common freight rates, constitutes the main justification for the block exemption for liner conferences.¹¹ It is generally assumed that the existence of such uniform or common freight rates is an essential condition for the exemption of all agreements provided in Article 3 of Regulation 4056/86.¹² Accordingly,

Due to strong criticism and taking into account the UNCTAD Liner Code, the carriage of passengers was excluded from the definition of liner conference. For more details, see *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschiffahrt mit Artikel 85 EWG-Vertrag (1991), p. 103; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 193 ff.

⁹ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1548, Rn. 39 in conjunction with p. 1532, Rn. 16; *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschiffahrt mit Artikel 85 EWG-Vertrag (1991), p. 103; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 189; *Power*, EC Shipping Law (1992), p. 302.

¹⁰ For more details, see below Chapter VI A. I. 2.

¹¹ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1545, Rn. 32.

¹² *Ibid.*, p. 1548, Rn. 39 in conjunction with p. 1545, Rn. 76; *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1175, Rn. 78; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 100 ff. In view of Community case law, see Commission Decision 92/262/EEC of 1 April 1992 (*French-West African shipowners' committees*), O.J. 1992 L 134/1, para. 45; Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, para. 42, in conjunction with CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 49 and ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 46 ff.; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, "TAA"*), O.J. 1994 L 376/1, paras. 315–358, especially paras. 326 ff., confirmed by CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission, "TAA"*), [2002] E.C.R. II-875, paras. 142–178; Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, "TACA"*), O.J. 1999 L 95/1, paras. 451 ff., confirmed by CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, "TACA"*), [2003] E.C.R. II-3275, para. 562; Commission Decision 2000/627/EC of 16 May 2000

in order to qualify for the block exemption, liner conferences have to set the same level of rates for each of their members (even if those rates differ widely from one type of cargo to another) without distinction or discrimination.¹³ This means that the same freight rate applies to every member of a liner conference.¹⁴

As far as the meaning of “uniform or common freight rates” is concerned, the UNCTAD Liner Code as the benchmark for interpretation should be taken into account. Article 13 of the UNCTAD Liner Code deals with conference freight rates and provides as follows:

- 1) Conference tariffs shall not unfairly differentiate between shippers similarly situated. Shipping lines members of a conference shall adhere strictly to the rates, rules and terms shown in the tariffs and other currently valid published documents of the conference and to any special arrangements permitted under this Code.
- 2) Conference tariffs should be drawn up simply and clearly, containing as few classes/categories as possible, depending on the particular requirements of a trade, specifying a freight rate for each commodity and, where appropriate, for each class/category; ...

Insofar it is correct to argue that freight rates within tariffs must be non-discriminatory and unique for each product or class of products within the tariff.¹⁵ In other words, freight rates are common, if all conference members offer the transport of the same commodity for the same price; and freight rates are uniform if a shipper is offered the same freight rate by all conference members.¹⁶ In *TAA*,¹⁷ the Commission held that the phrase “uniform or common” does not admit of the interpretation that, in order to fall within the block exemption for liner conferences, it is sufficient for a group of carriers to set freight rates (hence tariff structures) which vary from one member to another, but which are discussed in a joint structure. In order that shippers might secure the stabilization benefits envisaged,

(*Far East Trade Tariff Charges and Surcharges Agreement*, “FETTCSA”), O.J. 2000 L 268/1, para. 162, left open by CFI 19 March 2003, case T-213/00 (*CMA CGM and Others v. Commission*), [2003] E.C.R. II-913, para. 96; Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53, paras. 76 ff.

¹³ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 325.

¹⁴ In comparison with Article 12(b) of the UNCTAD Liner Code. Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 199.

¹⁵ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 198.

¹⁶ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 102. See also Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 326; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 198.

¹⁷ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1.

freight rates must be common, not only established in common.¹⁸ It is indispensable that the same rates are offered by all and to all.¹⁹ For this reason, agreements between ship-owners to establish differential freight rates and agreements between conferences and independents with the same objective, just like the *TAA*, do not comply with the definition of liner conferences in Article 1(3)(b) of Regulation 4056/86 and therefore cannot benefit from the block exemption in Article 3 of Regulation 4056/86.²⁰

In conclusion, Regulation 4056/86 follows the provisions in the UNCTAD Liner Code on types of conferences or agreements by granting a block exemption for liner conferences and accordingly defines liner conferences in the manner established in the UNCTAD Liner Code.²¹

II. Exemption under Article 3 of Regulation 4056/86

1. General Review

Regulation 4056/86 grants a block exemption to certain arrangements between members of one or several liner conferences, but not to liner conferences themselves or to the basic agreement setting up the conferences.²² Liner conferences themselves do not act commercially, but create a context in which member carriers can operate. In this sense, liner conferences are identical with or close to being associations of undertakings.²³ Agreements setting up a liner conference are very complicated.²⁴ A typical conference agreement is actually made up of a series of agreements. In addition to the basic agreement establishing a liner conference, there are normally many other agreements which concern other matters and usually take forms of clauses of conference agreements or separate agreements.²⁵ In general the basic agreement stipulates only that the member carriers should later come to agreements over freight rates, capacity management programs and scheduled timetables etc. The basic agreement establishing a liner conference does not contain directly such clauses or separate agreements which themselves are restric-

¹⁸ *Ibid.*, para. 325. See also *Lang*, Current Issues in EC Maritime Competition Law (1993), p. 412 ff.; Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 199.

¹⁹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “*TAA*”), O.J. 1994 L 376/1, para. 326.

²⁰ *Ibid.*, paras. 334. In comparison, see also Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement*, “*EATA*”), O.J. 1999 L 193/23, para. 221.

²¹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 199.

²² *Ruttley*, International Shipping and EEC Competition Law (1991), p. 10; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1547, Rn. 38.

²³ *Ruttley*, International Shipping and EEC Competition Law (1991), p. 10.

²⁴ For a general survey, see *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 18 ff.

²⁵ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 238.

tions of competition and thus subject to Community competition rules.²⁶ Thus the establishment of a liner conference itself does not constitute an agreement within the meaning of Article 81(1) EC. Accordingly, it is not appropriate to grant exemption to a liner conference for itself.

Article 3 of Regulation 4056/86 appears to cover a large number of agreements, which are to be analyzed with reference to the participating undertakings on the one side, and with reference to their objective content on the other. In order to have a complete outline of Article 3, it is necessary to discuss briefly the technical agreements in Article 2 of Regulation 4056/86, albeit this Article was repealed completely by Regulation 1419/2006 without any transitional period.²⁷ Furthermore, another two block exemptions under Article 6 of Regulation 4056/86 will be reviewed in conjunction.

2. Agreements with Reference to Participating Undertaking

Article 3 of Regulation 4056/86 authorizes certain “agreements, decisions and concerted practices of all or part of the members of one or more liner conferences” having one or more objectives provided in this Article. This wording offers various possible combinations of agreements within liner conferences. Firstly, agreements between all members or part of the members of one liner conference are imaginable. Agreements between all of the members or between parts of the members of several liner conferences also could give rise to dispute and debate.

a. Agreements between Various Liner Conferences

In this respect, disagreement mainly arises regarding the question whether an agreement between two or more liner conferences could also fall within the scope of the block exemption under Article 3 of Regulation 4056/86. One opinion argues that Article 3 covers agreements among all members of one or more conferences and as such also an initial agreement between liner conferences.²⁸ Another argument opposes this opinion with the reasoning that the initial agreement between liner conferences only establishes an institutional framework but does not in itself constitute a restriction to competition. Furthermore, liner conferences are not liable under Community competition rules.²⁹ An additional opinion considers the integration of various liner conferences through such an agreement as one single

²⁶ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1547, Rn. 38.

²⁷ According to Article 1 of Regulation 1419/2006, while Regulation 4056/86 as whole is repealed, a transitional period of two years from 18 October 2006 is granted to Article 1(3)(b) and (c), Articles 3 to 7, Article 8(2) and Article 26 of Regulation 4056/86.

²⁸ *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 124. As to the similar opinion, see *Pernice*, Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt (1993), p. 153.

²⁹ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 104, p. 151; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1550, Rn. 41.

conference, a geographical so-called “superconference”.³⁰ This view is sceptical of the first two interpretations.³¹

Actually, the answer to the above question depends on the content of this type of agreement. If an agreement as such does not contain clauses with concrete requirements for price settlement, capacity arrangement and service conditions etc. for all members of the liner conferences concerned, this agreement does not fall within the scope of the block exemption under Article 3. The reason is that an agreement as such could not constitute an infringement of Article 81(1) EC. But on the contrary, assumed that an inter-conference agreement as such does contain certain clauses which include concrete settlements in the manner of concerted and/or differential arrangements for all member carriers from the various liner conferences concerned and is meant to realize, e.g. a certain geographical market strategy or product marketing plan, especially through differential price fixing for geographical or product markets, then on account of these clauses, this agreement is restrictive for the purpose of Article 81(1) EC and fulfils the criteria in Article 3 of Regulation 4056/86.

b. “Tolerated Outsider Agreements”

Agreements between conference members and outsiders, primarily independents are called “tolerated outsider agreements”. As to the question whether this type of agreement also falls within the scope of the block exemption in Article 3 of Regulation 4056/86, a supporting opinion considers that Article 3 should be interpreted to cover “tolerated outsider agreements”.³² There are, however, several arguments which rebut this extensive interpretation:³³ they are partly questionable and partly convincing. One is based on the assumption that the organizational structure of liner conferences ensures stability in liner shipping;³⁴ it argues that agreements with outsiders do not establish such stable institutional surroundings and are therefore not suitable for the block exemption under Article 3. This is questionable, since it derives from the traditional understanding of the economic advantages which liner conferences were assumed to contribute to justify their exemption from general Community competition rules. This argument was challenged and severely criticized by contemporary theoretical and empirical studies.³⁵ But a convincing argument in the 8th Recital of Regulation 4056/86 emphasizes the

³⁰ As to “interconferences” or “superconferences”, see *Abrahamsson*, *International Ocean Shipping: Current Concepts and Principles* (1980), p. 123.

³¹ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 133 ff. and p. 194 ff.

³² *Jacobs*, *Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag* (1991), p. 124.

³³ For an overview, see *Pernice*, *Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt* (1993), p. 154; *Townley*, *The Liner Shipping Block Exemptions in European Law* (2004), p. 116; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*, C., p. 1550, Rn. 41.

³⁴ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 103.

³⁵ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*, C., p. 1545, Rn. 32. For more details, see below Chapter VI A. I. 2.

importance of effective competition from non-conference scheduled services. Residual competition,³⁶ i.e. competition from outsiders, primarily from independents, shows that conference agreements are no longer indispensable to maintain the regularity³⁷ of maritime transport services.³⁸ “Tolerated outsider agreements” threaten residual competition, and it is therefore contrary to the aim of Regulation 4056/86 to grant exemption to such agreements.

This argument was confirmed by the Commission’s decisions. In *French-West African shipowners’ committees*,³⁹ the Commission declared that “the system set up by the carriers’ agreements brings together conference and non-conference lines for the sole purpose of sharing among those lines all the liner trades in question. Such systems are not covered by Article 3 of Regulation 4056/86.”⁴⁰ In *TAA*,⁴¹ the Commission further emphasized effective competition from outsiders. The Commission identified the agreement referred to not as a genuine liner conference but as an agreement between a conference and outsiders,⁴² and declared that the system of differentiated rates in this agreement aims at associating non-conference carriers with price agreements between the old conference members. The Commission repeated its former opinion that such a “tolerated outsider agreement” is not a conference agreement and falls outside the scope of the block exemption provided in Article 3.⁴³

3. Objective Contents of Agreements Covered by Article 3 of Regulation 4056/86

a. Systematic Review

Article 3 of Regulation 4056/86 requires that the agreements exempted have certain contractual objectives. First of all, they must deal with the fixing of rates and conditions of carriage. It is consistent with the definition of liner conference⁴⁴ and the requirement of Regulation 4056/86 that the fixing of prices by conference members is an indispensable requirement for the enjoyment of the exemption⁴⁵ because of the nature of liner conferences as cartels of prices and conditions.⁴⁶

³⁶ For more details, see Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1550, Rn. 41 in conjunction with p. 1545 Rn. 32.

³⁷ For more details on “regularity” in relation to “stability”, see below Chapter VI A. I. 2. b.

³⁸ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1545, Rn. 32.

³⁹ Commission Decision 92/262/EEC of 1 April 1992 (*French-West African shipowners’ committees*), O.J. 1992 L 134/1.

⁴⁰ *Ibid.*, para. 45.

⁴¹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, “TAA”*), O.J. 1994 L 376/1.

⁴² *Ibid.*, para. 343.

⁴³ *Ibid.*, para. 355.

⁴⁴ See above Chapter IV A. I.

⁴⁵ *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 103 ff.; *Werner*, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 801; Basedow, in: *Immenga/Mestmäcker*, EG-

Besides, Article 3 of Regulation 4056/86 adds that these agreements may, “as the case may be”, have one or more of the following objectives:

- a) the coordination of shipping timetables, sailing dates or dates of calls;
- b) the determination of the frequency of sailings or calls;
- c) the coordination or allocation of sailings or calls among members of the conference;
- d) the regulation of the carrying capacity offered by each member;
- e) the allocation of cargo or revenue among members.

Agreements made with a view to the first four of these objectives aim at influencing the supply and the market in the liner shipping market by means of:

- determining the number of sailings (temporal delimitation of supply) and calls (geographical delimitation of supply);
- distribution and coordination of sailings and calls and, concomitantly, the operational patterns of the vessels (market sharing).⁴⁷

These agreements concern the internal arrangement of the supply of services and work as “rationalization agreements” which are primarily conceived to be ancillary to the fixing of freight rates to strengthen restriction of competition and only secondarily as a way of improving services.⁴⁸ In contrast to the first four types of agreements, Article 3(e) authorizes agreements concerning “the allocation of cargo or revenue among members”, namely so-called pool agreements.⁴⁹ Pool agreements⁵⁰ are usually considered ancillary to rate-fixing agreements with indirect effect and insofar different from rationalization agreements, since the latter’s function is directly related to the fixing of uniform or common freight rates.⁵¹

With regard to the meaning of Article 3 of Regulation 4056/86, the question arises as to whether price fixing alone is sufficient to enable the grant of the exemption. If not, then another question arises as to whether a cumulative⁵² relation

Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1548, Rn. 39 in conjunction with p. 1551, Rn. 43; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 201.

⁴⁶ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1177, Rn. 82. See Commission Decision 92/262/EEC of 1 April 1992 (*French-West African shipowners’ committees*), O.J. 1992 L 134/1, para. 45; Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwal*), O.J. 1993 L 34/20, para. 42; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, “TAA”*), O.J. 1994 L 376/1, paras. 320 ff.

⁴⁷ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 209.

⁴⁸ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 209 f.

⁴⁹ Cf. Article 2 of the UNCTAD Liner Code. For more details see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 213.

⁵⁰ See also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1536, Rn. 21 w.f.r.

⁵¹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 213.

⁵² *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1550, Rn. 42.

must exist between the requirement of price fixing and the above-mentioned five other objectives. The latter position is preferable and justified on several accounts. First, this is supported by a literal interpretation of the wording in Article 3 in comparison with the definition of liner conferences in Article 1(3)(b).⁵³ Secondly, it complies with the constant opinion in Community case law which asserts that exemptions in Community law have to be interpreted strictly.⁵⁴ Since the greater the number of conditions or objectives the smaller the scope of the exemption, a wider interpretation of the scope of the block exemption in Article 3 would lead to a “blank cheque exemption”⁵⁵ for price fixing in liner shipping.⁵⁶ Finally, despite the ambiguous wording in the 8th Recital of Regulation 4056/86, the Commission took the unambiguous position that ship-owners should, in addition to rate fixing, engage in restrictive activities or enter into restrictive agreements as listed in Article 3(a) to (e), so as to be able to enjoy the block exemption under Article 3.⁵⁷

⁵³ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 202.

⁵⁴ For instance, ECJ 16 June 1994, case C-322/93 P (*Automobiles Peugeot SA and Peugeot SA v. Commission*), [1994] E.C.R. I-2727, para. 37; ECJ 24 October 1995, case C-70/93 (*Bayerische Motorenwerke AG (BMW) v. ALD Auto-Leasing D GmbH*), [1995] E.C.R. I-3439, para. 28; ECJ 24 October 1995, case C-266/93 (*Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*), [1995] E.C.R. I-3477, para. 33; CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 48; CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission, “TAA”*), [2002] E.C.R. II-875, para. 146; CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, “FEFC”*), [2002] E.C.R. II-1011, para. 252; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, paras. 568 and 1381. See also *Dinger*, The Future of Liner Conferences in Europe (2004), p. 125; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 201 ff.

⁵⁵ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, “FEFC”*), [2002] E.C.R. II-1011, paras. 253, 259 and 260.

⁵⁶ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 202.

⁵⁷ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, “TACA”*), O.J. 1999 L 95/1, para. 397; Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement, “EATA”*), O.J. 1999 L 193/23, para. 177; Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53, para. 76. For further confirmation, see White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport, Commission Programme 2003/COMP/18 of 13 October 2004, para. 8; Annex to White Paper, para. 17; Consultation Paper on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, 27 March 2003, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/en.pdf>>, para. 9.

b. Fixing of Rates and Conditions

As clarified by the analysis of the definition of liner conference,⁵⁸ freight rates are common, if all conference members offer the transport of the same commodity for the same price; and freight rates are uniform if a shipper is offered the same freight rate by all conference members. The rates and conditions put forward by liner conferences should be uniform and common. This feature is one of the most important criteria of the definition of liner conferences and is considered the fundamental justification of the liner conference block exemption. It also limits the scope of application of the block exemption.

In general, “malpractice” is defined as “any action on the part of a member line which is not in accordance with the spirit of the conference or of the requirements imposed on conferences by the regulatory authorities and which may result in that member gaining an undue advantage over other members, or may give an undue advantage to particular shippers as compared with other shippers.”⁵⁹ In respect of the scope of Article 3 of Regulation 4056/86, it is questionable whether a conference in which malpractices take place falls within the definition of liner conferences in Article 1(3)(b) of Regulation 4056/86 and therefore fulfils the conditions for the block exemption in Article 3.

It could be argued that malpractices are the opposite of the primary objective of conference agreements, namely the fixing of uniform or common freight rates. As a consequence, it could be further concluded that a violation of the common tariff means that the conditions laid down in Article 3 of Regulation 4056/86 in relation with the definition of liner conferences in Article 1(3)(b) of Regulation 4056/86 are not fulfilled.⁶⁰ This position seems to be in line with the practice of the Commission which insisted on the need for ship-owners, once they form part of a conference, not to compete among themselves as regards freight rates.⁶¹ However, it could lead to a contradiction that malpractices which could contribute to price competition among the member carriers are suppressed, while the whole liner conference in which price competition is eliminated is allowed by the block exemption. In this way, it is contrary to the Community principle of proportionality.⁶²

From a different point of view, a tariff published in writing could by itself prove that a liner conference has as its objective the fixing of rates and conditions of carriage. Therefore, this tariff could constitute an essential element which satisfies the definition of liner conferences in Article 1(3)(b) of Regulation 4056/86 and fulfils the requirements in Article 3 of Regulation 4056/86. In practice, tariff books of liner conferences, although they actually are often not abided by and become mere “reference materials”, do not prevent liner conferences from enjoying the exemption under Article 3 of Regulation 4056/86. However, the Commission appeared not to accept this formalistic interpretation and held that malprac-

⁵⁸ See above Chapter IV A. I. 3.

⁵⁹ *UNCTAD*, The Liner Conference System (1970), para. 46.

⁶⁰ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 207.

⁶¹ *Ibid.*

⁶² Article 5 EC. For more details, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1549, Rn. 40.

tices do not affect the uniform or common nature of freight rates if the differences that they cause are limited.⁶³

c. Inland Price Fixing and Multimodal Transport

In line with the consistent rule in Community case law that a block exemption should be interpreted strictly, the scope of price fixing pursuant to the exemption in Article 3 of Regulation 4056/86 does not cover inland price fixing by multimodal transport operations.⁶⁴ This position was expressed and explained by the Commission in its decisions⁶⁵ and confirmed by the CFI in *FEFC*.⁶⁶

In *FEFC*, the finding of the CFI especially deals with the literal interpretation of the wording of the provisions in Regulation 4056/86, primarily of Articles 1 and 3, and the reading of the provisions concerned in the background of the legislative history of Regulation 4056/86. The CFI, in line with the Commission's decisions,⁶⁷ stressed that Article 1(2) of Regulation 4056/86, which defines the scope of Regulation 4056/86, merely speaks of "maritime transport" that only covers the transport "from or to one or more Community ports".⁶⁸ Based on the wording of the 11th Recital of Regulation 4056/86,⁶⁹ the CFI further stated that "the Council did not intend to extend the block exemption under Article 3 thereof to agreements relating to inland transport services". As a consequence, inland transport is not covered by the block exemption contained in Article 3 of Regulation 4056/86.⁷⁰ In this way, the CFI upheld the Commission's opinions in *DSVK v.*

⁶³ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, "TAA"*), O.J. 1994 L 376/1, paras. 350–355.

⁶⁴ Negenman, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1178, Rn. 84; Dinger, *The Future of Liner Conferences in Europe* (2004), p. 112.

⁶⁵ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, "TAA"*), O.J. 1994 L 376/1, paras. 371–377; Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, paras. 73–85; Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, "TACA"*), O.J. 1999 L 95/1. See Wood, *The Scope of The Conference Group Exemption* (1999), p. 3; Negenman, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1178, Rn. 84.

⁶⁶ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, "FEFC"*), [2002] E.C.R. II-1011, paras. 230 ff.

⁶⁷ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, "TAA"*), O.J. 1994 L 376/1, para. 373; Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 75.

⁶⁸ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, "FEFC"*), [2002] E.C.R. II-1011, paras. 230–241.

⁶⁹ The 11th Recital of Regulation 4056/86 provides that "users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference, since in the case of inland transport organised by shippers, the latter continue to be subject to Regulation (EEC) No 1017/68".

⁷⁰ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, "FEFC"*), [2002] E.C.R. II-1011, paras. 242 ff.

FEFC and *TAA*.⁷¹ As regards the relation to other modes of transport, the supporters for the extension of the block exemption took the view that multimodal transport operations constitute maritime transport because they constitute a single integrated product and therefore are subject to Regulation 4056/86 as a whole.⁷² The CFI, however, insisted that inland transport and maritime transport are different, as they can be purchased from and provided by different economic operators. For maritime carriers, inland transport is just an ancillary service to complement their maritime transport services.⁷³ Even if multimodal transport could be treated as a single composite product, the block exemption should, in compliance with the consistent rule of strict interpretation in Community case law, not be extended to it.⁷⁴ Moreover, the CFI said that an extension of the block exemption for liner conferences to inland transport as part of multimodal transport could lead to a distortion of competition in relation to other modes of transport, where Article 2(a) of Regulation 1017/68 prohibits joint price fixing.⁷⁵

The 11th Recital of Regulation 4056/86 concerns Article 5(4) of Regulation 4056/86, which covers the availability of tariffs to customers of liner conferences. The supporters in favour of the extension of the block exemption under Article 3 of Regulation 4056/86 to inland price fixing by multimodal transport argued that Article 5(3) and (4) of Regulation 4056/86 allows Article 3 to cover joint rate-fixing in respect of inland transport services.⁷⁶ The CFI pointed out that the function of Article 5 is merely to set out the obligations attached to the block exemption in Article 3 and rejected the arguments of the supporters with the reasoning that it is not possible to rely on Article 5(3) and (4) as a means to widen the exemption scope in Article 3 to inland price fixing.⁷⁷

As to the reading of the provisions concerned, the CFI also mentioned the legislative history of Regulation 4056/86.⁷⁸ During the legislative procedure leading to Regulation 4056/86, both the European Parliament and the Economic and Social Committee proposed a legislative amendment in order to explicitly include multi-

⁷¹ Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 78; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "*TAA*"), O.J. 1994 L 376/1, para. 375.

⁷² CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, "*FEFC*"), [2002] E.C.R. II-1011, para. 160.

⁷³ *Ibid.*, para. 261.

⁷⁴ *Ibid.*, para. 262.

⁷⁵ *Ibid.*, para. 264. See also *Lang*, Current Issues in EC Maritime Competition Law (1993), p. 421.

⁷⁶ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, "*FEFC*"), [2002] E.C.R. II-1011, paras. 182 ff. Cf. Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 86; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "*TAA*"), O.J. 1994 L 376/1, para. 376.

⁷⁷ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, "*FEFC*"), [2002] E.C.R. II-1011, para. 267.

⁷⁸ *Ibid.*, para. 248.

modal transport into the scope of Article 3 of Regulation 4056/86.⁷⁹ This proposed amendment was not adopted by the Council, which indicated that it is the intention of the Council that price fixing agreements for inland transport services should not be covered by the block exemption contained in Article 3 of Regulation 4056/86.⁸⁰ Additionally, as regards the argument of the FEFC that a statement⁸¹ made by the Commission and noted in the minutes of the Council at the time of the adoption of Regulation 4056/86 leads to the conclusion that price fixing for multimodal transport falls within the scope of Regulation 4056/86,⁸² the Commission stated that the FEFC confused the question of the block exemption for liner conferences with the statement concerning the application of Community competition rules to individual shipping lines, since the statement mentioned above “expressly refers to the technical exceptions pursuant to Article 2 of Regulation 4056/86 and Article 3 of Regulation 1017/68” and, therefore, “does not refer to the question of the group exemption, but confirms that both regulations apply in cases of multimodal sea/land operations; Regulation 4056/86 to the maritime segment and Regulation 1017/68 to the inland segment”.⁸³ In conclusion, the legislative history of Regulation 4056/86 does not support the argument that agreements on price fixing for multimodal transport are exempted from Article 81(1) EC in accordance with Article 3 of Regulation 4056/86.

d. Capacity Management Programs

Article 3(d) of Regulation 4056/86 permits liner conferences to regulate “the carrying capacity offered by each member”. This wording, however, does not directly indicate any restriction on the application of the block exemption for liner confer-

⁷⁹ See also Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 83; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 377.

⁸⁰ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “FEFC”), [2002] E.C.R. II-1011, para. 248. Cf. Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 84; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 378.

⁸¹ The Commission stated as follows: “multimodal sea/land transport operations are subject to the rules of competition adopted for land transport and to those laid down for sea transport. In practice, non-application of Article 85(1) [now Article 81(1)] [of the EEC Treaty] will be the rule as regards the organisation and execution of successive or supplementary multimodal ... transport operations and the fixing or application of inclusive rates for such transport operations, since both Article 2 of Regulation No 4056/86 and Article 3 of Regulation No 1017/68 state that the prohibition laid down by Article 85(1) [now Article 81(1)] of the Treaty shall not apply to such practices”.

⁸² CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “FEFC”), [2002] E.C.R. II-1011, para. 485. See also Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 89.

⁸³ Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, paras. 90 and 91.

ences to so-called capacity management programs,⁸⁴ which are capacity non-utilization agreements, or in other words agreements to limit the utilization of a certain percentage of the available capacity for the carriage of cargo on a particular route, in order to cushion carriers from the foreseeable surplus of supply and from a shortage of demand.⁸⁵ Such an ambiguity prompted a considerable debate⁸⁶ between the Commission and carriers over the question to what extent capacity management programs should be authorized under Article 3 of Regulation 4056/86.⁸⁷

In the Commission's view, the regulation of capacity within the meaning of Article 3(d) of Regulation 4056/86 is limited to the following situations: (1) capacity adjustments to facilitate the organization of conference members' sailings and calls, in order to improve the regularity, reliability and frequency of liner shipping services; (2) capacity adjustments to take account of seasonal (or short-term) fluctuations in demand.⁸⁸ Meanwhile, only the capacity regulation which is secondary to price fixing is permitted.⁸⁹ A freeze on the use of capacity where the main purpose is to increase freight rates cannot benefit from the block exemption under Article 3 of Regulation 4056/86, because its only effect is to raise the level of prices and it does not involve any improvement of the services offered.⁹⁰ Furthermore, the Commission added that conference members shall not increase any tariff

⁸⁴ *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 115; *Erdmenger*, Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt (1995), p. 400; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 119.

⁸⁵ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1180, Rn. 88. See also Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "TAA"), O.J. 1994 L 376/1, para. 22.

⁸⁶ See Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "TAA"), O.J. 1994 L 376/1; Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement*, "EATA"), O.J. 1999 L 193/23; Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53. See also *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1180, Rn. 88.

⁸⁷ For a comprehensive description of various opinions, see *Dinger*, The Future of Liner Conferences in Europe (2004), p. 118; *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1180, Rn. 87 *et seq.*

⁸⁸ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "TAA"), O.J. 1994 L 376/1, para. 365, repeated in Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement*, "EATA"), O.J. 1999 L 193/23, para. 178.

⁸⁹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "TAA"), O.J. 1994 L 376/1, para. 370.

⁹⁰ *Ibid.*, para. 366; Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement*, "EATA"), O.J. 1999 L 193/23, para. 179.

rates in conjunction with any capacity management program on any trade covered by such program or create an artificial peak season.⁹¹

In order to limit the application of the block exemption to capacity management programs, the Commission employed the interpretive principle of teleological reduction.⁹² Some authors doubted that this teleological approach cannot offer a comprehensible limitation of the scope of Article 3(d) of Regulation 4056/86.⁹³ The analysis of the reasonableness of this approach needs to take into account the following factors: the UNCTAD Liner Code, the internal relation between individual provisions within Article 3 of Regulation 4056/86 and the relation between Regulation 4056/86 and Community competition rules.

First, as mentioned in the 3rd and 4th Recitals of Regulation 4056/86, one of the main functions of Regulation 4056/86 is to realign EC law with the UNCTAD Liner Code. Therefore, Article 3 of Regulation 4056/86 should be interpreted in line with the aim of authorizing liner conferences as described in the UNCTAD Liner Code, primarily in Article 19 of the UNCTAD Liner Code.⁹⁴ According to Article 19, the main purpose of the UNCTAD Liner Code is to ensure a qualitatively high standard of liner shipping services by the stability effect of the conferences. Thus, the withdrawal of a large amount of shipping capacity from the market is in direct conflict with the objective of stability pursued by liner conferences. For this reason, it is inconsistent with the aim of the block exemption contained in Article 3 of Regulation 4056/86 in relation to the UNCTAD Liner Code to exempt those capacity arrangement activities of liner conferences which primarily aim at increasing freight rates.⁹⁵

Secondly, as far as the internal relation between individual provisions within Article 3 of Regulation 4056/86 is concerned, all activities listed in Article 3(a) to

⁹¹ Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53, para. 81. For more details see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1552, Rn. 44.

⁹² *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1552, Rn. 44. Under the interpretive principle of teleological reduction, a provision which is too broadly interpreted according to the meaning of the words, is reduced to the appropriate area of application according to the purpose of the regulation or contextual spirit of the law. For a detailed survey, see *Larenz*, Methodenlehre der Rechtswissenschaft (1991), p. 391 ff.

⁹³ Cf. *Chuah*, Liner conferences in the EU and the proposed review of EC Regulation 4056/86 (2005), p. 224; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1552, Rn. 44.

⁹⁴ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 120. Cf. Article 19(1) of the UNCTAD Liner Code: "Conferences should take necessary and appropriate measures to ensure that their member lines provide regular, adequate and efficient service of the required frequency on the routes they serve and shall arrange such services so as to avoid as far as possible bunching and gapping of sailings. Conferences should also take into consideration any special measures necessary in arranging services to handle seasonal variations in cargo volumes."

⁹⁵ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, "TAA"), O.J. 1994 L 376/1, para. 362.

(d) should be secondary to price fixing by liner conferences, just as the Commission declared in *TAA*:⁹⁶

“The phrase in point (d) of Article 3 (‘the regulation of the carrying offered by each member’), and the corresponding recital, must be interpreted as permitting activities which are secondary to price fixing, like the other exempted activities listed from (a) to (c) in Article 3, such as one-off capacity adjustments to accompany changes in timetables, sailings or calls among liner conference members or seasonal fluctuations in demand, which are all incidental to the main activity. Point (d) should not be interpreted as something quite different in nature from the other points listed in the same Article.”

These activities should not involve significant restrictions on competition that go far beyond what is tolerated with price fixing carried out by liner conferences. Therefore, Article 3(d) of Regulation 4056/86 should be interpreted as allowing only capacity adjustments resulting from variations in timetables, sailings or calls between conference members in order to offer adequate and efficient services.⁹⁷

Thirdly, Article 3 of Regulation 4056/86 should be interpreted in accordance with Article 81(3) EC.⁹⁸ The combination of price fixing and output limitation is possibly the most effective way to restrict competition.⁹⁹ If Article 3 of Regulation 4056/86 had been interpreted as authorizing liner conferences to carry out drastic reductions in capacity without any limitation, it would have led to, with great probability, the incompatibility of Article 3 of Regulation 4056/86 with Article 81(3) EC.¹⁰⁰ Moreover, it is also the consistent rule in Community case law that an exemption from Community competition rules should always be interpreted strictly.¹⁰¹ In conclusion, the teleological reduction employed by the Commission to allow capacity arrangement activities of liner conferences under certain conditions is in accordance with Regulation 4056/86 under Community competition rules.

⁹⁶ *Ibid.*, para. 370.

⁹⁷ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 211.

⁹⁸ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 121.

⁹⁹ *Faull*, Competition Policy in the Maritime Field (1995), p. 5; *Wood*, The Scope of The Conference Group Exemption (1999), p. 9; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 121.

¹⁰⁰ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 121; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 212 ff.

¹⁰¹ Cf. CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “*FEFC*”), [2002] E.C.R. II-1011, paras. 252 ff.; Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 62; Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “*TAA*”), O.J. 1994 L 376/1, para. 367.

e. Is the List of Agreements in Article 3 of Regulation 4056/86 Conclusive?

Article 3 of Regulation 4056/86 does not specify agreements other than the categories listed, and this list appears to be closed. In practice, however, agreements between conference members are usually complicated and detailed and often consist of sophisticated specific clauses and separate agreements, such as agreements concerning entry to and withdrawal from liner conferences, internal rules of an administrative or disciplinary nature, clauses on dispute resolution, and agreements on distribution and marketing of services (ship agents and freight forwarders commission). These specific clauses or separate agreements could be directly related and necessary to carry out the activities listed in Article 3¹⁰² and could also restrict competition.¹⁰³ Therefore, the question arose as to whether such clauses or agreements which are not expressly listed in Article 3 could also be interpreted to be exempted under Article 3.

For example, as regards the collective fixing of freight forwarder compensation,¹⁰⁴ it has been argued that this practice should be regarded as a necessary and ancillary corollary of the agreement on freight rates which enjoys the block exemption under Article 3 of Regulation 4056/86.¹⁰⁵ However, in the CFI's view, this argument cannot be justified because freight forwarder services cannot be equated with maritime transport services and therefore do not fall within the scope of Regulation 4056/86.¹⁰⁶

¹⁰² As to the so-called ancillary agreements, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 216 ff.

¹⁰³ For more details, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 214 ff.

¹⁰⁴ For a detailed survey, see *Wood*, The Scope of The Conference Group Exemption (1999), p. 13 ff.

¹⁰⁵ CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "TACA"), [2003] E.C.R. II-3275, para. 552.

¹⁰⁶ *Ibid.*, paras. 561–564. Cf. *Chuah*, Liner conferences in the EU and the proposed review of EC Regulation 4056/86 (2005), p. 217; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1551, Rn. 43. Additionally, the Commission explained its negative opinion on forwarder services in *TACA*. In this case, the Commission stated at first that the fixing of freight forwarder compensation is intended to restrict competition between the parties to the TACA and therefore adversely affects competition as regards the demand for services supplied by freight forwarders to the TACA parties. This might deprive customers of the benefits which would result from competition between the TACA parties. Secondly, it might also inhibit competition between freight forwarders and be a disincentive to improvements in the quality of services provided by freight forwarders, who may be encouraged to concentrate on the volume as opposed to the quality of business. Thus, competition may also be adversely affected on the supply side. In conclusion, the Commission did not consider that the agreement fixing maximum levels of freight forwarder compensation could qualify for the individual exemption. See Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, "TACA"), O.J. 1999 L 95/1, paras. 513–518.

In this respect, we must again refer to the consistent interpretation of the block exemption under Community competition rules. It is settled case law that, starting from the general principle laid down by Article 81(1) EC that agreements restricting competition are prohibited, provisions derogating therefrom in a regulation conferring the block exemption must, by their nature, be interpreted strictly.¹⁰⁷ In *Compagnie Maritime Belge (CEWAL)*, the CFI confirmed that the scope of the block exemption in Article 3 of Regulation 4056/86 should, like other block exemptions, be interpreted strictly.¹⁰⁸ Later in *TACA*, the Commission declared that activities which are not expressly mentioned in Article 3 of Regulation 4056/86 fall outside the scope of the block exemption under Article 3.¹⁰⁹ This position was again confirmed by the CFI when it stated that the scope of Regulation 4056/86 is restricted to maritime transport services from or to ports. Consequently, the block exemption contained in Article 3 of Regulation 4056/86 cannot be extended to services which, even if they could be considered to be ancillary to or necessary for maritime transport from or to ports, are not maritime transport services as such falling within the scope of Regulation 4056/86.¹¹⁰

4. Article 2 of Regulation 4056/86

Article 2 of Regulation 4056/86 is a faithful reproduction of Article 3 of Regulation 1017/68. Both provisions provide that the prohibition of Article 81(1) EC shall not apply to certain types of agreements whose object and effect is to achieve technical improvements or cooperation.¹¹¹ In comparison with Article 3 of Regula-

¹⁰⁷ CFI 22 April 1993, case T-9/92 (*Automobiles Peugeot SA and Peugeot SA v. Commission*), [1993] E.C.R. II-493, para. 37; ECJ 24 October 1995, case C-70/93 (*Bayerische Motorenwerke AG (BMW) v. ALD Auto-Leasing D GmbH*), [1995] E.C.R. I-3439, para. 28; ECJ 24 October 1995, case C-266/93 (*Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*), [1995] E.C.R. I-3477, para. 33; CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 48; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "*TACA*"), [2003] E.C.R. II-3275, para. 568.

¹⁰⁸ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 48. See also Negenman, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1178, Rn. 83.

¹⁰⁹ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, "*TACA*"), O.J. 1999 L 95/1, para. 398.

¹¹⁰ CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "*TACA*"), [2003] E.C.R. II-3275, para. 568.

¹¹¹ Article 3(1) of Regulation 1017/68 provides that "[t]he prohibition laid down in Article 2 shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation." A different point in Article 2 of Regulation 4056/86 in comparison with Article 3 of Regulation 1017/68 is that the former contains yet an additional condition in the wording "sole". For more details, see Commission Decision 2000/627/EC of 16 May 2000 (*Far East Trade Tariff Charges and Surcharges Agreement*, "*FETTCSA*"), O.J. 2000 L

tion 4056/86, the first question is whether Article 2 of Regulation 4056/86 constitutes a block exemption like that in Article 3 of Regulation 4056/86.¹¹² But the two provisions are worded differently. While Article 3 of Regulation 4056/86 says that “agreements ... are hereby exempted from the prohibition in Article 85(1) [now Article 81(1)] of the EC Treaty”, Article 2 of Regulation 4056/86 states that “the prohibition laid down in Article 85(1) [now Article 81(1)] of the EC Treaty shall not apply to agreements ...”. Furthermore, concerning Article 2 of Regulation 4056/86, the 7th Recital of Regulation 4056/86 declares that “certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition.” It follows from this declaration that only certain technical agreements may be considered to be excluded from the prohibition on agreements and restrictive practices and that the only reason for excluding them is that they are not restrictive in the sense of Article 81(1) EC.¹¹³ Therefore, Article 2 of Regulation 4056/86 constitutes a purely declaratory clarification of Article 81(1) EC, which is not binding and does not restrict the application of the primary Community competition rules.¹¹⁴ This position was held by the Commission¹¹⁵ and confirmed by the CFI.¹¹⁶ As a consequence, Article 2 of Regulation 4056/86 does not constitute a block exemption like that in Article 3 of Regulation 4056/86.

Moreover, the scope of application of Article 2 of Regulation 4056/86 is different from that of Article 3 of Regulation 4056/86, which deals exclusively with agreements between conference members, while Article 2 is applicable to technical agreements of all possible parties in the liner shipping market in the sense of Regulation 4056/86.¹¹⁷ This is again connected with the nature of Article 2 as a legal interpretation and not as a group exemption. Agreements between carriers within liner conferences are understood to restrict competition, while certain technical agreements could contribute to technical improvement and do not restrict competition, regardless of the participating parties. In respect of the framework of Community competition rules, Article 2 of Regulation 4056/86 can be considered as a legal interpretation of the prohibition contained in Article 81(1) EC and the

268/1, paras. 149 ff.; *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 100 ff.

¹¹² For various opinions, see *Jacobs*, *Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag* (1991), p. 94; *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 98 ff.; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 185.

¹¹³ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 185.

¹¹⁴ *Werner*, *Eine Wettbewerbsverordnung für den Seeverkehr* (1987), p. 800; *Pernice*, *Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt* (1993), p. 152.

¹¹⁵ Commission Decision 2000/627/EC of 16 May 2000 (*Far East Trade Tariff Charges and Surcharges Agreement*, “FETTCSA”), O.J. 2000 L 268/1, para. 146.

¹¹⁶ CFI 19 March 2003, case T-213/00 (*CMA CGM and Others v. Commission*), [2003] E.C.R. II-913.

¹¹⁷ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1542, Rn. 30.

exemption granted by virtue of Article 81(3) EC,¹¹⁸ based on the assumption that certain technical agreements are generally considered to be non-restrictive. Accordingly, Article 2 of Regulation 4056/86, concerning the maritime transport market as a specific sector, does not remove technical agreements as a whole from the scope of Article 81 EC.¹¹⁹ Despite the insignificant practical importance of Article 2 of Regulation 4056/86,¹²⁰ it is certainly possible that agreements that fall within the scope of Article 2 of Regulation 4056/86 nevertheless constitute a restriction to competition and fall under Article 81(1) EC.¹²¹ This potential contradiction can now be avoided, since Article 2 of Regulation 4056/86 was repealed with the adoption of Regulation 1419/2006.

5. Article 6 of Regulation 4056/86

Article 6 of Regulation 4056/86, entitled “exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services,” states:

“Agreements, decisions and concerted practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5(1) and (2) are hereby exempted from the prohibition laid down in Article 85(1) [now Article 81(1)] of the EC Treaty.”

As opposed to the provision in Article 2 of Regulation 4056/86, the wording in Article 6 of Regulation 4056/86 demonstrates unequivocally that it deals with another category of block exemption than the exemption provisions in Article 3 of Regulation 4056/86. Therefore, the argument¹²² that the statement of horizontal agreements between shippers contained in Article 6 of Regulation 4056/86 could not be interpreted as (block) exemption is not correct.

In respect of the participating parties of the exempted agreements, Article 3 of Regulation 4056/86 confines itself to the agreements between carriers as members of liner conferences. However, Article 6 of Regulation 4056/86 concerns two types of agreements: a) agreements between liner conferences and “transport users” and b) agreements between transport users.¹²³ Both block exemptions are

¹¹⁸ For the criticism of this issue, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 184.

¹¹⁹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 184.

¹²⁰ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1161, Rn. 45; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 101.

¹²¹ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 101; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 185.

¹²² *Rabe/Schütte*, Die erste Verordnung des Rates zur Anwendung des EWG-Kartellrechts (Articles 85 und 86 EWGV) auf den Seeverkehr (1988), p. 703.

¹²³ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1559, Rn. 54 and 55; *Dinger*, The Future of Liner Conferences in Europe

restricted to agreements concerning “the rates, conditions and quality of liner services”. This wording, however, leads to difficulties in limiting the scope of the block exemptions.¹²⁴

The first block exemption contained in Article 6 of Regulation 4056/86 covers vertical agreements between liner conferences and shippers, including agreements resulting from consultations between carriers and shippers on the basis of Article 5(1) of Regulation 4056/86¹²⁵ and loyalty arrangements in connection with Article 5(2) of Regulation 4056/86.¹²⁶ Both types of vertical agreement are based on the provisions in Article 5 of Regulation 4056/86, which provide for the obligations attached to the exemption under Article 3 of Regulation 4056/86. If such obligations are not complied with, the Commission may withdraw the exemption under Article 3, following the procedure under Article 7 of Regulation 4056/86. However, loyalty arrangements cannot automatically be exempted from the application of Article 82 EC, when the liner conference concerned is in a dominant position.¹²⁷

The second block exemption in Article 6 of Regulation 4056/86 covers horizontal agreements between shippers which are meant to aim at strengthening the collective position of shippers in negotiations with liner conferences.¹²⁸ However, this exemption for horizontal agreements covers only matters laid down in Article 6 of Regulation 4056/86 in relation to Article 5(1) and (2) of Regulation

(2004), p. 125 ff.; *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 140; *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1183, Rn. 94 *et seq.*

¹²⁴ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 125; *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991), p. 140. For more details, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 269 ff.

¹²⁵ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 126; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1559, Rn. 54.

¹²⁶ Article 5(2) of Regulation 4056/86 sets down the criteria under which loyalty arrangements are instituted and maintained between conference members and transport users.

¹²⁷ Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, paras. 84 ff., confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 188; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 129; Commission Decision 2005/480/EC of 30 April 2004 (*Compagnie Maritime Beige SA*), O.J. 2005 L 171/28. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 272.

¹²⁸ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 126. Cf. *Werner*, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 805.

4056/86,¹²⁹ and accordingly is merely accessory to the first type of block exemption for vertical agreements.¹³⁰

III. Conditions under Article 4 of Regulation 4056/86

In order to prevent liner conferences from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which a block exemption is granted, certain conditions are laid down in Article 4(1) of Regulation 4056/86¹³¹ and correspondingly consequences of the breach of these conditions are determined in Article 4(2) of Regulation 4056/86.

1. Non-Discrimination

Article 4(1) of Regulation 4056/86 requires conference agreements not to be discriminatory and embodies the principle of non-discrimination in Article 12 EC, Article 75(1) EC and Article 81(1)(d) EC.¹³² Article 4(1) of Regulation 4056/86 requires that conference agreements shall not cause detriments to certain ports, transport users or carriers by applying discriminating rates or conditions to the same goods. Discrimination may be acceptable, if it is justified on economic grounds.

In general, the non-discrimination rule in Article 4(1) of Regulation 4056/86 prohibits not only different treatment of same situation but also equal treatment of different situations,¹³³ since both can cause similar distortions of competition.¹³⁴ The rule refers to the basic characteristic of liner conferences that “rates and conditions of carriage” by liner conferences should be uniform or common.¹³⁵ Freight rates are common, if all conference carriers offer the transport of the same commodity for the same price; and freight rates are uniform if a shipper is offered the same freight rate by all conference members. This conclusion is derived not only from the normative interpretation of the definition of liner conferences in Article 1(3)(b) of Regulation 4056/86,¹³⁶ it is also implicitly confirmed in condition in

¹²⁹ Ortiz Blanco, Shipping Conferences under EC Antitrust Law (2007), p. 272.

¹³⁰ Dinger, The Future of Liner Conferences in Europe (2004), p. 126; Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1559, Rn. 55.

¹³¹ See the 10th Recital of Regulation 4056/86.

¹³² Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1551, Rn. 43.

¹³³ *Ibid.*, p. 1551, Rn. 43. See also Negenman, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1182, Rn. 90

¹³⁴ Cf. *Schröter*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 3 C., p. 1446, Rn. 3-4-069; similar see Dinger, The Future of Liner Conferences in Europe (2004), p. 107. Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 17 Rn. 15, p. 414.

¹³⁵ For more details, see above Chapter IV A. I. 3.

¹³⁶ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 326. See Dinger, The Future of Liner Conferences in

Article 4(1) of Regulation 4056/86. As the wording of Article 4(1) of Regulation 4056/86 indirectly demonstrated, the condition of non-discrimination is defined by referring expressly to the “carriage of the same goods”. Within liner conferences, the condition of non-discrimination in the sense of uniformity only applies to shippers of the same product. When shippers pay different prices for the same maritime transport service if the products transported are different, there is no discrimination.¹³⁷ This was also confirmed by the Commission¹³⁸ and the CFI.¹³⁹ In conclusion, discrimination in tariffs according to the type of product is recognized by Regulation 4056/86 and consistent with the uniformity of freight rates as the requirement of non-discrimination for shippers. Further, with respect to the term “economically justified”, the EJC has allowed price discrimination according to factors such as different tax, labour costs, currency parties and the intensity of competition.¹⁴⁰ Another example refers to time/volume rates which depend on the volume of cargo offered over a specified period of time. Such time/volume rates are normally lower than standard tariff rates but constitute part of the conference tariff.¹⁴¹

Another issue refers to the requirement of justification on economic grounds. Article 4(1) of Regulation 4056/86 does not contain a set of specific criteria for analysis of whether or not a difference in treatment is objectively justified. This allows flexible decisions on a case-by-case basis and ensures that all possible distortions of competition could be caught. An example for economically justified discrimination is the service contract, according to which some shippers get more favourable conditions in return for the commitment to ship a minimum volume of cargo via conference vessels.¹⁴² Another example is the levying of a currency adjustment factor.¹⁴³ Loyalty arrangements are also economically justified, in so far the rebates are granted without discrimination to all customers.

Europe (2004), p. 102; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 198.

¹³⁷ Cf. *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1182, Rn. 90; *Dinger*, The Future of Liner Conferences in Europe (2004), p. 107; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1551, Rn. 43.

¹³⁸ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, paras. 203–213.

¹³⁹ CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission*, “TAA”), [2002] E.C.R. II-875, paras. 1, 160 and 282; CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “FEFC”), [2002] E.C.R. II-1011, paras. 127 and 361. See also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1551, Rn. 43 as well as Fn. 111 w.f.r.

¹⁴⁰ See ECJ 14 February 1978, case 27/76 (*United Brands Company and United Brands Continentaal BV v. Commission*), [1978] E.C.R. 207, para. 251.

¹⁴¹ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, para. 120.

¹⁴² *Munari*, Das Europäische Wettbewerbsrecht des Seeverkehrs (1990), p. 642.

¹⁴³ *Werner*, Eine Wettbewerbsverordnung für den Seeverkehr (1987), p. 801.

2. Severability

Article 4 of Regulation 4056/86 sets out the consequence of non-compliance with the condition, namely automatic nullity of the agreement, while Regulation 4056/86 provides that this nullity could apply only to parts of the agreement which are void provided that they are severable from the whole.¹⁴⁴ Actually, the provision in Article 4(2) of Regulation 4056/86 contains a reasoning in two stages: first, the direct consequence of the breach of the condition is the automatic inapplicability of the block exemption concerned; secondly, the breach of the condition of the block exemption means the non-fulfilment of requirements in Article 81(3) EC and correspondingly leads to nullity pursuant to Article 81(2) EC.¹⁴⁵ The principle of severability applies to both stages. In this way, Article 4(2) of Regulation 4056/86 implicitly accepts both the general method of applying block exemptions used at that time and the application of the general principle of severability.¹⁴⁶ This is supported in the 14th Recital of Regulation 4056/86:

“Whereas the automatic nullity provided for in Article 85(3) [now Article 81(3)] in respect of agreements or decisions which have not been granted exemption pursuant to Article 85(3) [now Article 81(3)] owing to their discriminatory or other features applies only to the elements of the agreement covered by the prohibition of Article 85(1) [now Article 81(1)] and applies to the agreement in its entirety only if those elements do not appear to be severable from the whole of the agreement whereas the European Commission should therefore, if it finds an infringement of the block exemption, either specify what elements of the agreement are by the prohibition and consequently automatically void, or indicate the reasons why those elements are not severable from the rest of the agreement and why the agreement is therefore void in its entirety;”

It could be argued that the aim of the 14th Recital of Regulation 4056/86 is to apply the general principle of severability to soften the consequences of paragraphs (1) and (2) of Article 81 EC being applied to carriers, when there has been an infringement of Regulation 4056/86 and the exemption is inapplicable. The principle of severability was developed by the ECJ as a means of partially rescuing complex agreements that contain restrictive clauses. The ECJ has generally held that both the Commission and the competent national bodies have to limit themselves to applying the prohibition to the restrictive agreements or declaring the nullity of the parts, elements or clauses of those agreements that breach Article 81 EC, and only when the parts, elements or clauses are not entirely severable will they have to declare the prohibition or nullity of the whole agreement.¹⁴⁷ The pos-

¹⁴⁴ Article 4(2) of Regulation 4056/86 uses the expression “if it is severable”. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 119.

¹⁴⁵ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 251.

¹⁴⁶ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 251.

¹⁴⁷ Cf. ECJ 13 July 1966, joined cases 56 and 58/64 (*Consten and Grundig v. Commission*), [1966] E.C.R. 299, paras. 24–26; ECJ 27 March 1974, case 127/73 (*Belgische Radio en Televisie v. SV SABAM and NV Fonior*), [1974] E.C.R. 313; ECJ 18 December 1986, case 10/86 (*VAG France SA v. Établissements Magne SA*), [1986] E.C.R.

sible existence of prohibited clauses or agreements that are not severable within a complex agreement would cause the whole agreement to be declared void, including those parts which do not restrict competition. It will be the same for a complex agreement with prohibited restrictive clauses that are not severable from others that are authorized by a block exemption, just like the severability provision in Article 4(2) of Regulation 4056/86.

IV. Obligations under Article 5 of Regulation 4056/86

1. General Overview

Article 5 of Regulation 4056/86 lays down several obligations which should be fulfilled to maintain a block exemption under Articles 3 and 6 respectively.

In respect of their nature and consequence, the obligations in Article 5 are different from the condition in Article 4. The condition in Article 4 deals essentially with the fundamental characteristics of liner conferences which constitute the indispensable prerequisites for the justification of the block exemption granted to liner conferences. The obligations in Article 5 are primarily accessory to the implementation of the block exemptions in Articles 3 and 6 and often work as a link, in the case of a breach of obligations, to initiate the monitoring procedure under Article 7(1) of Regulation 4056/86.

The breach of the condition in Article 4 of Regulation 4056/86 automatically means the inapplicability of the exemption and as a result, by direct application of Article 81(2) EC, the foreseeable nullity of the agreement concerned and the possibility of the Commission imposing fines. In conclusion, the breach of the condition removes the protection granted under Articles 3 and 6 of Regulation 4056/86 in conjunction with Article 81(3) EC and leads to the application of Article 81(2) EC to hitherto exempted conference agreements.¹⁴⁸ The breach of the obligations in Article 5 of Regulation 4056/86 does neither automatically mean the inapplicability of an exemption, nor lead to immediate nullity of the agreements concerned.¹⁴⁹ Authorized agreements or practices are still protected from the consequences of Article 81(2) EC until the Commission expressly withdraws the exemption.

Article 5 of Regulation 4056/86 contains five obligations: 1) consultations between transport users and conferences; 2) loyalty arrangements; 3) inland transport operations and quayside services not covered by freight rates; 4) availability of tariffs; 5) notification to the Commission of awards at arbitration and recommendations. If a liner conference breaches the obligations contained in Article 5 there is always the possibility of it losing the block exemption under the procedure contained in Article 7(1) of Regulation 4056/86.

4071, para. 16. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 240 ff.

¹⁴⁸ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 244.

¹⁴⁹ *Ibid.*, p. 252.

Before the adoption of Regulation 1/2003, the Commission could, pursuant to Article 19(2) of Regulation 4056/86, impose fines on those conferences whose members were in breach. Regulation 1/2003 repealed and substituted Section II of Regulation 4056/86, but did not provide for similar rules for imposing fines, so that conference members could not be fined any more for the sole breach of their obligation under Article 5(5) of Regulation 4056/86.

2. Consultations with Transport Users

Article 5(1) of Regulation 4056/86 lays down the obligation for conferences to consult with transport users,¹⁵⁰ although it seems from the wording that Regulation 4056/86 obliges both conferences and transport users to engage in consultation “whenever requested” by either party.¹⁵¹ For transport users, this provision offers a right rather than an obligation. The “transport users” referred to are defined in Article 1(3)(c) of Regulation 4056/86 as follows:

“an undertaking (e.g. shippers, consignees, forwarders, etc.) provided it has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a conference or shipping line for the shipment of goods, or any association of shippers.”

In the light of this definition, Regulation 4056/86 obliges conferences to engage in consultation both with shippers and with intermediaries, such as freight forwarders that act on behalf of shippers. In this respect, Regulation 4056/86 goes further than the UNCTAD Liner Code, which imposes an obligation on conferences to negotiate with “shippers” organizations or representatives of shippers, but does not mention others like freight forwarders.¹⁵²

The wider provision in Article 5(1) of Regulation 4056/86 is obviously connected with the block exemption under Article 6 of Regulation 4056/86.¹⁵³ It follows from the wording of the provision in Article 5(1) that the purpose of consultations is to seek solutions on general issues of principle concerning the rates, conditions and quality of scheduled maritime transport services.¹⁵⁴ The consultation between conferences and transport users on these general issues under Article 5(1) constitutes a condition of the vertical block exemption to be granted to agreements under Article 6.¹⁵⁵

3. Loyalty Arrangements

Under certain requirements, Article 5(2) of Regulation 4056/86 allows loyalty arrangements between conferences and transport users.

¹⁵⁰ *Ibid.*, p. 254.

¹⁵¹ See Article 5(1) para. 2 of Regulation 4056/86.

¹⁵² See Article 11(1) of the UNCTAD Liner Code.

¹⁵³ See above Chapter IV A. II. 5.

¹⁵⁴ See Article 5(1) para. 1 of Regulation 4056/86.

¹⁵⁵ Cf. *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1559, Rn. 54.

a. Definition and Classification

The means which have been devised to secure the continued and exclusive patronage of shippers to the conference lines are referred to as “loyalty arrangements”.¹⁵⁶ The purpose of loyalty arrangements is to ensure that all liner cargoes in the sphere of operation of the conference, the carriage of which the conference members wish to reserve to themselves, are obtained by the conference members, and to eliminate competition from independents.¹⁵⁷ The inducement to utilize conference lines’ vessels exclusively is phrased either in the form of the deferred repayment of a portion of the freight charges paid if the shipper fulfils certain conditions of loyalty to the conference lines during a prescribed period, or of initially charging, to those shippers who signed a loyalty contract with the conference, rates lower than those charged to others who did not sign the contract.¹⁵⁸ In short, rebates as a unilateral offer¹⁵⁹ by liner conferences are given to shippers for their loyalty to liner conferences. Three different forms of loyalty arrangements can be distinguished: the deferred rebate system, the dual rate system and the immediate rebate system.¹⁶⁰ The last two are known as contractual systems, while the deferred rebate system traditionally does not use contracts.¹⁶¹ Regulation 4056/86 allows the immediate rebate system and the deferred rebate system.¹⁶²

b. Service Contract

Loyalty arrangements differ fundamentally from the increasingly common service contracts between individual members of liner conferences and shippers.¹⁶³ In a

¹⁵⁶ UNCTAD, *The Liner Conference System* (1970), para. 114. As to loyalty arrangements, cf. *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1554, Rn. 48.

¹⁵⁷ UNCTAD, *The Liner Conference System* (1970), para. 115; Cf. *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 255.

¹⁵⁸ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1554, Rn. 48; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 256.

¹⁵⁹ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 255.

¹⁶⁰ UNCTAD, *The Liner Conference System* (1970), para. 118. For more details on different rebate systems, cf. *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1184, Rn. 96; *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 47 ff.; Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, paras. 113–119.

¹⁶¹ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 255.

¹⁶² See Article 5(2)(a) of Regulation 4056/86.

¹⁶³ A service contract is, as in Section 3 para. 19 of the United States Shipping Act of 1984 (46 Ap. U.S.C. 1701 (2002)), defined as “a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port ro-

service contract the shipper promises to commit a fixed amount of cargo over a set period of time to a certain carrier. In consideration, the carrier agrees on a certain rate and on a specially defined level of service. The negotiated price in such contracts may be lower than the conference tariff, which is beneficial for the shippers. Service contracts derogate from the conventional conference tariff system and may lead to many positive effects not only for carriers but also for shippers. For example, shippers may get a reduction of the prices for maritime transport services and satisfy their need for special transport services; if an individual service contract is concluded for a long period of time, it could bring financial stability for both parties.¹⁶⁴

Service contracts are neither provided for nor authorized by Regulation 4056/86. Actually, service contracts between an individual carrier and its clients do not, in principle, restrict competition. Moreover, individual service contracts, as being, to a certain extent, a form of malpractice within liner conferences,¹⁶⁵ constitute a form of non-conference competition which, in line with the legislative motive of Regulation 4056/86,¹⁶⁶ could be seen as a way to ensure the necessary degree of residual competition in the maritime transport sector. In conclusion, service contracts are not subject to Article 81(1) EC.¹⁶⁷

Since service contracts are not subject to Article 81(1) EC, they do not require an exemption¹⁶⁸ and do not fall within the scope of the block exemption,¹⁶⁹ especially in the sense of Article 3 of Regulation 4056/86. However, a conflict with Article 81(1) EC may arise, if a conference agreement contains provisions that regulate if and under what conditions one conference member may enter into such service contracts.¹⁷⁰ The block exemption for liner conferences contained in Regulation 4056/86 does not authorize “a prohibition on individual service contracts or restrictions, whether binding or non-binding, on the contents of such contracts”.¹⁷¹ In *TACA*, the Commission correctly concluded that conference agreements which set out restrictions or prohibitions for service contracts do not fall within the scope of the block exemption under Article 3 of Regulation 4056/86. Despite the illogi-

tation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.”

¹⁶⁴ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 122.

¹⁶⁵ For more details on malpractices, see above Chapter IV A. II. 3. b.

¹⁶⁶ See the 8th Recital of Regulation 4056/86, which emphasizes the importance of non-conference competition.

¹⁶⁷ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 122; *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 256.

¹⁶⁸ *Ortiz Blanco*, *Shipping Conferences under EC Antitrust Law* (2007), p. 256.

¹⁶⁹ For more details, see *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 123 ff.; Cf. *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1555, Rn. 50.

¹⁷⁰ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “*TACA*”), O.J. 1999 L 95/1, para. 447.

¹⁷¹ *Ibid.*, para. 449.

cal reasoning of the Commission on this issue which was rejected by the CFI,¹⁷² the Commission's conclusion can be shared: it is appropriate to argue that, in compliance with the principle of strict interpretation of the block exemption contained in Article 3 of Regulation 4056/86, it is not the purpose of Article 3 to prevent member carriers from non-conference competition or internal competition, and that the block exemption in Article 3 does not serve to restrain indiscipline among the members of a conference.¹⁷³

c. Requirements

Although it follows from the wording of Article 5(2) of Regulation 4056/86¹⁷⁴ that conferences are not obliged to offer loyalty contracts, this provision established certain requirements that conferences must fulfil to take advantage of loyalty arrangements in the framework of block exemptions under Articles 3 and 6 of Regulation 4056/86, since such practice is as old as the conferences themselves.¹⁷⁵

Conferences determine, in consultation with transport users' organizations, the form and terms of their loyalty arrangements as demanded by Article 5(1) of Regulation 4056/86. As the 12th Recital of Regulation 4056/86 stated, "consultations between users or associations of users and conferences are liable to secure a more efficient operation of maritime transport services which takes better account of users' requirements".

Loyalty agreements should contain guarantees for the rights of users and conference members. From the third sentence of the first paragraph in Article 5(2) of Regulation 4056/86,¹⁷⁶ it could be argued that a bilateral written form for loyalty arrangements is required, to end the unilateral and non-binding nature of conferences' loyalty rebates. This is supported by the 10th Recital of Regulation 4056/86 which states:

¹⁷² See CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "TACA"), [2003] E.C.R. II-3275, para. 538 in relation to paras. 1381–1385. Cf. Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, "TACA"), O.J. 1999 L 95/1, para. 464.

¹⁷³ Dinger, *The Future of Liner Conferences in Europe* (2004), p. 125; Basedow, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), Verkehr; C., p. 1556, Rn. 51.

¹⁷⁴ Article 5(2) of Regulation 4056/86 states that "the shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations."

¹⁷⁵ For a detailed analysis of loyalty agreements, see *UNCTAD*, *The Liner Conference System* (1970), paras. 114–155.

¹⁷⁶ It reads that "[t]hese arrangements shall be based on the contract system or any other system which is also lawful".

“loyalty arrangements should be permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference;”

Conferences should offer transport users the choice between the immediate rebate system and the deferred rebate system.¹⁷⁷ This is required in Article 5(2)(a) of Regulation 4056/86 and serves, in accordance with the 10th Recital of Regulation 4056/86, to strengthen the negotiation position of transport users.

100% loyalty arrangements can be offered but may not be imposed unilaterally by the conferences. This is required to protect transport users as demanded in the 10th Recital of Regulation 4056/86, while transport users still should have the choice to obtain loyalty arrangements with less than 100% of their goods for transport.¹⁷⁸ In *Compagnie Maritime Belge (CEWAL)*,¹⁷⁹ the CFI considered that the members of CEWAL “offered shippers only 100% loyalty contracts [and] left no choice between obtaining a rebate in the event that the shipper agreed to ship all its goods by Cewal or no rebate in all other cases”.¹⁸⁰ The CFI, supporting the decision of the Commission, based its findings on Article 5(2)(b)(i) of Regulation 4056/86, according to which a 100% loyalty arrangement could not be imposed unilaterally. The ECJ went still further and held that the very fact that a conference is in a dominant position means that, in practice, it always imposes its loyalty arrangements on users.¹⁸¹

A loyalty period must not exceed six months. Under the system of deferred rebates neither the loyalty period on the basis of which the rebate is calculated nor the subsequent loyalty period required before payment of the rebate may exceed six months; this period shall be reduced to three months where the conference rate is the subject of a dispute.¹⁸²

Loyalty arrangements can be terminated with a maximum notice of six months. Under the system of immediate rebates each of the parties shall be entitled to ter-

¹⁷⁷ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1558, Rn. 53.

¹⁷⁸ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 183.

¹⁷⁹ *Ibid.* Cf. Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwal*), O.J. 1993 L 34/20; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365.

¹⁸⁰ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 183.

¹⁸¹ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 133–134 in relation to para. 131.

¹⁸² The 2nd subparagraph of Article 5(2)(a) of Regulation 4056/86.

minate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months; this period shall be reduced to three months when the conference rate is the subject of a dispute.¹⁸³

Conferences must set out a list of cargo and any portion of cargo agreed with transport users, which is specially excluded from the scope of the loyalty arrangement.¹⁸⁴ In *Compagnie Maritime Belge (CEWAL)*, the Commission noted that CEWAL had not furnished a list of cargoes excluded from the scope of the loyalty arrangement and thus breached Article 5(2)(b)(i) of Regulation 4056/86.¹⁸⁵

Conferences must set out a list of circumstances in which transport users are released from their obligation of loyalty. These shall include: circumstances in which consignments are dispatched from or to a port in the area covered by the conference but not advertised and where the request for a waiver can be justified; and those in which waiting time at a port exceeds a period to be determined for each port and for each commodity or class of commodities following consultation of the transport users directly concerned with the proper servicing of the port.¹⁸⁶

To balance the interests of the conference and the transport user, the transport user when demanding his release from the loyalty arrangement, is required to inform the conference in advance, within a specified period, of his intention to dispatch the consignment from a port not advertised by the conference or to make use of a non-conference vessel at a port served by the conference as soon as he has been able to establish from the published schedule of sailings that the maximum waiting period will be exceeded.¹⁸⁷

Although Article 5(2) of Regulation 4056/86 does not explicitly set out further requirements, infringement by loyalty arrangements of Community competition rules, especially of Article 82 EC, is still possible. For example, to limit the power of conferences over loyal shippers, Regulation 4056/86 does not fix a maximum percentage rebate. However, excessively high percentages may infringe Articles 81 and 82 EC.¹⁸⁸ Another example is given in *Compagnie Maritime Belge (CEWAL)*. The CFI noted that the evidence submitted by the Commission clearly showed the existence of blacklists of disloyal shippers which, once included in such lists, could not enjoy normal and adequate treatment by conferences. The CFI discovered that such blacklists had been used.¹⁸⁹ In view of the fact that the conference in question was in a dominant position, such blacklists constituted an

¹⁸³ The 1st subparagraph of Article 5(2)(a) of Regulation 4056/86.

¹⁸⁴ Article 5(2)(b)(i) of Regulation 4056/86.

¹⁸⁵ Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, para. 86, confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, paras. 173 ff.

¹⁸⁶ The 1st subparagraph of Article 5(2)(b)(ii) of Regulation 4056/86.

¹⁸⁷ The 2nd subparagraph of Article 5(2)(b)(ii) of Regulation 4056/86.

¹⁸⁸ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 258.

¹⁸⁹ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 185.

abuse in the sense of Article 82 EC.¹⁹⁰ As opposed to Article 81 EC, Article 82 EC does not provide for the possibility of an exemption. On this point, the CFI, referring to Article 8(1) of Regulation 4056/86, stated that the abuse of a dominant position within the meaning of Article 82 EC must be prohibited.¹⁹¹

4. Inland Transport Operations and Quayside Services Not Covered by the Freight Charge

According to Article 5(3) of Regulation 4056/86, liner conferences are not allowed to retain transport users from freely determining the undertakings to which they have recourse in respect of inland transport or quayside services not covered by freight or other charges agreed with the carriers.¹⁹² This provision is in line with Article 3 of Regulation 4056/86.¹⁹³ Article 3 only authorizes conferences to fix maritime freight rates which should be common or uniform, only cover the transport “from or to one or more Community ports”¹⁹⁴ and could not be extended to inland prices, especially in multimodal transport.¹⁹⁵ In consequence, member carriers of liner conferences cannot conclude a maritime transport contract conditional upon using their inland transport and quayside services. Their common price-fixing also covering inland and quayside services infringe Article 81(1) EC, whereas it is not foreclosed that a carrier could refer shippers to certain inland service providers or that individual agreements on inland or multimodal rates could be made directly between carriers and shippers.¹⁹⁶

5. Availability of Tariffs

The obligation of liner conferences to publish their tariffs under Article 5(4) of Regulation 4056/86 aims at making conferences more transparent about their activities.¹⁹⁷ As already mentioned, given the effort of the European legislator to bring Regulation 4056/86 into line with the provisions contained in the UNCTAD

¹⁹⁰ *Ibid.*, para. 181.

¹⁹¹ *Ibid.*, para. 188, confirmed by ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafa-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 135.

¹⁹² Cf. the 10th Recital of Regulation 4056/86.

¹⁹³ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1538, Rn. 27.

¹⁹⁴ Article 1(2) of Regulation 4056/86.

¹⁹⁵ Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17, para. 87, confirmed by CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, “FEFC”), [2002] E.C.R. II-1011, para. 240.

¹⁹⁶ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1538, Rn. 27. Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 264.

¹⁹⁷ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1185, Rn. 100; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 264.

Liner Code, Regulation 4056/86 is largely based on the UNCTAD Liner Code.¹⁹⁸ Article 5(4) of Regulation 4056/86 is essentially a summary of Article 9 of the UNCTAD Liner Code, which obliges conference members to supply their clients with information about the type of services, including financial conditions.¹⁹⁹

However, Article 5(4) of Regulation 4056/86 differs from Article 9 of the UNCTAD Liner Code in two aspects. First, as regards the requirements to make tariffs available, the two requirements in Article 9 of the UNCTAD Liner Code are cumulative, namely “tariffs ... shall be made available on request to shippers ... *and* they shall be available for examination at offices of shipping lines and their agents.” In Article 5(4) of Regulation 4056/86 the two requirements are alternative, namely “Tariffs ... shall be made available on request to transport users ..., *or* they shall be available for examination at offices of shipping lines and their agents.”²⁰⁰ Secondly, as regards the contents, the second paragraph of Article 5(4) of Regulation 4056/86, while maintaining the basic elements of Article 9 of the UNCTAD Liner Code, requires more concretely:

“They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.”

6. Notification to the Commission of Awards at Arbitration and Recommendations of Conciliator

Article 5(5) of Regulation 4056/86 sets out the fifth and final obligation, namely the notification to the Commission of arbitration and recommendations of conciliators in the case of disputes. It should be noted that this obligation does not concern awards and recommendations relating to all the requirements to which liner conferences are subject, but only to the condition of non-discrimination in Article 4 of Regulation 4056/86 and the obligations concerning loyalty arrangements (Article 5(2)) and the availability of tariffs (Article 5(3)). This restrictive provision could be understood to mean that the awards and recommendations accepted by the parties should be examined individually by the Commission to prevent arbitrators or conciliators from reaching a decision which could have been previously and directly suggested or agreed by the parties but was contrary to Regulation 4056/86. This argument is supported by the 11th Recital of Regulation 4056/86 which states:

¹⁹⁸ See above Chapter IV A. I.

¹⁹⁹ Article 9 of the UNCTAD Liner Code is entitled “Availability of tariffs and related conditions and/or regulations” and states as follows: “Tariffs, related conditions, regulations, and any amendments thereto shall be made available on request to shippers, shippers' organizations and other parties concerned at reasonable cost, and they shall be available for examination at offices of shipping lines and their agents. They shall spell out all conditions concerning the application of freight rates and the carriage of any cargo covered by them.”

²⁰⁰ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 265.

“whereas provision should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the European Commission in order to enable it to verify that conferences are not thereby exempted from the conditions provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86 [now Articles 81 and 82];”

Theoretically, this provision could make it easy for the Commission to control granted block exemptions.²⁰¹ However, in practice, there were until now only two notifications in compliance with the final obligation in Article 5(5) of Regulation 4056/86. The first, in 1991, concerned the case between the *Compagnie Maritime Belge* (CMB) and the East African Conference (EAC);²⁰² the second concerned the case of *SUNAG*.²⁰³ This demonstrates either a remarkable high or low consensus or the limited importance that conferences and transport users gave to this obligation.²⁰⁴

B. Competition Regulation of Liner Conferences under RIMT/IRRIMT

I. Definition of Liner Conferences

1. Definition of Liner Conferences

A direct definition of liner conferences exists neither in the RIMT nor in the IRRIMT. However, the IRRIMT provide for the definition of an agreement of liner conference. Article 3(14) IRRIMT reads that “[a]n agreement of liner conference shall mean the kind of agreement concluded between members of a liner conference or between liner conferences, which is defined in the UN Convention on a Code of Conduct for Liner Conferences, 1974.”²⁰⁵ This means, a liner confer-

²⁰¹ Negenman, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1185, Rn. 100.

²⁰² Commission Decision (*Compagnie Maritime Beige v. East African Conference (CMB v. EAC)*), Press Release IP/93/739 of 9 September 1993. The Commission terminated proceedings against the EAC, following agreement by the parties to amend the conference agreement particularly as regards notice periods for leaving the conference. For more details, cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 220.

²⁰³ Case C-339/95 (*Compagnia di Navigazione Marittima and Others v. Compagnie Maritime Belge and Others*, “*SUNAG*”), O.J. 1995 C 351/4, removed from the register on 11 March 1998. The Case of *SUNAG* was referred to the ECJ but withdrawn by the parties before the Advocate General’s opinion or Court’s judgment was given. Cf. *Wood*, The Scope of The Conference Group Exemption (1999), p. 4.

²⁰⁴ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 267.

²⁰⁵ This is the first time that Chinese legislation provides for, although indirectly, the definition of liner conferences in the form of law. It seems that the Chinese government has been reluctant to legislate in this area. An accurate explanation could not be given. The

ence under Chinese law is “a group of two or more vessel operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services”, as provided in the UNCTAD Liner Code.²⁰⁶

Liner shipping has not been mentioned in Chinese legislation until 1990 with the adoption of the Provisions on the Administration of International Liner Services. International liner shipping is defined in these Provisions as “international shipping transport operated by fixed vessels for the carriage of passengers and cargo (including containers) according to published schedules or regularly on fixed routes and routes among specified ports”.²⁰⁷ Although these Provisions lay down rules for the regulation of international liner shipping services, they do not provide for a definition of liner conference. Literally, these Provisions are to be applied to international liner shipping companies and their agents. The organizations of liner shipping companies, such as liner conferences, are not referred to.²⁰⁸

2. Definition of Liner Conference Agreements

“Liner conference agreements” as defined in Article 3(14) IRRIMT include two categories, i.e. agreements concluded between members of a liner conference and agreements between liner conferences (or called inter-conference agreements). This definition does not limit liner conference agreements to those which have as their objective the fixing of rates and conditions of carriage, and therefore, includes all kinds of agreements between members of a liner conference or between liner conferences, as price fixing agreements, cargo sharing agreements, technical agreements etc.

most important Chinese liner shipping companies, like COSCO and China Shipping, both of which are SOEs, are not permitted to participate in liner conferences. This may result from the Chinese government’s previous unhappy experiences with liner conferences, especially the fierce rate war between Chinese shipping companies and liner conferences at the end of the 1950s, see above Chapter I B. I. 3.

²⁰⁶ Chapter I of Part One of the UNCTAD Liner Code.

²⁰⁷ Article 13 of the Provisions on the Administration of International Liner Services. Later, the definition of international liner services is defined in Article 3(3) IRRIMT: “International liner services shall mean the regular international maritime cargo/or passenger transportation services provided between the fixed ports by means of using the owned or operated vessels or by means of the cases specified in Article 16(3) RIMT.”

²⁰⁸ There is no reference either to liner conferences in the shipping rules promulgated after the Provisions on the Administration of International Liner Services, namely, the Provisions on the Administration of International Maritime Container Transport Services [海上国际集装箱运输管理规定] of 5 December 1990 (amended on 18 April 1998, abolished on 1 January 2002), the Regulation of the Shanghai Shipping Exchange [上海航运交易所管理规定] of 3 October 1996, and the Implementation Rules on the Filing of Tariff of International Container Liner Services [国际集装箱班轮运输运价报备制度实施办法] of 17 October 1996.

3. Definitions of Other Forms of Agreements in Liner Services

Aside from liner conference agreements, the IRRIMT also provide for definitions of operational agreements and freight rates agreements respectively.

Operational agreements are defined as agreements relating to the increase or decrease of shipping capacity on one or more shipping routes concluded between or among international liner undertakings with the aim of stabilizing or controlling freight rates, or other cooperation agreements concluded among international liner undertakings. These agreements include agreed minutes with the nature of the above-mentioned agreements, agreements relating to joint vessel operations and joint utilizations of port facilities, alliances, consortia and other cooperation agreements concluded between or among international liner undertakings with the aim of improving operational efficiency.²⁰⁹ Freight rates agreements are defined as agreements relating to all kinds of charges, freight rates and surcharges etc., concluded between two or more international liner shipping undertakings. Such agreements shall also include the agreed minutes with the nature of the above-mentioned agreements.²¹⁰

In comparison with the definition of liner conference agreements, the two additional definitions are confusing, even contradictory. Although the definition of operational agreements contains qualifications such as “capacity arrangements” or “joint vessel operations”, it does not definitely exclude freight rate-fixing between international liner shipping undertakings. The definition of freight rate agreements only generally refers to freight rate conclusions between international liner shipping undertakings, but does not provide for any further conditions or requirements on freight rate conclusions as such. A basic question whether the international liner shipping undertakings may or may not fix freight rates in such freight rate conclusions can be clarified neither according to this definition in Article 3(16) IRRIMT nor pursuant to any other provisions in the RIMT or the IRRIMT. It seems that the Chinese law-maker tried to differentiate between various forms of organisations.

This definition is kept very broad since all cooperation agreements except liner conference agreements are operational agreements. According to this definition, operational agreements under Chinese law comprise the following forms of agreements: written agreements or agreed minutes, consortia, alliances and other forms of cooperation agreements with the aim of stabilizing freight rates or improving operational efficiency. The main cooperation types include capacity adjustments, joint vessel operations and joint utilizations of port facilities. Although the definition of operational agreements does not explicitly point out that agreements allowing price fixing cannot constitute operational agreements, this difference between liner conference agreements and operational agreements still is clear.

²⁰⁹ Article 3(15) IRRIMT.

²¹⁰ Article 3(16) IRRIMT.

II. Filing Requirements on Liner Conferences

The filing requirement is one of the fundamental characteristics and instruments of the maritime law system under the RIMT and the IRRIMT that provide for a comprehensive system of filing requirements for liner shipping service. Among these filing provisions, only Article 22 RIMT and Article 32 IRRIMT deal with liner conferences, the others refer to individual carriers who carry out international liner shipping services within the meaning of Article 3(3) IRRIMT. The relation between these two categories of filing provisions could be seen as the relation between general and specific provisions, since the provisions under Article 22 RIMT and Article 32 IRRIMT specifically concerning liner conferences rely on the basis of the general filing provisions under the RIMT and the IRRIMT. Moreover, the MOC-Notice 2007 adds further regulatory provisions directly concerning liner conferences and emphasizes the enforcement of the general filing provisions on liner conferences. In the following, an overview of the general filing provisions on international liner shipping services will be given in order to describe the framework of the filing system under the RIMT and the IRRIMT. On this basis, the whole system of filing requirements on liner conferences will be analyzed in the RIMT, the IRRIMT and the MOC-Notice 2007.

1. General Provisions on Liner Shipping Undertakings

a. Filing of Operation

The first general provision on filing of international liner shipping services is Article 19 RIMT which requires that the undertakings referred to shall, when opening new international liner transport routes, or cancelling international liner transport routes, or changing the vessels or voyage schedules of international liner transport, make a public announcement 15 days in advance, and file the information with the MOC within 15 days from the date of the occurrence of activities. As regards the “public announcement”, an additional requirement is given in Article 23 IRRIMT which states that the public announcement shall be made on the media determined by the MOC. A list of such media has not been given in the IRRIMT but in another Notice²¹¹ issued by the MOC.²¹²

Another related issue refers to the shipping agents of international liner shipping undertakings. According to Article 31 IRRIMT, international liner shipping undertakings shall announce their shipping agents and agents which issue their bills of lading located within the territory of the PRC through the media deter-

²¹¹ Notice on Implementation of the IRRIMT [关于实施国际海运条例实施细则的公告], issued by the MOC on 21 March 2003.

²¹² Para. 4 of the Notice on Implementation of the IRRIMT lists these media: *China Communications Newspaper* [中国交通报], *China Water Transport Newspaper* [中国水运报], *Shipping Exchange Bulletin* [航运交易公报], *China Shipping Gazette* [中国航务周刊], *Chinese Shipping Website* [中华航运网] www.chineseshipping.com.cn.

mined by the MOC.²¹³ The names of the media for the announcement shall be filed with the MOC.²¹⁴

b. Filing of Freight Rates

Article 20 RIMT refers to the filing of freight rates of international liner shipping services. The freight rates to be filed are: tariff rates or negotiated rates.²¹⁵ Tariff rates are the freight rates provided in the tariff book²¹⁶ of international liner service undertakings and NVOCCs, while negotiated rates are the freight rates agreed upon between international liner service undertakings and shippers or NVOCCs. The two terms are in compliance with the definitions in Article 3(17) and (18) IRRIMT.²¹⁷ Negotiated rates include the freight rates and related points and shall be concluded in the form of written contracts or agreements.²¹⁸ Tariff rates and negotiated rates shall come into effect 30 days and 24 hours, respectively, after having been accepted for filing by the MOC.²¹⁹ International liner service undertakings shall implement the valid freight rates that have been submitted for filing.²²⁰

One question regarding the filing of freight rates is which organisation is responsible for filing. Article 20(1) RIMT requires that freight rates be filed with an organisation designed by the MOC. This seems to refer to the Shanghai Shipping Exchange (SSE) established on 28 November 1996 in Shanghai. According to the Regulation of the Shanghai Shipping Exchange issued by the MOC on 3 October 1996, the SSE is an institutional non-profit legal person which provides marketplace, facilities and information for shipping business.²²¹ However, the responsi-

²¹³ Article 31(1) IRRIMT further requires that the content of announcement shall include the name, place of registration, address and contact details of the agent. Changes to appointment of agent shall be announced within 7 days before the effective date of agency agreement.

²¹⁴ Article 31(2) IRRIMT.

²¹⁵ Tariff rates (in Chinese *Gongbu Yunjia* [公布运价]) and negotiated rates (in Chinese *Xieyi Yunjia* [协议运价]) are translated also into published freight rates and contract prices respectively. See *Wang*, China's Rules on Shipping (2002), p. 33.

²¹⁶ The tariff book consists of the freight rates, the rules related to the freight rates and the rules which shall be complied with both by carriers and shippers (Article 3(17) IRRIMT).

²¹⁷ Article 3(17) IRRIMT gives the definition of "tariff rates", and Article 3(18) IRRIMT gives the definition of "negotiated rates".

²¹⁸ Article 3(18) IRRIMT in conjunction with Article 28 IRRIMT.

²¹⁹ Article 20(3) RIMT.

²²⁰ Article 20(4) RIMT.

²²¹ Article 2 of the Regulation of the Shanghai Shipping Exchange. The SSE has the tasks, besides assisting the MOC in the filing of freight rates, also the followings: to accept the filing of freight rates; to publish freight rates filed by liner shipping companies; to assist the MOC in inspecting the implementation of the filing; to collect and publish the information with respect to freight rates, etc. See the homepage of the SSE: <http://www.sse.net.cn/yunjiaobao.asp>. The scope of trading on the SSE includes waterway goods shipping, port-related business, ship leasing, sales and purchases of vessels and

bility of the SSE is still unclear. According to the MOC's Notice on the Adoption of a Freight Rates Filing System and the Authorization of the Shanghai Shipping Exchange²²² on 1 November 1996 (MOC-Notice 1996), the SSE's responsibility for filing formalities only covers the ports in Shanghai, Zhejiang and Jiangsu Provinces, from and to which maritime transport services are carried out.²²³ Furthermore, the Implementation Rule on the Tariff Filing of International Container Liner Services that was adopted by the MOC in 1996²²⁴ also applies only to freight filing in Shanghai, Zhejiang Province and Jiangsu Province.²²⁵ Up to now the MOC has not published any notice or official announcement concerning this matter, although the MOC has the legal duty to designate such an organisation.²²⁶ It

other shipping business permitted by the MOC (Article 17 of the Regulation of the Shanghai Shipping Exchange). For more details, see *Wang*, China's Rules on Shipping (2002), p. 33; *Yu/Zhou*, Abuse of Market Dominant Position (2006), p. 49.

²²² Notice on the Adoption of a Freight Rates Filing System and the Authorization of the Shanghai Shipping Exchange [关于实行运价报备制度和上海航运交易所授权的通知], issued by the MOC on 13 October 1996 and effective as of 1 November 1996.

²²³ Shortly before the establishment of the SSE, but after the adoption of the Regulation of the Shanghai Shipping Exchange, the MOC issued the Notice on the Adoption of a Freight Rates Filing System and the Authorization of the Shanghai Shipping Exchange on 1 November 1996 (MOC-Notice 1996). The addressees of the MOC-Notice 1996 are the Traffic Bureau of the Shanghai City government, the Traffic Bureau of the Jiangsu Province Government, the Traffic Bureau of the Zhejiang Province Government and the SSE. At that time, the SSE was still in preparation and was to be administrated jointly by the MOC and the Shanghai City Government. The Notice was also sent to the two Traffic Bureaus of Jiangsu and Zhejiang Province Governments probably because most international liner shipping undertakings were located in the two provinces and carried out operations from and to the Port of Shanghai. The Notice therefore restricts its scope of application only to the Ports of Shanghai and Ningbo. According to the Preamble of the MOC-Notice 1996, the newly adopted Freight Rates Filing System applies to international liner shipping services from and to ports of Shanghai or Ningbo. The SSE is authorized as the organisation in charge of handling filing formalities. The shipping undertakings which transport containers from and to ports in Shanghai, Zhejiang and Jiangsu Provinces shall file their freight rates for liner shipping in written form with the SSE for the record. The filed freight rates for liner shipping will be effective unless the SSE raises objections within two days from the date of filing. (Article 2 of the MOC-Notice 1996.)

²²⁴ Some provisions of this Implementation Rule are in conflict with or different from those of the RIMT. For example, according to this Implementation Rule, negotiated rates shall come into effect seven days after acceptance for filing by the SSE instead of 24 hours after acceptance for filing by the MOC under the RIMT. Cf. Article 20(3) RIMT and Article 16(2) of the Implementation Rule on the Tariff Filing of International Container Liner Services.

²²⁵ Article 2 of the Implementation Rule on the Tariff Filing of International Container Liner Services.

²²⁶ Article 20(1) RIMT.

seems that the SSE being such an organisation is just a *fait accompli*²²⁷ and a unified nationwide freight filing system has not yet been implemented.²²⁸

Another issue refers to the confidentiality of the filing of negotiated rates. It is questionable whether or not negotiated rates between shipping companies and shippers could be kept confidential under the regulation of the MOC. The National Industrial Transportation League (NITL) objected to the requirements that carriers shall file negotiated rates with the MOC, a process which would delay the implementation of those rates. Moreover, the NITL is worried that the negotiated rate information could be “disseminated” to Chinese State-owned or affiliated shipping undertakings,²²⁹ or other competitors.²³⁰ According to the Implementation Rule on the Tariff Filing of International Container Liner Services, the SSE shall not be allowed to make known the name of a cargo-owner who negotiated a freight agreement with a shipping company.²³¹ But the Implementation Rule on the Tariff Filing of International Container Liner Services does not clearly require that the SSE shall keep the filed negotiated rates confidential, before making them known to the public.²³² Moreover, the SSE is closely connected with the MOC, and therefore, there is the possibility that sensitive price information which the SSE obtains from the filing documents can be sent to SOEs like COSCO so that these can adjust their tariffs quickly to strengthen their market position. Considering the deficiencies of the freight rate filing system, it seems that the anxiousness of the National Industrial Transportation League (NITL) about the confidentiality of the filed negotiated rates is reasonable.²³³ Special attention should be paid to such anti-competitive practices conducted by State authorities or organisations in favour of SOEs.

c. Filing of Liaison Office and Resident Representative

The filing requirements also apply to the liaison office or resident representative of foreign international shipping undertakings. The RIMT provides that foreign international shipping undertakings may, with the approval of the MOC, establish

²²⁷ For more details, see *Wang*, China’s Rules on Shipping (2002), p. 33; *Yu/Zhou*, Abuse of Market Dominant Position (2006), p. 49.

²²⁸ *Yu/Zhou*, Abuse of Market Dominant Position (2006), p. 49.

²²⁹ It especially refers to COSCO and China Shipping.

²³⁰ *Anonymous*, The Comment of the United Nations on the RIMT (2002), p. 12.

²³¹ Article 20 of the Implementation Rule on the Tariff Filing of International Container Liner Services.

²³² Article 3 of the Implementation Rule on the Tariff Filing of International Container Liner Services requires that the SSE shall make freight rates known to the public upon availability of the filed freight rates.

²³³ For example, during drafting the RIMT, the National Industrial Transportation League (NITL) objected to the requirements that carriers shall file negotiated rates with the MOC, a process which would delay the implementation of those rates. Moreover, the NITL was worried that negotiated rates could be “disseminated” to Chinese State-owned or affiliated shipping undertakings, especially COSCO and China Shipping, or other competitors. See *Anonymous*, The Comment of the United Nations on the RIMT (2002), p. 12.

resident representatives within the territory of the PRC.²³⁴ The IRRIMT require that foreign international shipping undertakings that carry out operations covering Chinese ports have a liaison office within the territory of the PRC. Such liaison offices may take the form of a foreign investment enterprise or resident representative office established within the territory of the PRC by a foreign enterprise, a Chinese enterprise legal person or an economic organisation with a permanent address in China. Commissioning of liaison offices shall be filed with the MOC with the prescribed documents for the record.²³⁵ Any changes to the liaison office or the content of its organisation shall be filed with the MOC within 15 days from the day of the change for the record.²³⁶

2. Specific Provisions on Liner Conferences

a. Article 22 RIMT and Article 32 IRRIMT

Article 22 RIMT requires generally that liner conference agreements, operational agreements, or freight rates agreements, which are concluded between international liner shipping undertakings and cover Chinese ports, shall be filed with the MOC within 15 days from the date of the conclusion of such agreements. Article 32 IRRIMT²³⁷ contains further provisions on formalities. Liner conference agreements shall be filed by the liner conference representative on behalf of all the members engaging in maritime transport to/from Chinese ports for records and a list of the conference members shall be provided, while international shipping transport undertakings under operational agreements and freight tariff agreements shall file records of the agreements individually.²³⁸

b. MOC-Notice 2007

The filing requirements in the MOC-Notice 2007 refer to two aspects concerning liner conferences. The first concerns the designation of a liaison office and representatives and the related filing formalities, the second refers to the filing of agreements under liner conferences and organisation of freight rates discussions.

As regards the first aspect, Article 2 of the MOC-Notice 2007 states that liner conferences and organisations of freight rates discussion agreements shall desig-

²³⁴ Article 34(1) RIMT. Article 34(2) RIMT in conjunction with Article 39 IRRIMT prohibits the business operation of such resident representatives.

²³⁵ Article 25(1) IRRIMT. For more accurate formalities, see Article 48 IRRIMT which states the responsible regional and central authorities, necessary documents, the period of administration approval or refusal, other formalities and the existence period of such resident representative.

²³⁶ Article 25(3) IRRIMT. For more detailed provisions concerning the change of name, representative person, extension and the termination, see Articles 49 to 51 IRRIMT.

²³⁷ Hereby, the wording “liner conference” in Article 32 IRRIMT refers actually to a representative or a liaison office of a liner conference within the territory of the PRC. This representative or liaison office shall submit the copy of the liner conference agreement to the MOC.

²³⁸ Such a requirement may be a heavy burden not only to members of freight rate agreements but also to the MOC.

nate their liaison office and representatives within the territory of the PRC before the date of 15 April 2007. The contact information as well the changes of liaison offices and representatives shall be made public in the media determined by the MOC, filed with the MOC and notified to the shippers or shippers' associations within the territory of the PRC. Attached to the MOC-Notice 2007 was a list of media which is not totally identical with the list in the Notice on Implementation of the IRRIMT of the MOC on 21 March 2003.²³⁹ In addition to the aforementioned five media, the MOC-Notice 2007 adds the Website of China Shipowners' Association.²⁴⁰ The MOC-Notice 2007 implements the RIMT and the IRRIMT, since these regulations contain no requirements on the designation of liaison offices and representatives by liner conferences or on related filing issues.

As regards the second aspect, several conflicts of provisions between the MOC-Notice 2007 and the RIMT and the IRRIMT should be pointed out. Article 4(1) of the MOC-Notice 2007 provides that international liner shipping companies engaged in liner conference agreements, operational agreements as well as organisation of freight rates discussion agreements covering Chinese ports, are responsible for filing such agreements. Furthermore, Article 4(1) of the MOC-Notice 2007 takes the RIMT as the legal basis for its provision. However, the RIMT does not contain provisions regarding the party responsible for the filing of liner conference agreements, operational agreements or organisation of freight rates discussion agreements. The only relevant provision is Article 32 IRRIMT. However, the provision under Article 4(1) of the MOC-Notice 2007 complies only with Article 32(2) IRRIMT in respect of operational agreements and organisation of freight rates discussion agreements, but not with Article 32(1) IRRIMT in respect of liner conference agreements.

A further conflict appears in Article 4(2) of the MOC-Notice 2007 which provides that international liner shipping companies may submit the filing documents either themselves or through the liaison office of liner conferences and freight rates discussion agreements. Hereby operational agreements are not concerned any more. This provision complies neither with Article 4(1) of the MOC-Notice 2007 nor with Article 32 IRRIMT.

A third conflict refers to the documents to be filed. The documents required by Article 4(2) of the MOC-Notice 2007 include:

- 1) signed photocopies of the agreements, including minutes, decisions, agreements and other documents of meetings discussing the change of items and rates of charges, freight rates, surcharges and other related issues.
- 2) a statement signed by personnel in charge of liner conferences and organisation of freight rates discussion agreements on the items to be filed.

This provision extends the scope of the documents to be filed under Article 22 RIMT and Article 32 IRRIMT which only refer to the related agreements. In addition, Article 4(3) of the MOC-Notice 2007 demands that the party responsible for filing explains why the agreements filed adjust the charge items or increase freight

²³⁹ Para. 4 of the Notice on Implementation of the IRRIMT.

²⁴⁰ www.csoa.cn

rates as well as surcharges. This includes the outcome of consultations between liner conferences, freight rates discussion organisations on one side and shippers' associations within the territory of the PRC on the other side, the main opinions of relevant parties, and related information concerning areas outside Mainland China.

In respect of the background of the release of the MOC-Notice 2007,²⁴¹ it could be argued that the MOC has not been aware of the complexity of competition regulation of liner conferences until the investigation of *THC* in 2002. The MOC tried to tighten the control of anti-competitive practices carried out by liner conferences. However, lacking effective competition rules and sufficient regulatory experience, the MOC could only lay down more detailed formality provisions in the framework of the filing system, in order to improve the transparency of liner conferences practice and make more information available for the Chinese regulator. Nevertheless, legal consistency of the RIMT, the IRRIMT and the MOC-Notice 2007 was not paid sufficient attention.

III. Legal Nature of Liner Conferences and Applicability of Competition Rules

1. General Legitimization of Liner Conferences

As demonstrated above, the definition of liner conferences in accordance with the UNCTAD Liner Code is accepted in China and liner conferences which cover the Chinese ports are legitimized by fulfilling the prescribed filing requirements.²⁴² This means that the typical restrictive practices of liner conferences, such as freight rate-fixing, a capacity management program and loyalty arrangements, are to be allowed. This is a general legitimization of liner conferences. The filing requirements constitute the only condition for this general legitimization, and no other competition assessment or legal obligations are stipulated.

However, the legal nature of this general legitimization is not clear. Two interpretations could be considered. If it amounts to a block exemption for liner conferences, there ought to be certain conditions or obligations under which such a block exemption could be justified and even be removed for the breach of these conditions or obligations. An unconditional block exemption would not be reasonable, since the restrictive effects of liner conferences as "hard-core cartel" are generally accepted. If the general legitimization cannot be considered an unconditional block exemption, then it can only be an individual exemption under applicable competition rules, but in this case it is still necessary to determine the conditions under which restrictive practices of liner conferences in certain circumstances could be substantiated and exempted. Anyway, such conditions are indispensable for either of the two possibilities of interpretation. Without such conditions a complete, reasonable and workable regime of regulation on liner conferences is impossible.

²⁴¹ For more details see below Chapter V B. I.

²⁴² For more details see above Chapter IV B. II. 2. Cf. *Nesterowicz*, *The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping* (2005), p. 57.

2. Discussion of the Applicability of Competition Rules

The unclarified legal nature of the general legitimization of liner conferences is an essential legal deficiency and leads to fatal difficulties in the application of competition rules both in the general sense and in maritime regulation.

a. General Competition Rules

General competition rules before the adoption of the AML were to be found mainly in the Pricing Law and the PRCPM. In particular, conference agreements could constitute infringements of Article 14 of the Pricing Law and Article 4 PRCPM which, however, do not provide conditions for a possible exemption. The application of Article 14 of the Pricing Law and Article 4 PRCPM to liner conferences would therefore lead to the result that liner conferences are legitimized by the filing but shall be prohibited for enforcement of their restrictive agreements. This is a deficiency in the competition rules in the Pricing Law and the PRCPM, which cannot help clarify the legal nature of the general legitimization of liner conferences. This deficiency prevents the application of Article 14 of the Pricing Law and Article 4 PRCPM to liner conferences. Nonetheless, the possibility that the rules prohibiting the abuse of a dominant position in Articles 6, 7 and 8 PRCPM be applied to liner conferences must not be excluded, since a collective dominant position of liner conferences is generally accepted. However, this possibility depends on various factors such as the determination of a dominant position in a certain liner shipping market and the interpretation of certain terms (i.e. exorbitant profits in Article 6 PRCPM, price dumping and rebate in Article 7 PRCPM, discrimination in Article 8 PRCPM) as well as their application to liner conferences.

Notwithstanding this possibility of application of rules on the abuse of a dominant position, the applicability of the Pricing Law and the PRCPM as a whole cannot be supported due to the deficient general legitimization of liner conferences. In practice, there is no administrative decision or court judgement which touches upon the issue of applicability of the Pricing Law and the PRCPM to liner conferences. Even in the later THC investigation, the MOC did not consider the application of the Pricing Law to conference agreements.²⁴³

b. RIMT and IRRIMT

The promotion and protection of competition constitutes the basic principle for the administration and regulation of international shipping services and auxiliary services.²⁴⁴ The main competition rules which are relevant to liner conferences are

²⁴³ More see below Chapter VI B. I. 5.

²⁴⁴ Article 3 RIMT in conjunction with Article 2 IRRIMT: "The MOC and the relevant competent communications department of the people's government in the province, autonomous region or municipality directly under the Central Government shall, in accordance with the provisions of the Maritime Transportation Regulations and these Rules administer the international maritime transportation business operations as well as the auxiliary business operations relating to international maritime transportation un-

laid down in Article 27 RIMT. Moreover, the procedural provisions in Article 35 RIMT, which principally refer to liner conferences, could also result in substantive rules on competition, similar to the procedural provisions in Articles 55 and 56 IRRIMT which provide legal criteria for the assessment of anti-competitive practices.

aa. Prohibition of Rates Below Normal and Reasonable Ones

Article 27(1) RIMT prohibits international shipping services to be offered at freight rates which are below normal and reasonable freight rates and thereby to prejudice fair competition.²⁴⁵ This provision does not only refer to international liner shipping services, but applies to international shipping services and NVOCCs in general. The legislative background was the ruinous competition in the international shipping market in the past.²⁴⁶

As compared with cost as a benchmark, the Chinese legislator took a more pragmatic attitude and selected a relative flexible new criterion.²⁴⁷ The commodity supplied by shipping companies is the transport service. Compared with tangible commodities, there are many more factors beside cost affecting the constitution of freight rates. Therefore, it is unreasonable to use cost as the only criterion to evaluate competition through low pricing. In addition, the “normal and reasonable level” as assessment standard allows comparing freight rates of shipping companies from different countries.²⁴⁸ Further elements shall be taken into account:²⁴⁹

- 1) the freight rate level of most of the undertakings within the same industry and of undertakings who have the same scale of business as the undertakings under investigation;
- 2) the reason of the freight rate level fixed by the undertakings under investigation, including the composition of costs, the level of management and the level of profit and loss etc; and

der the principles of fairness, high efficiency and facilitation with the purpose of encouraging fair competition and preventing illegitimate competition.”

²⁴⁵ Such a prohibition also applies to operators of auxiliary business operations relating to international maritime transportation, such as shipping agencies, ship managers, freight storage and warehousing operators, and operators of container station and yard services as well. These operators are required not to provide auxiliary services at an abnormal and unreasonable level of charges. See Article 38(1) IRRIMT.

²⁴⁶ In recent years, because of the booming shipping market and the high freight rates, the concern about competition through low pricing has been greatly reduced. However, low pricing is always a means of competition in the shipping market, especially under fierce competition or during a downturn of the shipping market, for example, zero tariffs in the China-Japan route. On 1 May 1997 and 1 February 1999 the SSE respectively coordinated tariffs on the two routes: from Shanghai to Europe and from Shanghai to Japan. For more details about tariff coordination by the SSE, see <http://www.sse.net.cn/yunjiaxietiao.asp>.

²⁴⁷ Yu/Zhou, Abuse of Market Dominant Position (2006), p. 50.

²⁴⁸ *Ibid.*

²⁴⁹ Article 55 IRRIMT.

- 3) whether (the pricing practices of freight rate aim at) attacking and repelling certain competitors

As regards the application to liner conferences, only the prohibition of “fighting ships” could fall under Article 27(1) RIMT. In respect of its legislative background and the assessment criteria for “normal and reasonable level”, Article 27(1) RIMT seems to try to stabilize the freight rate level and avoid ruinous price competition. In this sense, the stabilization function of liner conferences complies with Article 27(1) RIMT.

bb. Prohibition of Illegal Rebates

Article 27(2) RIMT provides for the prohibition of unlawful rebates which are not registered in the account book. This refers to illegal practices, such as infringement of laws on accounting and taxes, but not to rebate clauses of loyalty agreements which are very common among liner conferences. Article 27(2) RIMT cannot apply to liner conferences.

cc. Prohibition of Abuse of a Dominant Position

Article 27(3) RIMT prohibits international shipping undertakings to abuse a dominant position to impose discriminatory prices or other restrictive terms on the other party to the transaction.²⁵⁰ In this sense the prohibition of abuse of a dominant position provided for in Article 27(3) RIMT requires four cumulative conditions. The first is the abuse of a dominant position. The RIMT does not prohibit a dominant position in general, but only its abuse. However, despite this simple substantive requirement, neither the RIMT nor the IRRIMT have further provisions on the definition of a dominant position or of the abuse of a dominant position, not to speak of a market definition, of market analysis or the necessary criteria of assessment. The only possible reference to dominant position could be in the PRCPM, but the RIMT and the IRRIMT do not refer to it.

The second condition is discriminating prices or other restrictive terms enforced in the transaction or transport services contracts. Although Article 27(3) RIMT especially refers to the abuse of a dominant position, the provisions are still rather vague and difficult to be enforced. The RIMT does not list certain types of behaviour which may constitute such abuse. However, it derives from the wording of Article 27(3) RIMT that abuse here is not limited to imposing discriminatory freight rates. Any other restrictive type of abuse is also taken into account provided that it is detrimental to the other party of the transaction. As regards the evaluation of any act detrimental to the other party of the transaction, the following elements shall be considered: (1) obstacles to the free choice of carriers by the

²⁵⁰ Article 27(3) RIMT. Similarly, operators of auxiliary services relating to international maritime transportation are not allowed to abuse a dominant position to restrict the other party to the transaction to choose freely operators of auxiliary services, or to attract the other party to the transaction by using the monopoly position in the relevant product market for the purpose of repelling other competition in the same market (Article 38(3) IRRIMT). The abuse of a dominant position in the auxiliary shipping service market will not be discussed in the thesis.

shippers; (2) obstacles to normal shipment of cargo; or (3) soliciting cargo by offering secret rebates not apparent from the books and seriously distorting competition.²⁵¹

The third refers to the other party to the transaction which is the subject to be protected. Shippers constitute the main subjects to be protected by these rules. The competitors of international shipping undertakings which abuse their dominant position can not be protected according to Article 27(3) RIMT. The fourth condition refers to the effect of damage resulting from the abuse of a dominant position. It ensues from the wording that the abuse of a dominant position would not be determined if no damaging effect could be found.

Just as the rules prohibiting the abuse of a dominant position in the PRCPM, Article 27(3) RIMT can apply to liner conferences, especially in respect of discriminatory charges or surcharges and loyalty arrangements. There are, however, difficulties in the determination of a dominant position in a certain liner shipping market and in the determination of the related damages arise. In practice, Article 27(3) RIMT has never been enforced against liner conferences, e.g. in the later THC investigation, the MOC did not mention Article 27 RIMT at all.²⁵²

dd. Specific Rules Relating to Liner Shipping Services

Next to the prohibitions discussed above, some special prohibitions apply to liner shipping services by analogy. They are not stated in substantive rules, but in the procedural rules in Article 35 RIMT. Article 35(1) RIMT refers to agreements concluded between or among international liner undertakings, including liner conference agreements, operational agreements and rate discussion agreements in which Chinese ports are involved. If such agreements are likely to be detrimental to fair competition, the competition investigation under Chapter V of the RIMT could be initiated by request or by a decision of the authority. A similar provision in Article 35(2) RIMT refers to all kinds of consortia created by international liner shipping undertakings through agreements and handling more than 30% of the total shipping volume for one consecutive year on one particular shipping line to and from one or more Chinese ports.

However, the wording of the above-mentioned “possibility of detriment to fair competition” is relatively general and vague. Article 35(1) RIMT only mentions liner conference agreements, but does not provide any further assessment criteria. It seems that Article 35(2) RIMT tries to determine some quantitative criteria through a market analysis. However, this provision is restricted to all kinds of consortia, and the term “consortium” is neither defined nor used as a standard legal term in Chinese maritime legislation. The only reference to assessment criteria on ‘detriment to fair competition’ is found in Article 56 IRRIMT which mentions three elements for assessment:

- 1) obstruction of free choice of carriers by shippers;
- 2) obstruction of normal shipment of cargo; and

²⁵¹ Article 56 IRRIMT.

²⁵² More see below Chapter VI B. I. 5.

- 3) secret rebates not registered in the accounts, serving to solicit cargo and distorting the competition in the market.

Of the three supplementary elements, only the first one is probably applicable to liner conferences. However, the “obstruction of free choice of carriers by shippers” affects only a small anti-competitive aspect of liner conferences but not the fundamental ones. Without other fundamental competition rules, especially on prohibition of agreements, association and concerted practices with the aim or effect of limiting competition, this element could hardly give rise to any effective enforcement by the authorities.

c. MOC-Notice 2007

The general legitimization of liner conferences relates to the MOC-Notice 2007. The MOC-Notice 2007 provides for two substantive provisions regulating liner conference agreements.

The first is Article 3 of the MOC-Notice 2007 which requires effective consultation between liner conferences and shippers as well as their representative organisation:

“Liner conferences and organisation of freight rates discussion agreements shall establish effective consultation mechanisms with shippers or shippers’ associations within Chinese territory, so as to have extensive and effective consultation on issues such as the adjustment of items of charges, the adjustment of freight rates, the adjustment of surcharges and other related issues. Upon a request for consultation from one side, the recipient shall send a representative for consultation in a timely manner and without undue delay. All relevant parties shall respect and carefully consider each other’s suggestions and concerns and try to reach consensus.”

This requirement of consultation can be traced back to the THC investigation carried out by the MOC from 2002 to 2006.²⁵³ There is no official explanation as to why the consultation requirement only applies to the adjustment of charges, freight rates and surcharges by liner conferences. Moreover, although Article 3 states that consultation must not be delayed, no sanction or penalty is provided to enforce this rule. The conclusion of an agreement by such consultation is also not required. An assessment of the question whether the ‘related parties have respected and carefully considered each other’s suggestions and concerns’ would perhaps fall under the competence of the responsible authority in a competition investigation. However, in this respect, neither the RIMT nor the IRRIMT provide a legal basis according to which the activities of liner conferences in consultation procedures shall be taken into account by the investigation authorities when carrying out a competition investigation.

²⁵³ For more details, see above Chapter V B. I.

The second additional substantive provision in the MOC-Notice 2007 is the new requirement for liner conference agreements that the filed documents are not binding.²⁵⁴ Article 4(2) No. 1 of the MOC-Notice 2007 demands that:

“In the relevant agreements, minutes and decisions of the meetings and other related documents, it should be indicated that relevant decisions are not binding on the members of liner conferences and freight rates discussion agreements; the members have the right to decide independently. Representatives of the members shall sign such agreements or the meeting minutes for confirmation.”

This non-binding requirement fundamentally conflicts with the basic conditions of liner conferences and it is incompatible with China's ratification of the UNCTAD Liner Code. This does not clarify the above-mentioned general legitimization of liner conferences in China, but leads to further contradictions.

One of the essential aspects of liner conferences defined in the UNCTAD Liner Code is the existence of common or unified freight rates. If a statement of the members of a liner conference is legally required that the conference agreement is not binding, the essential requirement of common or unified freight rates would not be met. The definition of liner conference agreements in Article 3(14) IRRIMT would be meaningless. Furthermore, it could be argued that all other provisions relating to liner conferences in the RIMT and the IRRIMT would make no sense. The MOC as the law-maker of the MOC-Notice 2007 has not explained this requirement of a statement that agreements are not binding. It can only be speculated that the MOC in hard negotiations with liner conferences involved in the *THC* case could not find sufficient competition rules on liner conferences and could not reach any effective enforcement of existing provisions. Finally, the MOC had this idea to require a statement with members' signature for conformation that agreements are not binding. However, this effort of the MOC not only gives rise to a fundamental contradiction among the existing rules, but also demonstrates that the deciding authority for maritime regulation lacks the fundamental understanding of the legal nature of liner conferences.

C. Conclusion

In respect of the anti-competitive nature of liner conferences, it is an essential question whether an antitrust exemption or a legal exception has been authorized for liner conferences in order to grant legality to their operations to a certain extent. Under the EC general competition rules, liner conferences principally constitute an infringement of Article 81(1) EC. Notwithstanding the question of compatibility between the adoption of Regulation 4056/86 and Article 81(3) EC, liner conferences enjoy the antitrust exemption which Regulation 4056/86 explicitly

²⁵⁴ Article 4(2) No. 1 of the MOC-Notice 2007 lists the documents which include liner conference agreements, services operational agreements and freight rates discussion agreements as well as minutes, decisions, agreements and other materials of meetings.

provides for. In contrast, the legal status of liner conferences in Chinese law is not very clear. The legality of liner conferences is established by the formal filing requirements without any substantive examination as to competition. This could be considered a general legitimization; however, its legal nature is unclear.

Furthermore, an antitrust exemption of liner conferences cannot exist without any conditions or restrictions in respect of the fundamental anti-competitive characteristic of liner conferences. Under the EC regime, this primarily refers to the conditions under Article 4 and the obligations under Article 5 of Regulation 4056/86. Owing to lack of such conditions in the Chinese regime, the legal nature of the general legitimization of liner conferences cannot be clarified and impedes the application of competition rules both in the general sense and in maritime regulation to liner conferences.

Chapter V: Regulatory Procedure

A. Procedural Rules in the EU: Reform and Application

An analysis of procedural rules of Regulation 4056/86 has to proceed under the consideration of the so-called “modernisation of Community procedural rules”: from the previous Regulation 17 to the new Regulation 1/2003.

I. Regulation 4056/86 in Relation to Regulation 17

Section II of Regulation 4056/86 lays down the procedural provisions pursuant to which the Commission could make decisions and impose penalties to ensure compliance with the prohibitions under Articles 81(1) and 82 EC, as well as the conditions governing the application of Article 81(3) EC.¹ The procedural provisions of Regulation 4056/86, especially Articles 13 to 26, are similar to the provisions of Regulation 17 (mainly Articles 8 to 24).² Also in respect of case law and administrative practice, it could be said that the general rules under Regulation 17 and its implementing provisions, with certain exceptions, were applicable to maritime transport procedures.³ However, Regulation 4056/86 contains many procedural provisions with specific characteristics, most of which derive from Regulation 1017/68, which, although applicable to inland transport operations, takes into account certain distinctive features of all transport operations and prepares the ground for Regulation 4056/86.⁴ One of the significant differences⁵ between the procedure applying in the maritime transport sector and the general proceedings under Regulation 17 is the simplified notification laid down in Regulation 4056/86, which will be looked into in comparison with the adoption of the new Community procedural rules: Regulation 1/2003.

¹ See the 16th Recital of Regulation 4056/86.

² *Rabe/Schütte*, Die erste Verordnung des Rates zur Anwendung des EWG-Kartellrechts (Articles 85 und 86 EWGV) auf den Seeverkehr (1988), p. 705.

³ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 177 ff.

⁴ See the 17th Recital of Regulation 4056/86.

⁵ As to the differences in the procedural provisions in Regulation 4056/86 from the general provisions in Regulation 17, see *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 211 ff.; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 177 ff.

II. Regulation 4056/86 in Relation to Regulation 1/2003

1. Regulation 1/2003: Modernization of Community Procedural Rules

a. The Need for Reform: From Regulation 17 to Regulation 1/2003

Regulation 17 was adopted and came into force in 1962 and has been in force for more than 40 years without significant modification.⁶ Regulation 17 had two main pillars: the notification procedure and the infringement procedure.⁷ The former aims at either a declaration of negative clearance that an agreement does not infringe Article 81(1) EC, or an exemption decision under Article 81(3) EC; the latter is procedure for investigating and sanctioning violations of Community competition rules such as cartels and abuses of a dominant position. Regulation 17 was based on the prior notification which was implemented through a system of prohibition with reservation of exemption by approval, according to which all agreements potentially falling within Article 81(1) EC must be notified to the Commission for assessment if they are to benefit from a negative clearance or an exemption according to Article 81(3) EC. The direct application of Articles 81(1) and 82 EC is the basic principle also confirmed in Regulation 17, which means that not only the Commission but also national courts and authorities could apply Articles 81(1) and 82 EC under the old system of Regulation 17.⁸ However, the power to apply Article 81(3) EC was granted exclusively to the Commission, which led to a centralized system of conferring exemptions.⁹

This centralized notification system established by Regulation 17 allowed the Commission to enjoy a *de facto* and a *de iure* enforcement monopoly,¹⁰ while the role of national legal systems and courts was more or less marginalized.¹¹ Although, at the time when Regulation 17 was enacted, centralization was a conscious choice with a view to constructing a European competition law enforcement system,¹² this system could not cope with the contemporary enlargement of

⁶ Regulation 17 was last amended by Council Regulation 1216/1999 of 10 June 1999 (O.J. 1999 L 148/5).

⁷ *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 108.

⁸ *Ibid.*, p. 108, particularly Fn. 3 w.f.r. See also *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 723.

⁹ According to Article 9(1) of Regulation 17, the Commission shall, though subject to review of its Decisions by the ECJ, have sole power to declare Article 81(1) EC inapplicable pursuant to Article 81(3) EC. Accordingly, national courts and competition authorities could not grant exemption under Article 81(3) EC.

¹⁰ *Kominos*, Public and Private Antitrust Enforcement in Europe (2006), p. 5. Cf. also *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 723; *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 108 ff.

¹¹ *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003), p. 69.

¹² *Kominos*, Public and Private Antitrust Enforcement in Europe (2006), p. 6; *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 723; *Kominos*, Modernisation and Decentralisation (2007), p. 629.

the EU and the integration of the internal market any more.¹³ Furthermore, this centralized system led to a low level of private enforcement of competition rules and complicated a concerted use of national proceedings and investigations by the Commission.¹⁴ In addition, the centralized notification system caused an administrative burden which, on the side of the Commission, protracted the process of investigation and decision. It was to the detriment of effective antitrust regulation,¹⁵ and led, on the side of undertakings, to lengthy delays before obtaining a negative clearance or exemption decision and the lack of legal certainty. The latter referred especially to the practice of issuing “comfort letters”.¹⁶ In conclusion, under the previous notification system in Regulation 17 the Commission has been unable to cope satisfactorily with the volume of notifications and to carry out the *ex ante* regulation of competition effectively.

In response to the numerous calls for reform,¹⁷ the Commission initiated the reform process by adopting a “White Paper”¹⁸ in April 1999, in which the Commission emphasized two major deficiencies of the system under Regulation 17.¹⁹ First, this system could no longer ensure the effective protection of competition, and the Commission’s monopoly on the application of Article 81(3) EC was a significant obstacle to the effective application of the rules by national competition authorities and courts.²⁰ The Commission had to admit that it could not alone bear the responsibility for enforcing Community competition rules throughout the Community and that the notification system no longer constituted an effective tool for the protection and prevented the Commission’s resources from being used for detection and punishment of serious infringements.²¹ Secondly, the centralized

¹³ See the 1st Recital of Regulation 1/2003. Cf. White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 of 28 April 1999, O.J. 1999 C 132/1. See also *Schaub/Dohms*, Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag (1999), p. 1055 ff.; *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 110.

¹⁴ *Komninos*, Public and Private Antitrust Enforcement in Europe (2006), p. 6; *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 109.

¹⁵ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1484, Rn. 5.

¹⁶ For more details, see *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 109.

¹⁷ *Ibid.*, p. 110.

¹⁸ White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 of 28 April 1999, O.J. 1999 C 132/1.

¹⁹ Cf. *Lenaerts*, Modernisation of the Application and Enforcement of European Competition Law (2002), p. 13 ff.

²⁰ Para. 11 of the White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

²¹ Para. 20 of the White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

notification system under Regulation 17 imposed an excessive burden on industry by increasing compliance costs and preventing companies from enforcing their agreements without notifying them to the Commission even if they fulfilled the conditions of Article 81(3) EC, which was a disadvantage particularly for small and medium-sized enterprises in comparison with larger firms.²²

In response to the comments on the “White Paper”,²³ the Commission released a proposal for a new Regulation on 27 September 2000,²⁴ which culminated in the new Council Regulation 1/2003.²⁵ That is a fundamental reform of the enforcement rules concerning anti-competitive agreements and abuse of a dominant position as prohibited by Articles 81 and 82 EC.²⁶ The new enforcement system under Regulation 1/2003 is designed to ensure more effective enforcement of Commu-

²² Para. 29 of the White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

²³ All Member States have contributed comments on the “White Paper” to the Commission. Over one hundred interested third parties were involved. As to opinions in the literature on the “White Paper”, see *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 724 Fn. 12 w.f.r.

²⁴ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, COM (2000) 582 final of 27 September 2000, O.J. 2000 C 365 E/284.

²⁵ Regulation 1/2003 replaced Regulation 17, applies from 1 May 2004 and is complemented by a package of regulations and notices. The so-called “Modernisation Package” includes:

- Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L 123/18;
- Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, O.J. 2004 C 101/43;
- Commission Notice on the co-operation between the European Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O.J. 2004 C 101/54;
- Commission Notice on the handling of complaints by the European Commission under Articles 81 and 83 of the EC Treaty, 2004/C 101/05, O.J. 2004 C 101/65;
- Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06, O.J. 2004 C 101/78;
- Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty, 2004/C 101/07, O.J. 2004 C 101/81;
- Commission Notice – Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97.

²⁶ Regulation 1/2003 applies to the application of Articles 81 and 82 EC, does not concern the merger control. For the latter the Community procedural rules were modernized through the adoption of Regulation 139/2004 (O.J. 2004 L 24/1) which replaced the previous Regulation 4064/89 (O.J. 1989 L 395/1). See also *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003), p. 69; cf. *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 108.

nity competition rules in the interest of consumers and businesses, while easing the administrative burden not only on the side of undertakings but also especially on the side of the Commission. Via decentralized application of Community competition rules and by strengthening a *posterior* control, Regulation 1/2003 will alleviate the Commission's workload and increase the part played by national authorities and courts in implementing competition law while guaranteeing its uniform application.

b. Main Features of Regulation 1/2003

Regulation 1/2003 replaced the previous notification system under Regulation 17 with a legal exception system (Article 1). Regulation 1/2003 introduces a decentralized enforcement regime which expands the competence of direct application of Community competition rules to national competition authorities (NCAs) and courts, on the one hand (Articles 4 to 6), and enhances the Commission's power in investigation and deciding penalties on the other (Chapters III, V and VI). In order to ensure a uniform application of Community competition rules under the decentralized regime, rules are given to govern the relation between Articles 81 and 82 EC and national competition laws (Article 3), burden of proof (Article 2), conflicts (Article 16) with provisions on cooperation between NCAs and courts and the Commission (Articles 11 to 15). Following is an overview of the main features and changes brought about by Regulation 1/2003. A more detailed analysis on Community procedural rules in relation to Regulation 4056/86 will be given in the next sections.

aa. Legal Exception Instead of Notification

As shown above, under the previous Regulation 17, Article 81(3) EC was not directly applicable since its application depended on the prior notification. The most important change brought about by Regulation 1/2003 is the replacement of the prior notification system by the direct applicability of Article 81(3) EC, i.e. the system of legal exception. Under this system, agreements, decisions and concerted practices covered by Article 81(1) EC which do not satisfy the conditions of Article 81(3) EC shall be prohibited, no prior decision to that effect being required. All agreements, decisions and concerted practices that fall under Article 81(1) EC which satisfy the conditions of Article 81(3) EC shall not be prohibited, no prior decision to that effect being required. With reference to Articles 4 to 6 of Regulation 1/2003, the concept of direct applicability means that, besides the Commission, competition authorities and courts of the Member States are empowered to apply Article 81(3) EC.

From the day the White Paper was published, intense legal debate has arisen in respect of the legality of changing the previous notification system without amending the EC Treaty as well as to potential systematic deficiencies such as a possible violation of legal certainty enjoyed by undertakings.²⁷ The legality dis-

²⁷ For the legality discussion, see *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003), p. 70 w.f.r. See also *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 112 Fn. 18 w.f.r. As to the

cussions might have come to a halt²⁸ when the Commission finally adopted Regulation 1/2003 with emphasis on effective supervision and the simplification of administration to the greatest possible extent.²⁹ The Commission explained that the centralized notification system under Regulation 17 hampered the application of Community competition rules by the national courts and competition authorities, prevented the Commission from concentrating its resources on curbing the most serious infringements, and also imposed considerable costs on undertakings.³⁰ Based on this finding, the Commission came to the conclusion of ending the previous notification system. It stated:

“The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the EC Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the EC Treaty.”³¹

bb. Decentralized Enforcement Regime

The abolition of the centralized notification system and the ending of the exemption monopoly of the Commission led to a decentralized enforcement regime under Regulation 1/2003. While the power of the Commission to directly apply Articles 81 and 82 EC is confirmed in Article 4 of Regulation 1/2003, Article 5 explicitly provides that NCAs shall have the power to apply Articles 81 and 82 EC in individual cases and may make decisions on their own initiative or on a complaint.³² Regarding national courts, the Commission admitted the essential importance of national courts for the application of Community competition rules and emphasized their function in deciding disputes between private individuals and protecting the subjective rights under Community law. Accordingly, national courts shall also have the power to apply Articles 81 and 82 EC.³³

Regarding the initiation of proceedings, Regulation 1/2003 refers to the principle of uniform and consistent application of Community competition rules. Therefore, it is an essential rule that NCAs automatically lose their competence if the Commission initiates its own proceedings. Where a national competition authority is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. However, the Commission should consult the national authority concerned before it initiates a proceeding.³⁴

violation of legal certain of undertakings, see *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 729 ff.

²⁸ *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 113.

²⁹ See the 2nd Recital of Regulation 1/2003.

³⁰ See the 3rd Recital of Regulation 1/2003.

³¹ See the 14th Recital of Regulation 1/2003.

³² Article 5 of Regulation 1/2003.

³³ Article 6 of Regulation 1/2003.

³⁴ See the 14th Recital of Regulation 1/2003. Article 11(6) of Regulation 1/2003 requires: “The initiation by the European Commission of proceedings for the adoption of a deci-

cc. Burden of Proof

A new feature introduced by Regulation 1/2003 is the explicit establishment of rules for the burden of proof in competition proceedings. Rules concerning burden of proof were not stated in Regulation 17, but developed and established in Community case law.³⁵ Under the previous notification system, in cases of infringement of Article 81(1) EC the Commission bore the burden of proof.³⁶ If an infringement was declared by the Commission, the burden of proof shifted to the undertaking claiming the benefit of an exemption under Article 81(3) EC.³⁷ In civil proceedings in national courts the burden of proof was borne by the party alleging an infringement of Article 81(1) EC. In turn, the defendant had to demonstrate either that it held or had applied for an individual exemption under Article 81(3) EC or that the agreement satisfies the requirements of a block exemption.³⁸

Regulation 1/2003 recognized these rules developed in Community case law. In order to ensure an effective enforcement of Community competition rules and to respect the fundamental right of defence, Regulation 1/2003 explicitly establishes the rules for burden of proof.³⁹ According to Article 2 of Regulation 1/2003, the burden of proof falls on the party or the authority alleging the infringement.⁴⁰ The undertakings concerned bear the burden to demonstrate that the conditions for applying their defence are met.⁴¹ In addition, it should be noted that the rules for burden of proof in Article 2 of Regulation 1/2003 affect neither national rules on the standard of proof nor obligations of NCAs and courts to ascertain the relevant

sion under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the EC Treaty. If a competition authority of a Member State is already acting on a case, the European Commission shall only initiate proceedings after consulting with that national competition authority.”

³⁵ See e.g. CFI 9 July 1992, case T-66/89 (*Publishers' Association v. Commission*), [1992] E.C.R. II-1995, para. 69; Commission Decision 92/427/EEC of 27 July 1992 (*Quantel International- Continuum/Quantel SA*), O.J. 1992 L 235/9.

³⁶ See e.g. ECJ 28 March 1984, joined case 29/83 and 30/83 (*Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*), [1984] E.C.R. 1679, paras. 19–20; ECJ 8 July 1999, case C-199/92 P (*Hüls AG v. Commission*), [1999] E.C.R. 4287, para. 152. See also *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 118.

³⁷ ECJ 17 January 1984, joined cases 43/82 and 63/82 (*Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB), and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v. Commission*), [1984] E.C.R. 19, para. 52; ECJ 11 July 1985, case 42/84 (*Remia BV and Others v. Commission*), [1985] E.C.R. 2545, para. 45; CFI 21 February 1995, case T-29/92 (*Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) and Others v. Commission*), [1995] E.C.R. II-289, para. 262; CFI 8 June 1995, case T-9/93 (*Schöller Lebensmittel GmbH & Co. KG v. Commission*), [1995] E.C.R. II-1611, para. 141.

³⁸ *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 118.

³⁹ See the 5th Recital of Regulation 1/2003.

⁴⁰ The first sentence of Article 2 of Regulation 1/2003.

⁴¹ The second sentence of Article 2 of Regulation 1/2003.

facts of a case, provided that such rules and obligations are compatible with the general principles of Community law.⁴²

dd. Relation between Articles 81 and 82 EC and National Competition Laws

Another feature of Regulation 1/2003 is the parallel application of Community competition rules and national competition law. In this respect, Article 81 EC has priority over national competition laws,⁴³ while Article 82 EC does not enjoy this priority.⁴⁴ Article 3(2) sentence 2 of Regulation 1/2003 does not stipulate that Article 82 EC applies as a maximum standard. Therefore, stricter national competition rules remain possible and the conduct that would not amount to an abuse under Article 82 EC can be prohibited under national competition law.⁴⁵ In addition, Article 3(3) of Regulation 1/2003 provides that Article 3(1) and (2) of Regulation 1/2003, without prejudice to general principles and other provisions of Community law, do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 EC.⁴⁶ The aim of the parallel application of Community and national competition law mandated in Article 3 of Regulation 1/2003 is “to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation” and “to create a level playing field” for agreements within the internal market.⁴⁷

Two fundamental principles should be followed in respect of this parallel application regime. The first is the principle of primacy of Community competition rules and its effectiveness (*effet utile*);⁴⁸ the second is the principle of “effect on trade between Member States”.⁴⁹ In this way, Article 3 of Regulation 1/2003 emphasizes harmonization of national competition laws with Community competition rules. Harmonization is further consolidated through Article 3(2) of Regulation 1/2003,⁵⁰ which provides that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do

⁴² See the 5th Recital of Regulation 1/2003. For a detailed survey of practical implication of Article 2 of Regulation 1/2003, see *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 119 ff.

⁴³ See Article 3(1) sentence 1 and Article 3(2) sentence 1 of Regulation 1/2003. For more details see *Basedow*, The Modernization of European Competition Law (2007), p. 430 f.; *Böge/Bardong*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 4, p. 1558, Rn. 4-3-068.

⁴⁴ *Oelke*, Das europäische Wettbewerbsnetz (2006), p. 142.

⁴⁵ For more details see *Böge/Bardong*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 4, p. 1566, Rn. 4-3-097 ff.

⁴⁶ Cf. the 9th Recital of Regulation 1/2003.

⁴⁷ See the 8th Recital of Regulation 1/2003.

⁴⁸ *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 731 Fn. 35.

⁴⁹ *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 123.

⁵⁰ *Ibid.*, p. 125.

not restrict competition within the meaning of Article 81(1) EC, or which fulfil the conditions of Article 81(3) EC or which are covered by a Regulation for the application of Article 81(3) EC. The provisions of Article 3(2) of Regulation 1/2003 leave no room for the independent application of national law in cases where Community competition rules apply. Therefore, the need to determine whether a particular agreement has an effect on trade between Member States would not be pivotal any more.⁵¹

ee. Cooperation of National Courts, NCAs and the Commission

The uniform application of Community competition rules under the decentralized enforcement system means an efficient and consistent enforcement carried out in a system of parallel powers,⁵² in other words, by a multitude of national courts and NCAs in addition to the Commission. This requires cooperation between the Commission, the national courts and the NCAs, which is also an important feature of Regulation 1/2003.⁵³

In order to guarantee efficient cooperation between such parallel powers, Chapter IV of Regulation 1/2003 provides for cooperation between the Commission and NCAs as well as national courts, on the one hand, and for cooperation between NCAs among each other on the other. Accordingly, material and procedural instruments were established as an operative structure for multiple cooperation of Community authorities including instruments such as a network of public authorities (Article 11), information exchange (Article 12), suspension or termination of proceedings (Article 13), an advisory committee (Article 14) and an exchange of information, questions and observations between the Commission and national courts (Article 15).

2. Self-Regulation in Regulation 4056/86: From Notification in Regulation 17 to Legal Exception in Regulation 1/2003

Although the modernization of Community procedural rules through Regulation 1/2003 is far-reaching and comprehensive, it did not substantially change procedural rules under Regulation 4056/86,⁵⁴ in particular the notification system.

Regulation 4056/86 reflected most of the procedural provisions of Regulation 17. Differences result from the characteristics of maritime transport services as one type of transport industry. The procedural provisions of Regulation 1017/68 which apply to inland transport services take account of certain general features of transport services and determine principles later copied by specific regulations for other transport sectors, such as Regulation 4056/86. One of these principles is *self-*

⁵¹ *Ibid.*, p. 125 ff.

⁵² See the 22nd Recital of Regulation 1/2003.

⁵³ For a detailed survey of the cooperation of national courts, NCAs and the Commission, see *Korah*, *An Introductory Guide to EC Competition Law and Practice* (2007), p. 241 ff.

⁵⁴ *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; A., p. 1484, Rn. 5.

regulation.⁵⁵ Regulation 1017/68 states that “it is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices”.⁵⁶ Regulation 4056/86 followed Regulation 1017/68 and points out that “it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory”.⁵⁷ But Regulation 17 sticks to the view that it is “necessary to make it obligatory, as a general principle, for undertakings which seek application of Article 81(3) EC to notify to the Commission their agreements, decisions and concerted practices”.⁵⁸ Under the transport regulations, e.g. Regulation 4056/86, no matter how restrictive the agreements, decisions or practices might be, they do not need to be notified to the Commission and can be concluded or operated without being declared. Undertakings run the risk, however, that their agreements may be declared retroactively void. It is their own responsibility to evaluate this risk.

The principle of self-regulation is further reflected in the circumstance that the inland and maritime transport regulations do not contain provisions on individual negative clearance like those in Article 2 of Regulation 17,⁵⁹ although the transport sector is characterized by the widespread application of block exemptions which cover most of the traditional practices leading to competition restrictions.⁶⁰ However, it is possible for transport undertakings to notify their restrictive agreements if they want to enjoy legal certainty, i.e. when in certain circumstances undertakings may wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are in compliance with the provisions in force.⁶¹

Non-mandatory notification in transport regulations, i.e. Regulation 4056/86, marks a fundamental difference between those regulations and the notification system in Regulation 17. Non-mandatory notification corresponds to self-assessment as a functional element of self-regulation in transport sectors in which general block exemptions and *ex post* antitrust regulation as well as infringement

⁵⁵ See above Chapter I A. I. 1. See also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1484, Rn. 5; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 45 ff.

⁵⁶ See the 14th Recital of Regulation 1017/68.

⁵⁷ See the 18th Recital of Regulation 4056/86.

⁵⁸ See the 3rd Recital of Regulation 17. Cf. *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1484, Rn. 5; *Kreis*, Verkehr, in: *Loewenheim /Meessen/Riesenkampff*, Kartellrecht (2005), Band 1, § 7 Rn. 8 f.

⁵⁹ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; A., p. 1484, Rn. 5.

⁶⁰ For more details about historical legislative background, see *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996), p. 212.

⁶¹ See the 17th Recital of Regulation 4056/86.

procedures were combined. This procedural system, though based on the “sector-specific characteristics” of maritime transport services,⁶² could in practice avoid the negative results of mandatory notification under Regulation 17 which confronted the Commission with the information difficulties and a heavy workload and prevented the Commission from concentrating its resources on curbing the most serious infringements.⁶³

To a certain extent, the traditional system of self-regulation in Regulation 4056/86 is generally rather in compliance than in conflict with Regulation 1/2003. Under Regulation 1/2003, Member States and undertakings should take more responsibility for enforcement. Under the directly applicable exception system in Regulation 1/2003, undertakings are freed from the obligation to notify. Regulation 1/2003 requires undertakings to evaluate themselves the compatibility of their restrictive practices with Article 81(3) EC, in the light of the legislation in force and of case law. This will certainly lighten the administrative burden and require more responsibility from the undertakings. The Commission is of the opinion that undertakings are generally well placed to evaluate the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form.⁶⁴ This legislative view of Regulation 1/2003 complies with that of Regulation 4056/86 as explained above.⁶⁵ Therefore, it is correct to argue that the non-mandatory notification system in Regulation 4056/86 converges with the legal exception system in Regulation 1/2003.

III. System of Legal Exception and Monitoring Procedure in Regulation 4056/86

To ensure the efficiency of the new legal exception system and the respect of Community competition rules, Regulation 1/2003 strengthens the power of competition authorities to implement *ex post* antitrust control. These provisions also apply to Regulation 4056/86 and operate in conjunction with the monitoring procedures in Articles 7 and 8 of Regulation 4056/86 to produce practical enforcement effects in the maritime transport sector.

1. *Ex Post* Regulation in the System of Legal Exception

With the replacement of the previous centralized notification by the new legal exception system, the new enforcement regime under Regulation 1/2003 shifts from *ex ante* authorisation to *ex post* control.

⁶² Ortiz Blanco, Shipping Conferences under EC Antitrust Law (2007), p. 180.

⁶³ See the 3rd Recital of Regulation 1/2003.

⁶⁴ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06, O.J. 2004 C 101/78, para. 3.

⁶⁵ See the 18th Recital of Regulation 4056/86.

a. Undertakings' Responsibility of Self-Assessment

Under the previous centralized notification system, undertakings bore an administrative burden but also enjoyed the advantage that the Commission could not, for infringements of Articles 81(1) and 82 EC, impose fines in respect of acts taking place after notification to the Commission and before its decision in application of Article 81(3) EC, if these acts were kept within the limits of the activity described in the notification.⁶⁶ Due to the overwhelming workload caused by the large number of notifications, the Commission could not cope efficiently with the notification process. Undertakings could take advantage of this and seek protection by means of notifying each and every act to the Commission. Regulation 1/2003 put an end to this possibility. Based on the consideration that undertakings are generally well placed to evaluate the legality of their actions and therefore quite able to take an informed decision on whether to go ahead with an agreement or practice and in what form, undertakings themselves must evaluate the compatibility of their restrictive practices with Article 81(3) EC, in the light of the legislation in force and case law as well as extensive guidance in the Commission's Guidelines and Notices.⁶⁷

b. The Competition Authorities' Competence in *ex post* Control

In the directly applicable exception system under Regulation 1/2003 the reinforcement of *ex post* control is indispensable to ensure respect of Community competition rules.⁶⁸ In compliance with the decentralized enforcement regime, NCAs have the power to apply Articles 81 and 82 EC in individual cases and may, acting on their own initiative or on a complaint, not only take such decisions as requiring an infringement to be brought to an end, ordering interim measures, accepting commitments and imposing fines, periodic penalty payment or any other penalty provided for in their national law,⁶⁹ but also carry out inspections.⁷⁰ Accordingly, national courts also gain an enhanced role in the direct application of Community competition rules.⁷¹ While the Commission's previous exemption monopoly was revoked and the NCAs' competences are extended, Regulation 1/2003 strengthens the Commission's power of enquiry.⁷² Not only can the Com-

⁶⁶ See Article 15(5) of Regulation 17. The Commission has made only exceptional use of Article 15(6) of Regulation 17, which empowers the Commission to withdraw notifying undertakings' immunity from fines.

⁶⁷ White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 of 28 April 1999, O.J. 1999 C 132/1, para. 77. See also above Chapter V A. II. 2. Cf. Müller, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 730 ff.

⁶⁸ White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 of 28 April 1999, O.J. 1999 C 132/1, para. 108.

⁶⁹ Article 5 of Regulation 1/2003.

⁷⁰ Article 22 of Regulation 1/2003.

⁷¹ Article 6 of Regulation 1/2003. See also the 7th Recital of Regulation 1/2003.

⁷² Articles 17 to 21 of Regulation 1/2003. Cf. Weitzbrecht, Das neue EG-Kartellverfahrensrecht (2003), p. 71 ff.

mission, acting on a complaint or on its own initiative, find that there is an infringement of Articles 81 and 82 EC and require undertakings to end such infringement, impose behavioural or structural remedies, order interim measures and accept commitments,⁷³ but it can also impose penalties.⁷⁴

c. The European Commission's Findings of Inapplicability

Notably, the Commission still has a competence for a decision on infringement. Article 10 of Regulation 1/2003 empowers the Commission to make a positive "finding of inapplicability" by decision. However, this competence should be interpreted restrictively. According to Article 10 of Regulation 1/2003, a finding of inapplicability can only be made on the Commission's own initiative and where it is in the public interest to take a decision. As clarified in the 14th Recital of Regulation 1/2003, inapplicability decisions will only be adopted by the Commission where there are strong public policy considerations which are strictly linked to the implementation of Articles 81 and 82 EC and where the law needs to be clarified, such as "with regard to new types of agreements or practices that have not been settled in the existing case law and administrative practice". Moreover, findings of inapplicability are only declaratory, since any constitutive decision regarding the compatibility of an agreement with Article 81 EC would be alien to the system of direct applicability of Article 81(3) EC under Regulation 1/2003. At all events, it is not the legislative goal of Article 10 of Regulation 1/2003 to restore a kind of notification system.⁷⁵

2. Block Exemption in Article 29 of Regulation 1/2003

Chapter IX of Regulation 1/2003, entitled "Exemption Regulation", includes only one article, Article 29 entitled "withdrawal in individual cases". From the wording and the organisational form two points should be clarified in relation to block exemption regulations under the *ex post* control regime in Regulation 1/2003. As to the first point, block exemption regulations, such as those listed in Article 29 of Regulation 1/2003,⁷⁶ but also Regulation 4056/86, help undertakings to evaluate

⁷³ Articles 7 to 9 of Regulation 1/2003.

⁷⁴ Articles 23 to 26 of Regulation 1/2003.

⁷⁵ *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004), p. 731; *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003), p. 115; European Commission Staff Working Paper: The proposal for a new regulation implementing Articles 81 and 82 EC, SEC (2001) 1828.

⁷⁶ Council Regulation (EEC) No. 19/65 of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, O.J. 1965 36/533; Council Regulation (EEC) No. 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, O.J. 1971 L 285/46; Council Regulation (EEC) No. 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, O.J. 1987 L 374/9; Council Regulation (EEC) No. 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the

themselves their practices in a certain industry or sector. In this way, these block exemption regulations clarify the legal situation, simplify the application of Community competition rules both for undertakings and competition authorities, and then promote legal certainty especially for undertakings. Under Regulation 1/2003, all existing block exemption regulations still remain in force and agreements covered by block exemption regulations are legally valid and enforceable even if they restrict competition within the meaning of Article 81(1) EC.⁷⁷ In the industries or sectors regulated by such block exemption regulations, the Commission has adopted and may continue to adopt block exemption regulations by which it declares Article 81(1) EC inapplicable to certain categories of agreements, decisions and concerted practices.⁷⁸

However, as to the second point, it is still possible under Regulation 1/2003 that agreements authorised under such block exemption regulations will be prohibited in the future. According to Article 29(1) of Regulation 1/2003, the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption regulation has certain effects which are incompatible with Article 81(3) EC. With this conditional requirement, this provision would rather complement, than come into conflict with, those provisions concerning conditions or obligations in the concerned block exemption regulations, such as Articles 4 and 5 of Regulation 4056/86. According to Article 29(2) of Regulation 1/2003, a national competition authority may also withdraw the benefit of a block exemption regulation in respect of its territory or part of its territory, if this territory has all the characteristics of a distinct geographic market. Nevertheless, it should be noted that block exempted agreements cannot be considered invalid by national courts in the context of private litigation.⁷⁹

3. Monitoring Procedure in Regulation 4056/86

Articles 7 and 8 of Regulation 4056/86 establish rules for monitoring agreements exempted under Articles 3 and 6 of Regulation 4056/86 and conference practices. They also determine the circumstances in which the Commission would in individual cases make an infringement decision and withdraw the benefit of exemption granted to liner conferences and other exempted agreements that either breach the obligations set down in Regulation 4056/86, do not fulfil the conditions of Article 81(3) EC or constitute an abuse of a dominant position in the sense of Article 82 EC.

insurance sector, O.J. 1991 L 143/1; Council Regulation (EEC) No. 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 1992 L 55/3.

⁷⁷ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 2.

⁷⁸ See the 10th Recital of Regulation 1/2003.

⁷⁹ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 37.

As explained above, the procedural provisions for *ex post* control under Regulation 1/2003 can also apply to block exemption regulations such as Regulation 4056/86 and complement the application of their condition or obligation. In respect of the practical implementation of Regulation 1/2003 in the maritime transport sector, as long as the amended Regulation 4056/86 remains in force till 18 October 2008, it is correct to assume that the general procedural rules for *ex post* control under the legal exception system support and complement in particular the monitoring procedure in Articles 7 and 8 of Regulation 4056/86; and the interpretation and application of the latter should be carried out in the context of the former.

After the adoption of Regulation 1/2003 which repealed Regulation 17 and Regulation 141 and fundamentally amended the procedural provisions in Section II of Regulation 4056/86, the procedural acts and measures of the Commission pursuant to Articles 7 and 8 of Regulation 4056/86 which previously followed the provisions in Section II of Regulation 4056/86 should from then on comply with the procedural rules in Regulation 1/2003,⁸⁰ especially in respect of the powers of the competition authorities to find and decide on investigations and fines.

a. Article 7 of Regulation 4056/86

In respect of the practices of certain undertakings, i.e. of conference carriers, which should be monitored, or, in other words, should be controlled *ex post*, Article 7 of Regulation 4056/86 deals with the breach of obligations coupled via Article 5 of Regulation 4056/86 to the exemption under Article 3 of Regulation 4056/86, on the one hand. On the other hand Article 7 of Regulation 4056/86 concerns the breach of conditions of Article 81(3) EC.

aa. Breach of Obligation

The amended Article 7(1) of Regulation 4056/86 simplified the three-step regulation measures in the old article which started with the “recommendation” of the Commission under the consideration of the gravity of the breach concerned.⁸¹ According to the amended provisions,⁸² if the obligations attached to the exemption granted under Article 3 of Regulation 4056/86 are breached, the Commission may decide either to prohibit the liner conference concerned from carrying out, or

⁸⁰ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1560, Rn. 56.

⁸¹ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1186, Rn. 102.

⁸² According to Article 38(1)(a) of Regulation 1/2003, the old provisions in Article 7(1) of Regulation 1/2003 were simplified and replaced by one paragraph as follows: “Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the European Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.”

to require it to perform certain specific acts, or to withdraw the benefit of the block exemption which it enjoyed.

bb. Breach of Conditions of Article 81(3) EC

Article 7(2) of Regulation 4056/86 was amended by Article 38 of Regulation 1/2003. But this amendment is of minor significance⁸³ and Article 7(2) remains largely unchanged.⁸⁴ Liner conferences should not only follow the conditions and obligations laid down in Articles 4 and 5 of Regulation 4056/86 attaching to Articles 3 and 6 of Regulation 4056/86. They also have to fulfil the four cumulative criteria of Article 81(3) EC at all times in order to retain the benefit of block exemption. When their agreements qualify for the exemption under Articles 3 and 6 of Regulation 4056/86 but have effects which are incompatible with the criteria of Article 81(3) EC, the Commission shall pursuant to Article 7(2) of Regulation 4056/86 take certain measures to put an end to the concerned restrictive effects on competition; the severity of these measures must be in proportion to the gravity of the situation concerned. As opposed to Article 7(1) of Regulation 4056/86, Article 7(2) of Regulation 4056/86 states explicitly that the Commission may use this competence on its own initiative or after a complaint.

The European legislator endeavoured, in Article 7(2) of Regulation 4056/86, to specify the circumstances in which one or more of the criteria of Article 81(3) EC are not fulfilled in respect of the sector characteristics of maritime transport services. The term “special circumstances” in Article 7(2)(a) of Regulation 4056/86 is specified in Article 7(2)(b) of Regulation 4056/86 as follows:

- 1) acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or
- 2) acts of conference which may prevent technical or economic progress or user participation in the benefits;
- 3) acts of third countries which:⁸⁵
 - prevent the operation of outsiders in a trade,
 - impose unfair tariffs on conference members,
 - impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on types of vessels).

⁸³ Cf. Article 38(1)(b) of Regulation 1/2003.

⁸⁴ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 274.

⁸⁵ In compliance with Article 7(2)(b)(iii) of Regulation 4056/86, procedures of consultation and negotiation were provided for in Article 7(2)(c)(i) of Regulation 4056/86, which is further related with Article 9 (conflicts of international law) of Regulation 4056/86. For more details, see *Basedow*, in *Immenga/Mestmäcker* (2007), *Verkehr*; C., p. 1561, Rn. 58; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 277 ff. However, in face of the increasing liberalisation of international maritime transport services, the above provisions gain scarcely significance in practice. Additionally, Article 9 of Regulation 4056/86 was repealed by Regulation 1419/2006 without transitional period. See *Basedow*, in *Immenga/Mestmäcker* (2007), *Verkehr*; C., p. 1561, Rn. 58; *Parameswaran*, The liberalization of maritime transport services (2004), p. 54 ff.

At first sight of the term “special circumstances” both in Article 7(2)(a) and (b) of Regulation 4056/86, it could be argued that the list in Article 7(2)(b) should be exhaustive and the Commission’s measures could only be taken in the case of circumstances specified in Article 7(2)(b). However, the opposite opinion⁸⁶ is preferable on several accounts. First, the term “*inter alia*” in Article 7(2)(b) supports the argument that the list here concerned is not exhaustive.⁸⁷ Secondly, it is necessary to take into account Article 29 of Regulation 1/2003 in respect of the finding of “special circumstances” under which the Commission could withdraw the exemptions granted under Articles 3 and 6 of Regulation 4056/86. Accordingly, it is necessary to consider separately Article 29(1) and (2) of Regulation 1/2003.⁸⁸ Article 29(1) of Regulation 1/2003 provides the conditions for a withdrawal of the exemption in individual cases in which the agreement authorised under an exemption regulation has certain effects which are incompatible with Article 81(3) EC. These conditions as a general rule in Regulation 1/2003 which provides for the primary procedural rules for enforcement of Community competition rules require a wider interpretation of “particular case”,⁸⁹ or in other words “special circumstances”. As shown above, the general procedural rules for *ex post* control under the legal exception system in Regulation 1/2003 support and complement especially the monitoring procedure in Articles 7 and 8 of Regulation 4056/86; and the interpretation and application of the latter should be carried out in the context of the former. Therefore, Article 29(1) of Regulation 1/2003 allows a wider interpretation of “special circumstances” and applies to the withdrawal of the exemption in individual cases under Regulation 4056/86. Quite differently, Article 29(2) of Regulation 1/2003 determines a concise geographical requirement, i.e. “in the territory of a Member State, or in a part thereof”. This conflicts with the scope of application of Regulation 4056/86⁹⁰ which left no room to NCAs to withdraw, in individual cases, block exemptions within their territory.⁹¹ Thirdly, in compliance with the wider interpretation in Article 29(1) of Regulation 1/2003, there are actually other possible circumstances in which individual exemptions authorised under Regulation 4056/86 constitute an infringement of Article 81(3) EC and should be withdrawn.⁹²

⁸⁶ Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1560, Rn. 57.

⁸⁷ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 274.

⁸⁸ It is argued that Article 29 of Regulation 1/2003 does not apply to the withdrawal of the individual block exemption enjoyed by liner conferences, which should be governed exclusively by Article 7(2) of Regulation 4056/86. See *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 274. However, it is not appropriate to generally deny the application of Article 29 of Regulation 1/2003 as a whole to the withdrawal of exemption in individual cases under Regulation 4056/86.

⁸⁹ Article 29(1) of Regulation 1/2003: “... when it finds that in any particular case an agreement, ...”.

⁹⁰ For more details see above Chapter III A.

⁹¹ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 274.

⁹² Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1561, Rn. 57, particularly Fn. 165 w.f.r.

Article 7(2)(c) of Regulation 4056/86 provided for the measures which the Commission may take against agreements or practices which infringe Article 81(3) EC in respect of the specified circumstances. Despite the consultation and negotiation on international conflicts in Article 7(2)(b)(iii) and 7(2)(c)(i) of Regulation 4056/86, and in conjunction with the fundamental rules in Regulation 1/2003, the Commission may take one of the following courses of decision: (1) the Commission may deprive undertakings, primarily liner conferences, of the benefit of the block exemption under Articles 3 and 6 of Regulation 4056/86 in individual cases;⁹³ (2) it may adopt a decision prohibiting or obliging conferences or, as appropriate, transport users as participating parties of agreements to carry out certain acts;⁹⁴ (3) it may adopt a decision accepting commitments offered by undertakings concerned, with a view, *inter alia*, to support non-conference competition;⁹⁵ (4) it might also order interim measures in cases of urgency due to the risk of serious and irreparable damage to competition and on the basis of a *prima facie* finding of infringement, although such circumstance could rarely occur in the maritime transport sector.⁹⁶

b. Article 8 of Regulation 4056/86

The amendment pursuant to Regulation 1/2003 to Regulation 4056/86 repealed the duplication of Article 82 EC in Article 8(1) of Regulation 4056/86 and the moderate measure of “recommendation” in Article 8(3) of Regulation 4056/86. While the application of Article 81(1) EC still depends on the verification of a possible exemption pursuant to Article 81(3) EC, namely the principle of *rule of reason*, the application of Article 82 EC is *per se*, which means the abuse of a dominant position excludes any possibility of exemption from Article 82 EC and leads directly to the infringement of Article 82 EC. As already clarified by the court judgements, exemptions pursuant to Article 81(3) EC do not block the applicability of Article 82 EC.⁹⁷ In this respect, Article 8(1) of Regulation 4056/86 is redundant.⁹⁸

⁹³ The second Paragraph of Article 7(2)(c)(i) of Regulation 4056/86 in conjunction with Articles 7 and 29 of Regulation 1/2003.

⁹⁴ The second Paragraph of Article 7(2)(c)(i) of Regulation 4056/86 in conjunction with Article 7 of Regulation 1/2003.

⁹⁵ The second Paragraph of Article 7(2)(c)(i) of Regulation 4056/86 in conjunction with Article 9 of Regulation 1/2003. For more details on non-conference competition in the regime of Regulation 4056/86, see the 8th Recital of Regulation 4056/86; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1561, Rn. 57.

⁹⁶ Article 8 of Regulation 1/2003 in conjunction with Article 7(2)(c)(ii) of Regulation 4056/86.

⁹⁷ See e.g. ECJ 11 April 1989, case 66/86 (*Ahmed Saeed Flugreisen and Ohters v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*), [1989] E.C.R. 803, para. 32; CFI 10 July 1990, case T-51/89 (*Tetra Pak Rausing SA v. Commission*), [1990] E.C.R. II-309, para. 29; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 135.) For more detailed analysis, see

Similar to Article 7 of Regulation 4056/86, Article 8(2) of Regulation 4056/86 allows the Commission to withdraw the benefit of block exemption from those conferences which abuse their dominant position. However, Article 8(2) of Regulation 4056/86 states that the Commission may take measures either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest. Moreover, this provision allows the Commission to take, pursuant to Regulation 1/2003, all appropriate measures for the purpose of bringing to an end infringements of Article 82 EC, e.g. to impose fines.⁹⁹

These provisions demonstrate a moderate but also ambivalent approach of the Commission.¹⁰⁰ The understanding of this moderate approach is connected with the relation between Articles 81 and 82 EC in respect of their joint application under Regulation 4056/86. In order to ensure legal certainty and consumer interests under Community competition rules, if the Commission finds that exempted agreements such as loyalty arrangements under Article 5(2) of Regulation 4056/86, on an individual basis, infringe Article 82 EC, the Commission has first to withdraw the benefit of block exemption under Article 81(3) EC and then can pursue this infringement of Article 82 EC.¹⁰¹ The Commission and NCAs could directly take measures against abusive acts insofar as the practices of liner conferences are not authorised under the block exemption. This approach is especially remarkable in view of the fact that a block exemption under Article 81 EC is authorised *ex ante* while abuse control is carried out *ex post*. However, Article 8(2) of Regulation 4056/86 directly allows the Commission to withdraw the benefit of block exemption from conferences which abuse their dominant position. Also the CFI stated in *Compagnie Maritime Belge (CEWAL)* that the wording of

Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht (2004), Rn. 12 f., p. 381 f.; *Eilmansberger*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 Article 82, p. 1075 f, Rn. 2-15-035 f.

⁹⁸ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1187, Rn. 105; *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1562, Rn. 59.

⁹⁹ *Negenman*, in: *Schröter/Jakob/Mederer*, Kommentar zum Europäischen Wettbewerbsrecht (2003), p. 1187, Rn. 106. As regards the practices of the Commission and the Courts, see Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, para. 50, confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 190; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 52 and 136; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "TACA"), [2003] E.C.R. II-3275, para. 1378; Commission Decision 2005/480/EC of 30 April 2004 (*Compagnie Maritime Beige SA*), O.J. 2005 L 171/28.

¹⁰⁰ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 279.

¹⁰¹ CFI 10 July 1990, case T-51/89 (*Tetra Pak Rausing SA v. Commission*), [1990] E.C.R. II-309, para. 38. See also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1562, Rn. 60.

Article 8(2) of Regulation 4056/86 clearly means that the situation contemplated is that of a practice which, although exempted in accordance with Article 81 EC, is nevertheless contrary to Article 82 EC.¹⁰² The consequence and effect of this provision in respect of the relation between Articles 81 and 82 EC in their conjunctive application is still not clear, although constant case law still emphasizes that abusive practices “covered by a block exemption did not prevent Article 86 [now Article 82 EC] from being applied”.¹⁰³

IV. Enforcement of Procedural Rules on Liner Conferences

1. The European Commission as Enforcement Organisation

The Commission is the central enforcement organization with general responsibility for policing and securing compliance with Community competition rules.¹⁰⁴ Although the Commission’s exemption monopoly was revoked by Regulation 1/2003, its powers of inquiry and implementation are strengthened remarkably under the new enforcement system.

The Commission has direct powers to investigate and order the termination of infringements of Community competition rules. Its decisions are subject to judicial review by the ECJ. The Commission exercises this competence in cooperation with the NCAs by consultation, exchange of information and investigation assistance, but does not have to act through the NCAs. The Commission has powers directly to impose fines for substantive or procedural infringements, including periodic penalty payments for refusal to obey cease-and-desist orders or orders to disclose information or submit to investigations.¹⁰⁵

The Commission is also required to observe procedural safeguards to protect the interests of undertakings directly or indirectly affected by its decisions. Some safeguards are provided for in Regulation 1/2003, while others have been introduced in response to rulings of the ECJ on procedural issues or to outside criticism of the fairness and impartiality of its procedures.¹⁰⁶ Among the specific safeguards provided in the regulations are protection from disclosure of trade secrets and confidential business information. Additional safeguards preserve the basic rights of defendants in proceedings leading up to an adverse decision to reply to the

¹⁰² CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 190.

¹⁰³ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 52 and 136; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, para. 1379. See also Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1562, Rn. 60.

¹⁰⁴ See Articles 211 EC *et seq.*

¹⁰⁵ Articles 23 and 24 of Regulation 1/2003. Fines are enforceable in the Member States under Article 256 EC in the same way as judgments or orders of national courts.

¹⁰⁶ *Ritter/Braun*, European Competition Law (2004), p. 1031.

Commission's charges before the decision is taken and the right of complainants and other interested parties to object to proposed decisions favourable to other undertakings. These "due process" rights have been clarified in recent years with respect to access to documents in the Commission's files and legal professional privilege, and a neutral Hearing Officer has been appointed to conduct hearings. In addition to these specific procedural safeguards, the Commission is obliged in its competition enforcement procedures to observe the general principles of law and fundamental rights which the ECJ has recognised as common constitutional tradition of the Member States and which are part of Community law, such as the principle of proportionality, the right to a fair hearing, legal certainty and protection against self-incrimination.¹⁰⁷ Finally, addressees of and interested parties to any formal decision by the Commission have the ultimate safeguard of the right of appeal to the ECJ. Appeals against competition decisions are first heard by the lower chamber of the European Court, the CFI, with a further appeal on points of law to the ECJ itself.

2. Initiation of Proceedings: From Regulation 4056/86 to Regulation 1/2003

The initiation of proceedings is "an authoritative act of the Commission, evidencing its intention of taking a decision".¹⁰⁸ According to Article 10 of Regulation 4056/86, which was repealed by Regulation 1/2003, the Commission would, on its own initiative or on receipt of a complaint from Member States or natural or legal persons, initiate procedures to terminate any infringement of the provisions of Article 81(1) EC or Article 82 EC or to enforce Article 7 of Regulation 4056/86. The new enforcement system under Regulation 1/2003 reflects these main routes to initiate proceedings under Regulation 4056/86, previously based on Regulation 17, and lays down a more general and explicit framework for the initiation of proceedings in which the Commission may begin an investigation on its own initiative, on complaints or on clearance requests.

a. The European Commission's Own Initiative

Under the new enforcement regime in Regulation 1/2003, the Commission may begin a proceeding¹⁰⁹ or reopen a proceeding¹¹⁰ on its own initiative (*ex officio* proceedings), which mostly results from informal sources of information.¹¹¹ While the initiation of proceedings on a complaint from natural or legal persons requires the justification of a legitimate interest, the validity of an investigation commenced on the Commission's own initiative is not affected by whether or not the

¹⁰⁷ See Article 6(2) EC and the 37th Recital of Regulation 1/2003. For more details see *Ritter/Braun*, European Competition Law (2004), p. 1031 ff., particularly Fn. 20 w.f.r.

¹⁰⁸ Commission Notice on cooperation within the Network of Competition Authorities, O.J. 2004 C 101/43, para. 52.

¹⁰⁹ Article 7(1) of Regulation 1/2003.

¹¹⁰ Article 9(2) of Regulation 1/2003.

¹¹¹ *Ritter/Braun*, European Competition Law (2004), p. 1040.

source of the Commission's information had a legitimate interest to file a formal complaint.¹¹²

b. Complaints

The importance of complaint as a cause for the initiation of a proceeding is related to the purpose of the Community competition enforcement which is not only to maintain effective competition on the internal market but also to protect individual undertakings and consumers from restrictive practices insofar as they contribute to effective competition.¹¹³ Especially under the consideration that private enforcement of Community competition rules is still relatively undeveloped,¹¹⁴ complaints should be a desirable alternative.¹¹⁵ For this reason, a complainant may not only request the Commission to initiate proceedings, but in case of a decision of commitments by the Commission¹¹⁶ also request to reopen proceedings when a material change in any of the facts on which the Commission's decision was based occurs, or the undertakings concerned act contrary to their commitments, or the decision was based on incomplete, incorrect or misleading information provided by the parties.

A complaint may be submitted by a Member State, but more often by injured individual undertakings or natural persons. In this respect a difference arises in the requirement of "legitimate interest" as the justification of a complaint. As already explicitly provided for in Article 10 of Regulation 4056/86, Member States as complainants do not need to justify any legitimate interest,¹¹⁷ while natural or legal persons can only put forward complaints when they can show a legitimate interest. This is explicitly repeated and emphasized in Article 7(2) of Regulation 1/2003. As to individuals who claim a legitimate interest,¹¹⁸ it is necessary to justify a complaint by proving that they have been individually injured and that the inter-

¹¹² ECJ 12 July 1979, joined case 32/78, 36/78 to 82/78 (*BMW Belgium SA and Others v. Commission*), [1979] E.C.J. 2435, para. 18.

¹¹³ Order of ECJ 11 December 1973, joined case 41/73, 43 to 48/73, 50/73, 111/73, 113/73, 114/73 (*Société anonyme Générale Sucrière and Others v. Commission*), [1973] E.C.R. 1465; ECJ 21 September 1989, joined cases 46/87 and 227/88 (*Hoechst AG v. Commission*), [1989] E.C.R. 2859, para. 25.

¹¹⁴ *Konninos*, Public and Private Antitrust Enforcement in Europe (2006), p. 6 ff.

¹¹⁵ *Ritter/Braun*, European Competition Law (2004), p. 1043.

¹¹⁶ See Article 9(2) of Regulation 1/2003.

¹¹⁷ See Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwat*), O.J. 1993 L 34/20, confirmed in substance by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201. See also *Ritter/Braun*, European Competition Law (2004), p. 1044.

¹¹⁸ Such as the parties to an agreement or practice, associations of enterprises, consumer associations and third parties who suffer from or were threatened with loss as a direct result of it. For more details see *Ritter/Braun*, European Competition Law (2004), p. 1044.

vention of the Commission is necessary in order to obtain a remedy which they would probably not obtain in an action before the national courts.¹¹⁹

Complaints may be submitted formally¹²⁰ but also informally.¹²¹ As regards legal consequences of the above two circumstances, two points should be noted. First, after receipt of a complaint the Commission is not obliged to initiate proceedings¹²² or to adopt an infringement decision,¹²³ but to react within a reasonable period of time.¹²⁴ The Commission does not need to carry out a full-scale investigation of every complaint, but has to investigate a complaint sufficiently to make clear whether an infringement of Articles 81 or 82 EC has been or is being committed and, if so, whether it is advisable or necessary for it to intervene, given the alternative means of redress available to complainants.¹²⁵ A complaint must be

¹¹⁹ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004/C 101/05, O.J. 2004 C 101/65, para. 44.

¹²⁰ In this case, a complaint must take certain formalities and fulfil necessary content requirements. For more details see *Ritter/Braun*, European Competition Law (2004), p. 1046 ff.

¹²¹ By informal complaints the individual complainants do not need to reveal their identity, but have no procedural rights. Nevertheless, the Commission must respect the confidentiality of informants, unless the request is manifestly unjustified. See ECJ 7 November 1985, case 145/83 (*Stanley George Adams v. Commission*), [1985] E.C.R. 3539; cf. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004/C 101/05, O.J. 2004 C 101/65, para. 81.

¹²² CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223, para. 74; Order of ECJ 12 June 1992, case C-29/92 (*Asia Motor France SA and Others v. Commission*), [1992] E.C.R. I-3935.

¹²³ CFI 24 January 1995, case T-114/92 (*Bureau Européen des Médias de l'Industrie Musicale (BEMIM) v. Commission*), [1995] E.C.R. II-147, para. 62; CFI 16 September 1998, case T-110/95 (*International Express Carriers Conference (IECC) v. Commission*), [1998] E.C.R. II-3605, para. 46. See also ECJ 18 October 1979, case 125/78 (*GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v. Commission*), [1979] E.C.R. 3173, para. 17; CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223, paras. 75–76; CFI 18 November 1992, case T-16/91 (*Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v. Commission*), [1992] E.C.R. II-2417; CFI 27 October 1994, case T-32/93 (*Ladbroke Racing Ltd v. Commission*), [1994] E.C.R. II-1015, paras. 37–39; CFI 27 June 1995, case T-186/94 (*Guérin Automobiles v. Commission*), [1995] E.C.R. II-1753, para. 22; CFI 18 September 1995, case T-548/93 (*Ladbroke Racing Ltd v. Commission*), [1995] E.C.R. II-2565, para. 45; CFI 9 January 1996, case T-575/93 (*Casper Koelman v. Commission*), [1996] E.C.R. II-1, para. 39.

¹²⁴ This period depends on the complexity of the case. Cf. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004/C 101/05, O.J. 2004 C 101/65, para. 60.

¹²⁵ CFI 30 January 2002, case T-54/99 (*max.mobil Telekommunikation Service GmbH v. Commission*), [2002] E.C.R. II-313, paras. 48–56. Cf. CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223, para. 76; CFI 29 June 1993, case T-7/92 (*Asia Motor France SA and Others v. Commission*), [1993] E.C.R. II-669, para. 36.

lodged within a reasonable time after a past suspected anti-competitive conduct has been discovered. Neither should the reaction of the Commission to a complaint be delayed beyond a reasonable period, nor could this period be extended by the Commission indefinitely in favour of a complainant for the purpose of providing evidence to substantiate its complaint.¹²⁶ Secondly, the Commission may begin its investigation and start formal proceedings if it considers a complaint well-founded.¹²⁷ The Commission can also reject a complaint on the basis of an examination of the factual and legal aspects of the complaint “with all due care”.¹²⁸ The Commission may reject a complaint, according to Article 13 of Regulation 1/2003, on the ground that a national competition authority has dealt with the case, or, according to Community case law, by finding, for example, that the case does not display a sufficient Community interest to justify initiation of proceedings and investigation of the case.¹²⁹

c. Clearance Requests

aa. Article 10 of Regulation 1/2003

Under Regulation 1/2003 there still are possibilities for clearance by the Commission. Similar provisions consisted already in Regulation 17¹³⁰ and Regulation 4056/86¹³¹ which, however, rested on the notification system before Regulation 1/2003 was adopted. According to Article 10 of Regulation 1/2003, the Commission may find that Article 81 EC is not applicable to an agreement either because the conditions of Article 81(1) EC are not fulfilled, or because the criteria of Article 81(3) EC are satisfied, as the case may be, after amendments or commitments have been made to meet the Commission’s competition concerns.¹³² It should be noted that this clearance decision of a declaratory nature¹³³ can only be made by the Commission on its own initiative, not on request of the parties concerning an agreement which likely falls under Article 81(1) EC.¹³⁴

¹²⁶ ECJ 2 October 2003, joined cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P (*International Power and Others v. Commission*), [2003] E.C.R. I-11421, paras. 109–110 and 179; see *Ritter/Braun*, European Competition Law (2004), p. 1047.

¹²⁷ *Ritter/Braun*, European Competition Law (2004), p. 1050.

¹²⁸ CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223, para. 74; CFI 27 June 1995, case T-186/94 (*Guérin Automobiles v. Commission*), [1995] E.C.R. II-1753, para. 23; CFI 21 January 1999, joined cases T-185/96, T-189/96 and T-190/96 (*Riviera Auto Service Etablissements Dalmasso SA and Others v. Commission*), [1999] E.C.R. II-93, para. 48.

¹²⁹ CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223, paras. 74–76; CFI 15 January 1997, case T-77/95 (*Syndicat Français de l’Express International (SFEI) and Others v. Commission*), [1997] E.C.R. II-1, para. 29; CFI *IECC* (1998), para. 46.

¹³⁰ Article 2 of Regulation 17.

¹³¹ Articles 11(4) and 12 of Regulation 4056/86.

¹³² Article 9(1) of Regulation 1/2003. To this extent, it is similar to Article 11(4) of Regulation 4056/86.

¹³³ See the 14th Recital of Regulation 1/2003. See also above Chapter V A. III. 1. c.

¹³⁴ *Ritter/Braun*, European Competition Law (2004), p. 1052.

bb. Informal Guidance

Another possibility for clearance by the Commission follows from the 38th Recital of Regulation 1/2003, according to which the Commission may, at the request of individual undertakings, issue “informal guidance” where a case gives rise to genuine uncertainty because it presents novel or unsolved questions.¹³⁵ The reason for this right in favour of undertakings is that “legal certainty for undertakings operating under Community competition rules contributes to the promotion of innovation and investment.”¹³⁶ However, the issuing of informal guidance by the Commission requires compatibility with the Commission’s enforcement priorities¹³⁷ and the fulfilment of three cumulative criteria: the first is the absence of sufficient clarification in the existing Community legal framework; the second is economic importance, particularly widespread economic usage in the market place or important investments related to structural operations, such as non-full-function joint ventures; the third is that there is no need for further fact-finding.¹³⁸ As regards the legal effects, an informal guidance is primarily intended to help undertakings carry out an informed evaluation themselves; therefore, it is similar to a negative clearance under Article 2 of Regulation 17.¹³⁹ However, an informal guidance is not legally binding and does not guarantee immunity from fines. Since it is a general principle of Community competition rules that formal notifications provide for immunity from fines, as declared by the CFI in *TACA*,¹⁴⁰ this possibility for clearance by the Commission is different from Article 15(5) of Regulation 17 and Article 19(4) of Regulation 4056/86.

3. Powers of Investigation

a. Investigative Powers

In order to detect any agreement, decision or concerted practice prohibited by Article 81 EC or any abuse of a dominant position prohibited by Article 82 EC, the Commission should be empowered not only to require necessary information but also directly to undertake inspections.¹⁴¹ Under Regulation 1/2003 the Commission has investigatory powers in five directions:

¹³⁵ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06, O.J. 2004 C 101/78.

¹³⁶ The 1st Sentence of the 38th Recital of Regulation 1/2003.

¹³⁷ *Ritter/Braun*, European Competition Law (2004), p. 1053.

¹³⁸ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06, O.J. 2004 C 101/78, para. 8.

¹³⁹ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004/C 101/06, O.J. 2004 C 101/78, para. 23.

¹⁴⁰ CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, “*TACA*”), [2003] E.C.R. II-3275, paras. 1597–1633. Cf. CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission*, “*TAA*”), [2002] E.C.R. II-875, paras. 48–53.

¹⁴¹ See the 23rd and 24th Recital of Regulation 1/2003.

- the power to request information from the NCAs;¹⁴²
- the power to require undertakings and associations of undertakings to provide all necessary information;¹⁴³
- the power to take statements;¹⁴⁴
- the power to execute on-the-spot inspections;¹⁴⁵
- the power to investigate sectors of the economy and particular types of agreements.¹⁴⁶

b. Information Request on NCAs

The Commission may request information from the national governments and their NCAs.¹⁴⁷ This is an investigative power of the Commission, on one side. On the other side, information exchange falls within the scope of competence of all competition authorities on the level both of the Community and of the Member States, i.e. they have the power to provide the necessary information to each other and make use of it.¹⁴⁸ Therefore, Regulation 1/2003 simplifies the provisions in Regulation 17 and Regulation 4056/86¹⁴⁹ and offers a clear and systematic framework in order to strengthen the cooperation of the competition authorities within the Community and the uniform application of Community competition rules.

c. Information Request on Undertakings

The provisions on the Commission's power to require information from undertakings were adopted in Article 18 of Regulation 1/2003 without remarkable amendments.¹⁵⁰ However, unlike Article 11 of Regulation 17,¹⁵¹ under Article 18 of Regulation 1/2003 the Commission has the power to require information from undertakings either by sending a simple request (*discovery request*) or by making a decision (*discovery order*).¹⁵² Which form is used is determined by the Commission in accordance with the individual circumstances of the case.¹⁵³

As regards the formalities, both discovery request and discovery order must state the legal basis and the purpose of the request, specify the information required (*subject matter*), fix the time-limit for information submission and warn of

¹⁴² Article 18(6) of Regulation 1/2003.

¹⁴³ Article 18 of Regulation 1/2003.

¹⁴⁴ Article 19 of Regulation 1/2003.

¹⁴⁵ Articles 20 and 21 of Regulation 1/2003.

¹⁴⁶ Article 17 of Regulation 1/2003.

¹⁴⁷ Article 18(6) of Regulation 1/2003.

¹⁴⁸ Article 12(1) of Regulation 1/2003.

¹⁴⁹ E.g. Article 16 of Regulation 4056/86.

¹⁵⁰ *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003), p. 71.

¹⁵¹ Article 11 of Regulation 17 provided for a two-stage procedure: first sending a simple request and to issue a formal compulsory order only if the addressee of the request refused or failed to comply with an initial request.

¹⁵² Article 18(1) of Regulation 1/2003.

¹⁵³ *Ritter/Braun*, European Competition Law (2004), p. 1061 ff.

the risk of fines for refusal or supplying incorrect information.¹⁵⁴ Unlike the discovery request which normally takes the simple form of a letter containing a list of questions to be answered and of documents to be delivered,¹⁵⁵ a discovery order which takes the form of an official decision must inform the undertakings concerned of the right to judicial review of the decision by the ECJ.¹⁵⁶ The addressee may apply to the ECJ for judicial review of the decision, but unless the ECJ grants a stay of execution, the addressee would meanwhile have to comply.¹⁵⁷

As regards the extent of inquiry, the information required as subject matter of a discovery request or discovery order must be “necessary” for, or “conducive” to, the enforcement of Community competition rules. The “necessity” is determined at the Commission’s discretion. The Commission does not have to justify in detail the need for the information, provided that the request respects the principle of proportionality and reasonableness.¹⁵⁸ Moreover, according to Community case law, the addressees have no right to refuse discovery information or documents on the ground that they are incriminating which means that the information supplied may be used against the addressees themselves or other undertakings.¹⁵⁹ This investigative power of the Commission by means of discovery order is confirmed further in the 23rd Recital of Regulation 1/2003 as follows:

“When complying with a decision of the European Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.”

Finally, it should be noted that discovery can be ordered not only from undertakings and associations of undertakings, but also from third parties such as competitors, customers and even consulting firms,¹⁶⁰ while the privilege of law firms con-

¹⁵⁴ In comparison with Articles 18(2) and (3) of Regulation 1/2003. See also ECJ 18 October 1989, case 27/88 (*Solvay & Cie v. Commission*), [1989] E.C.R. 3355, paras. 5–9; ECJ 18 October 1989, case 374/87 (*Orkem v. Commission*), [1989] E.C.R. 3283, paras. 8–11; Commission Decision 76/593/EEC of 25 June 1976 (*CSV*), O.J. 1976 L 192/27; Commission Decision 91/213/EEC of 15 March 1991 (*Baccarat*), O.J. 1991 L 97/16.

¹⁵⁵ CFI 20 February 2001, case T-112/98 (*Mannesmannröhren-Werke AG v. Commission*), [2001] E.C.R. II-729, paras. 71–72; *Ritter/Braun*, European Competition Law (2004), p. 1066.

¹⁵⁶ Article 18(3) of Regulation 1/2003.

¹⁵⁷ See Order of CFI 21 November 1990, case T-39/90 R (*Samenwerkende Elektriciteits-produktiebedrijven (SEP) NV v. Commission*), [1990] E.C.R. II-649. For more details see *Ritter/Braun*, European Competition Law (2004), p. 1068.

¹⁵⁸ *Ritter/Braun*, European Competition Law (2004), p. 1063.

¹⁵⁹ ECJ 18 October 1989, case 374/87 (*Orkem v. Commission*), [1989] E.C.R. 3283, para. 34; CFI 20 February 2001, case T-112/98 (*Mannesmannröhren-Werke AG v. Commission*), [2001] E.C.R. II-729, paras. 84–88.

¹⁶⁰ For instance, Commission Decision 80/1334/EEC of 17 December 1980 (*Italian Cast Glass*), O.J. 1980 L 383/19, para. 26. See also *Ritter/Braun*, European Competition Law (2004), p. 1062.

tinues to be respected. Non-EC undertakings can also be requested by the Commission to provide information in accordance with the general requirements of “extraterritorial application” of Community competition rules. This is important for liner conferences as associations of undertakings, many members of which are non-EC carriers.

d. On-the-Spot Investigation

The Commission’s enquiry power is also strengthened in respect of the inspection of undertakings. Under Regulation 1/2003 the power of the Commission to conduct an inspection is not limited to the traditional scope of premises and land of undertakings concerned and their means of transport, but extended to any other premises, land and means of transport beyond this scope.¹⁶¹ Article 21(1) of Regulation 1/2003 especially mentions “the homes of directors, managers and other members of staff” of undertakings concerned.¹⁶²

Similar to the power of information request in Article 18 of Regulation 1/2003, the Commission may conduct an inspection either in the form of “a written authorisation”¹⁶³ or a decision.¹⁶⁴ As regards content requirements, both forms must specify subject matter and purpose of the inspection and indicate the penalties for refusal or supplying incorrect information. Beyond the form of inspection by “a written authorisation”, a decision to conduct an inspection should additionally appoint the date of inspection beginning and especially inform the undertakings concerned of the right to have the decision reviewed by the ECJ.¹⁶⁵ Therefore, the provisions on on-the-spot inspection are similar to those on discovery in Article 18 of Regulation 1/2003.

Despite these similarities and some cases in which both discovery and on-the-spot investigations were carried out in tandem,¹⁶⁶ these two investigation powers remain basically distinct and independent. The Commission may or may not give the undertakings concerned prior notice of a possible surprising on-the-spot investigation. If the assistance of the national competition authority according to national rules requires authorisation from a judicial authority, such authorisation must be applied for. Such authorisation may also be applied for as a precautionary measure even if the national rules do not require it.¹⁶⁷ But for the execution of a decision to conduct inspection on other premises according to Article 21 of Regulation 1/2003, a prior authorisation from the national court concerned is a precondition.¹⁶⁸ To recapitulate briefly, the Commission must give notice of an inspection (without decision) to the competent authority of the Member State in whose

¹⁶¹ *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003), p. 71.

¹⁶² In comparison with the 26th Recital of Regulation 1/2003.

¹⁶³ Article 20(3) of Regulation 1/2003.

¹⁶⁴ Article 20(4) of Regulation 1/2003.

¹⁶⁵ Compared with Article 20(3) and (4) of Regulation 1/2003.

¹⁶⁶ *Ritter/Braun*, European Competition Law (2004), p. 1070.

¹⁶⁷ Article 20(6) and (7) of Regulation 1/2003. See also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O.J. 2004 C 101/54, paras. 38–41.

¹⁶⁸ Article 21(3) of Regulation 1/2003. See also the 26th Recital of Regulation 1/2003.

territory the inspection is to be conducted¹⁶⁹ but must consult with that authority before it takes a decision to proceed to inspection.¹⁷⁰ Where authorisation of a national court is required that national court must control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive.¹⁷¹ However, the national court may neither call into question the necessity for the inspection nor demand that it be provided with the information (evidence) in the Commission's file; the lawfulness of the Commission decision is subject to review only by the ECJ.¹⁷² Because of the surprise involved in an on-the-spot investigation, the inspectors of the Commission will wait a short time for a company's external legal adviser to arrive if it does not have an in-house lawyer, and the privilege of outside lawyers continues to be respected.¹⁷³

e. Interview and Statements

Under Regulation 1/2003 the Commission has the power to interview any natural or legal person that consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. This power was not provided in Regulation 17. The reason for this empowering is that the detection of infringements of Community competition rules is growing more difficult and the Commission's power must be strengthened in order to protect competition effectively.¹⁷⁴ However, the Commission has no power to summon witnesses or to hear them under oath and may not impose fines in the case of incorrect or misleading information.¹⁷⁵

f. Sector Enquiry

The Commission may investigate suspicious pricing behaviour or other conduct suggesting an antitrust violation across a whole industry.¹⁷⁶ In the course of this inquiry, the Commission may use the form of discovery and the form of inspection, for which Articles 18, 20 and 21 of Regulation 1/2003, respectively, are applicable.

g. Confidentiality and Professional Secrecy in Article 28 of Regulation 1/2003

The Commission and the NCAs as well as their officials and experts may not disclose information acquired or exchanged which is "of the kind of professional secrecy".¹⁷⁷ Article 28(1) of Regulation 1/2003 requires that the information acquired through investigation can be used "only for the purpose for which it was

¹⁶⁹ Article 20(3) of Regulation 1/2003.

¹⁷⁰ Articles 20(4) and 21(2) of Regulation 1/2003.

¹⁷¹ Articles 20(8) and 21(3) 1st Paragraph of Regulation 1/2003.

¹⁷² Articles 20(8) and 21(3) 2nd Paragraph of Regulation 1/2003.

¹⁷³ *Ritter/Braun*, European Competition Law (2004), p. 1077.

¹⁷⁴ See the 25th Recital of Regulation 1/2003.

¹⁷⁵ Inference from Article 23(1)(a) of Regulation 1/2003.

¹⁷⁶ Article 17(1) of Regulation 1/2003.

¹⁷⁷ Article 28(2) of Regulation 1/2003.

acquired”. Article 28(2) of Regulation 1/2003 repeats the obligation of Article 287 EC and refers to the duty of government agencies not to disclose private information that a business or individual has supplied about itself and that is not widely known or publicly available, especially a so-called “business secret”, which is also recognized in Articles 27(4) and 30(2) of Regulation 1/2003. As required in the 32nd Recital of Regulation 1/2003, “it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.”

4. The Right to be Heard

The reason for the provisions on hearings in Article 17 of Regulation 1/2003 is “*audiatur et altera pars*” which is explained in the 32nd Recital of Regulation 1/2003 as follows:

“The undertakings concerned should be accorded the right to be heard by the European Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised.”

In compliance with the due process obligation of the Commission to observe the “rights of defence”, the Commission shall base its decision only on objections on which the parties concerned have been able to comment.¹⁷⁸

Article 27 of Regulation 1/2003 entitles prospective addressees of Commission decisions, complainants and other interested third parties to be heard. The implementation of these provisions is supplemented and supported by Regulation 773/2004.¹⁷⁹ To sum up,¹⁸⁰ the prospective addressees of decisions are guaranteed that the Commission shall decide only on objections on which the parties concerned have been able to comment,¹⁸¹ and these addressees have the right of access to the files,¹⁸² the right to a written response¹⁸³ and the right to express their arguments at an oral hearing.¹⁸⁴ Complainants shall be associated closely with the proceedings¹⁸⁵ and have the right to be informed of reasons for the rejection of a complaint,¹⁸⁶ the right of access to a non-confidential version of the statement of objections,¹⁸⁷ the limited right of access to files,¹⁸⁸ the right to written comment¹⁸⁹

¹⁷⁸ Article 27(1) 2nd Sentence of Regulation 1/2003.

¹⁷⁹ Chapters V and VI of Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L 123/18.

¹⁸⁰ For more details, see *Ritter/Braun*, European Competition Law (2004), p. 1087 ff.

¹⁸¹ Article 27(1) of Regulation 1/2003; Article 11(2) of Regulation 773/2004.

¹⁸² Article 27(2) of Regulation 1/2003; Article 15 of Regulation 773/2004.

¹⁸³ Article 10 of Regulation 773/2004.

¹⁸⁴ Article 14 of Regulation 773/2004.

¹⁸⁵ Article 27(1) of Regulation 1/2003.

¹⁸⁶ Article 7 of Regulation 773/2004.

¹⁸⁷ Article 6(1) of Regulation 773/2004.

¹⁸⁸ For example, Article 9 of Regulation 773/2004.

and the right to express their arguments at oral hearing.¹⁹⁰ As regards other natural or legal persons as third parties, who must demonstrate “a sufficient interest”, the rights to be heard are not as extensive as those of defendants and include primarily the opportunity to make their views known in writing or to ask questions during the oral hearing,¹⁹¹ without guarantee of access to files in respect of the confidentiality obligation.¹⁹²

5. Cooperation between Authorities and Courts: Community and Member States

The decentralization through Regulation 1/2003 leads to parallel enforcement powers¹⁹³ both at the levels of the Community (the Commission) and of the Member States (national competition and judicial authorities). The uniform and effective implementation of this decentralized enforcement therefore requires coordination and “cooperation in good faith”¹⁹⁴ between competition authorities at the two levels. With a focus on conflict rules, Chapter IV of Regulation 1/2003 (Articles 11 to 16) provides provisions regarding the cooperation between the Commission and the NCAs, on one hand, and the cooperation between the Commission and the national courts on the other hand.

a. Cooperation between the European Commission and NCAs

As required in the 15th Recital of Regulation 1/2003, the Commission and the NCAs should form together a network of public authorities. The so-called “European Competition Network” (ECN)¹⁹⁵ is a forum for discussion and cooperation by application and enforcement of Community competition rules with the aim to ensure an efficient division of work and an effective and consistent application of Community competition rules.

Within the ECN the exchange of information and the use of such information in evidence can also include confidential information¹⁹⁶ and can be used not only for the application of Articles 81 and 82 EC but also for the parallel application of national competition laws.¹⁹⁷ Beyond reciprocal cooperation within the ECN, the Commission takes the role of guardian in order to ensure that the decisions made by national authorities are consistent and that Community competition rules are applied in a uniform manner, thereby avoiding conflicting decisions.¹⁹⁸ In accor-

¹⁸⁹ Article 6(2) of Regulation 773/2004.

¹⁹⁰ Article 13(3) of Regulation 773/2004.

¹⁹¹ Articles 13 and 14 of Regulation 773/2004.

¹⁹² See above Chapter V A. IV. 3. g.

¹⁹³ See the 22nd Recital of Regulation 1/2003.

¹⁹⁴ Article 11(1) of Regulation 1/2003 in comparison with Article 10(2) EC.

¹⁹⁵ The detailed provisions on the European Competition Network (ECN) are given not in Regulation 1/2003 but in the Commission Notice on cooperation within the Network of Competition Authorities, O.J. 2004 C 101/43.

¹⁹⁶ Article 12(1) of Regulation 1/2003.

¹⁹⁷ Article 12(2) of Regulation 1/2003 in relation to the 16th Recital of Regulation 1/2003.

¹⁹⁸ Article 11(4) and (5) of Regulation 1/2003.

dance with this, the NCAs must inform the Commission in writing and in time of the commencement of a first formal investigation and no later than 30 days of the adoption of a decision.¹⁹⁹ At the same time, the Commission should consult the Advisory Committee on Restrictive and Dominant Positions before taking a decision.²⁰⁰

Another important aspect of cooperation within the ECN concerns conflict provisions. In case of parallel initiation of proceedings by two or more NCAs, either on complaint or on their own initiative, the fact that one national authority is dealing with the case shall be sufficient reason for other authorities to suspend their proceedings.²⁰¹ Similarly, the fact that another NCA has dealt with the agreement concerned justifies a NCA to reject a complaint.²⁰² Where national authorities disagree on the allocation of a case or where more than three Member States are involved, the Commission may, in order to ensure effective enforcement, decide to initiate proceedings which relieves the national authorities of their competence to apply Articles 81 and 82 EC; where a national authority is already acting in the case, the Commission will do so only after consulting that national authority.²⁰³ When the NCAs rule on agreements under Articles 81 or 82 EC which are already the subject of a Commission decision, they cannot make decisions which would run counter to the decision of the Commission.²⁰⁴

b. Cooperation with National Courts

The requirement of uniform application of Community competition rules requires national courts to act in close cooperation with the Commission, since national courts are empowered to apply Community competition rules directly.²⁰⁵ Accordingly, the national courts may ask the Commission to transmit to them information or opinions concerning the application of Articles 81 and 82 EC. NCAs and the Commission may submit to the national courts written or oral observations and may request the transmission of any document necessary for the evaluation of a case.²⁰⁶ If national courts make judgments on the application of Articles 81 or 82 EC, the Member States should forward a copy of the judgment to the Commission without delay after the full written judgment is notified to the parties.²⁰⁷ When national courts rule on agreements under Articles 81 or 82 EC which are already

¹⁹⁹ Article 11(3) and (4) of Regulation 1/2003.

²⁰⁰ Article 14 of Regulation 1/2003.

²⁰¹ Article 13(1) of Regulation 1/2003.

²⁰² Article 13(2) of Regulation 1/2003.

²⁰³ Article 11(6) of Regulation 1/2003.

²⁰⁴ Article 16(2) of Regulation 1/2003.

²⁰⁵ As to the cooperation between the Commission and the national courts, see also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O.J. 2004 C 101/54.

²⁰⁶ Article 15(3) of Regulation 1/2003. See also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O.J. 2004 C 101/54, para. 39.

²⁰⁷ Article 15(2) of Regulation 1/2003.

the subject of a Commission decision, they cannot take decisions running counter to the decision of the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may evaluate whether it is necessary to stay its proceedings.²⁰⁸

6. Commission Decisions

Chapter III of Regulation 1/2003 is entitled “Commission Decisions” and regulates four types of decisions: cease-and-desist orders (Article 7), interim measures (Article 8), decisions with commitments (Article 9) and decisions stating the inapplicability of Articles 81 and 82 EC²⁰⁹ (Article 10). Besides, there are also decisions rejecting complaints²¹⁰ and other purely procedural orders for discovery and inspection (Articles 18(3), 20(4) and 21(2)). In practice one single decision may often include several different types of decisions which are addressed to the same parties.²¹¹

a. Cease-and-Desist Orders

According to Article 7(1) of Regulation 1/2003, the Commission may, if it finds that there is infringement of Articles 81 or 82 EC, require the undertakings concerned to end this infringement. The Commission may also order punished undertakings to refrain from similar conduct in the future. For instance, in *TACA*,²¹² the Commission ordered the undertakings concerned on one side to put an end forthwith to the affirmed infringements of Articles 81(1) and 82 EC, and on the other side to refrain in future from any action having the same or a similar object or effect as the infringements referred to.²¹³

Article 7(1) of Regulation 1/2003 empowers the Commission to impose behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed if there is no equally effective behavioural remedy, in particular where there is a substantial risk of lasting or repeated infringement that derives from the very structure of the undertaking, or where any equally behavioural remedy would be more burdensome for the undertaking concerned than a structural remedy.²¹⁴ An example relating to liner conferences is the case of *TACA* in which the Commission ordered the undertakings concerned to “inform, within a period of two months, customers with whom they have concluded joint service

²⁰⁸ Article 16(1) of Regulation 1/2003.

²⁰⁹ See above Chapter V A. III. 1. c.

²¹⁰ For example, pursuant to Article 13 of Regulation 1/2003.

²¹¹ For more details, see *Ritter/Braun*, European Competition Law (2004), p. 1105.

²¹² Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “*TACA*”), O.J. 1999 L 95/1.

²¹³ Articles 4 and 7 of the decision adopted in Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “*TACA*”), O.J. 1999 L 95/1.

²¹⁴ Article 7 of Regulation 1/2003 in comparison with the 12th Recital of Regulation 1/2003.

contracts that those customers are entitled to renegotiate the terms of those contracts or to terminate them forthwith”.²¹⁵

In addition, Article 7(1) of Regulation 1/2003 empowers the Commission, in case of its legitimate interest, to issue a formal decision declaring that conduct which is known to have ceased was an infringement of Articles 81 and 82 EC, even when no fine is imposed.²¹⁶ The purpose may be to clarify the legal position with respect to new types of agreements and practices that have not been settled in the existing case law or to prevent recurrence.²¹⁷ A declaratory decision with a small fine (“symbolic” fine) might be an alternative, although this symbolic fine was annulled by the CFI in *FEFC*.²¹⁸

b. Interim Measures

Unlike Article 3 of Regulation 17 which does not expressly refer to a power of the Commission to take interim measures, Article 8 of Regulation 1/2003 explicitly provides such power. Under Article 8 of Regulation 1/2003 and with reference to Community case law, interim measures can be decided:

- on the basis of a *prima facie* finding of infringement;
- in case of urgency due to the risk of serious and irreparable damages to competition;
- if the order is provisional and limited to a period of time and may be renewed insofar as necessary and appropriate;
- on the Commission’s own initiative.

As regards the last condition, it is held in Community case law that the primary purpose of applying Community competition rules is to prevent distortions of competition and especially to safeguard the interests of consumers, rather than to protect the position of particular competitors.²¹⁹ However, a compliant could help

²¹⁵ Article 9 of the decision adopted in Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, “TACA”*), O.J. 1999 L 95/1.

²¹⁶ See the 11th Recital of Regulation 1/2003. Cf. also Ritter/Braun, European Competition Law, p. 1117.

²¹⁷ See the 14th Recital of Regulation 1/2003; CFI 11 March 1999, case T-136/94 (*Eurofer ASBL v. Commission*), [1999] E.C.R. II-263, para. 138; Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement, “EATA”*), O.J. 1999 L 193/23, paras. 182-186; ECJ 2 March 1983, case 7/82 (*Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission*), [1983] E.C.R. 483, paras. 16-28; ECJ 20 May 1987, case 272/85 (*Association nationale des travailleurs indépendants de la batellerie (ANTIB) v. Commission*), [1987] E.C.R. 2201, para. 15.

²¹⁸ CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, “FEFC”*), [2002] E.C.R. II-1011.

²¹⁹ Order of CFI 26 October 2001, case T-184/01 R (*IMS Health Inc. v. Commission*), [2001] E.C.R. II-3193, para. 145, following the Opinion of Advocate General Jacobs in ECJ 26 November 1998, case C-7/97 (*Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*), [1998] E.C.R. I-7791, para. 58. Following the judgment of the Frankfurt Higher Regional Court, the Commis-

the Commission to acquire information and justify interim measures,²²⁰ and a compliant might constitute a desirable alternative to private enforcement which is still not developed in the framework of Community competition rules.

c. Commitments

According to Article 9 of Regulation 1/2003, the undertakings concerned by a Commission proceeding may prior to the Commission's decision offer commitments to meet the concerns of the Commission expressed in its preliminary assessment. If the Commission agrees to the proposals or, where necessary, their amendments, it may decide to make those commitments binding on the undertakings. Such a decision may be adopted for a specific period and conclude that there are no longer grounds for action in the case. In respect of *status quo* and maintenance of these commitments as well as the grounds based on which the commitments were made, the proceeding may be reopened upon request or on the Commission's own initiative.

d. Publication

Cease-and-desist orders, interim measures, decisions on commitments, decisions stating the inapplicability of Articles 81 and 82 EC and decisions imposing sanctions must be published according to Article 30(1) of Regulation 1/2003, while procedural decisions may be published if they show sufficient general interest.

7. Fines

a. Categories of Fines

As regards categories of fines, Regulation 1/2003 differentiates between procedural fines, substantive fines and daily fines.²²¹ According to Article 23(2) of Regulation 1/2003, the Commission may impose fines on undertakings for their intentional or negligent actions infringing Articles 81 and 82 EC, contravening a decision ordering interim measures, or failing to comply with a commitment made binding by a Commission decision. The provisions in Article 19(2) of Regulation 4056/86 were similar; therefore, the application of Article 23(2) of Regulation 1/2003 after the abolishment of Article 19(2) of Regulation 4056/86 actually means no change in this respect. The same is generally expected for procedural fines²²² and daily fines.²²³ However, it should be noted that Article 23(1) of Regulation 1/2003 provides for more extensive provisions of procedural fines than Article 19(1) of Regulation 4056/86, for example, in the case of a breach of seals affixed through the Commission's inspection pursuant to Article 20(2)(b) of Regulation 1/2003.

sion withdrew its interim measures, see Commission Decision 2003/741/EC of 13 August 2003 (*NDC Health/IMS Health: Interim measures*), O.J. 2003 L 268/69.

²²⁰ Ritter/Braun, European Competition Law (2004), p. 1116.

²²¹ Articles 23(1), (2) and 24 of Regulation 1/2003.

²²² Article 23(1) of Regulation 1/2003 in comparison with Article 19(1) of Regulation 4056/86.

²²³ Article 24 of Regulation 1/2003 in comparison with Article 20 of Regulation 4056/86.

b. Addressees

Addressees of a fine decision can be undertakings or associations of undertakings.²²⁴ Associations may be fined if the responsibility for an infringement of Articles 81 or 82 EC may be imputed to the association and not, or not only, to its members.²²⁵ Therefore, two criteria should be met in order to justify a fine decision against an association: the first is legal personality, and the second is responsibility for autonomous market behaviour.²²⁶ This follows from the definition of “undertaking” in Community competition rules. Therefore, “liner conferences” cannot be fined by fine decisions: though they are defined as “associations of liner shipping companies”, they are no legal entities and assume no responsibility for autonomous market behaviour.²²⁷ This opinion was affirmed also by the CFI in *Compagnie Maritime Belge (CEWAL)*:

“... the Court finds that, since the conference does not have legal personality, the European Commission was entitled to impose a fine on the members of CEWAL, rather than on the conference itself. In this regard, it should be stressed that, in addition to CEWAL, each of the members of the conference was an addressee of the statement of objections. In those circumstances and having regard to the fact that CEWAL had no legal personality, the Court considers that, even if the statement of objections referred only to the possibility of imposing a fine on CEWAL in respect of the abusive practices, the applicants could not have been unaware that they ran the risk of a fine being imposed upon them, rather than on the conference.”

c. “Non-criminal” Nature and Limitation Periods

Like Article 4 of Regulation 4056/86, Article 23(5) of Regulation 1/2003 states explicitly that the fines imposed by decisions are of “non-criminal” nature.²²⁸ The legislative aim is to force the infringer to give up a current violation on one side, and to refrain the infringer or others from further violation in future. An example concerning liner conferences is the case of *Compagnie Maritime Belge (CEWAL)*²²⁹ in which the CFI pointed out explicitly that “the fine is also intended

²²⁴ See Articles 23(1), (2) and 24(1) of Regulation 1/2003.

²²⁵ CFI 16 December 2003, joined Cases T-5/00 and T-6/00 (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied, Technische Unie BV v. Commission*), [2003] E.C.R. II-5761, paras. 351–362.

²²⁶ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 232; CFI 21 February 1995, case T-29/92 (*Vereniging van Samenwerkende Prijsregulende Organisaties in de Bouwnijverheid (SPO) and Others v. Commission*), [1995] E.C.R. II-289, para. 385; CFI 23 February 1994, joined cases T-39/92 and T-40/92 (*Groupement des Cartes Bancaires “CB” and Europay International SA v. Commission*), [1994] E.C.R. II-49, paras. 137–139.

²²⁷ For more details see above Chapter IV A. I.

²²⁸ Cf. Ritter/Braun, European Competition Law (2004), p. 1123.

²²⁹ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 235.

to dissuade the undertakings from committing the infringements in question anew".²³⁰

In addition, the fines can also be imposed for a violation that has already ceased.²³¹ This is, however, subject to the provisions on period of limitation. The fining of undertakings for substantive infringements or infringements of procedural provisions is allowed only during this period.²³² According to Article 25 of Regulation 1/2003, the power of the Commission to impose fines is subject to the following limitation periods:

- three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
- five years in the case of all other infringements.

Furthermore, Article 26 of Regulation 1/2003 provides for a limitation period of five years for the enforcement of a fines decision of the Commission. The rules on limitation periods for enforcement of fines and periodic penalty payments were previously given in Regulation 2988/74,²³³ which also applied to fines for infringements in the field of transport. No provisions on the period of limitation were determined in Regulation 4056/86; the relevant provisions in Regulation 2988/74 were applicable. After the adoption of the decentralized enforcement regime, the NCAs can take procedural steps more independently; this may often lead to interruption of the limitation period. Therefore, it is necessary to clarify the function and implementation of provisions on limitation periods in the new regime.²³⁴ According to Article 37 of Regulation 1/2003, Regulation 2988/74 shall not apply to measures taken under Regulation 1/2003. Accordingly, provisions on the period of limitation were laid down in Articles 25 and 26 of Regulation 1/2003. They are applicable to liner conferences under the amended Regulation 4056/86 and will apply to the liner shipping sector after the ending of Regulation 4056/86 on 18 October 2008.

d. Amount of Fines and Determination

As regards the amount of fines, Regulation 4056/86 provides for a certain scale of fines for particular infringements,²³⁵ and also allows percentage fines.²³⁶ Regula-

²³⁰ This dissuasive function of fines was confirmed again in CFI 19 March 2003, case T-213/00 (*CMA CGM and Others v. Commission*), [2003] E.C.R. II-913, para. 340.

²³¹ ECJ 15 July 1970, case 41/69 (*ACF Chemiefarma NV v. Commission*), [1970] E.C.R. 661, para. 175.

²³² For more details see *Ritter/Braun*, European Competition Law (2004), p. 1124 ff.

²³³ Council Regulation (EEC) No. 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, O.J. 1974 L 319/1.

²³⁴ See the 31st Recital of Regulation 1/2003.

²³⁵ Such as 100 to 5000 ECU (European Currency Unit) for procedural fines (Article 19(1) of Regulation 4056/86), 1000 to one million ECU for substantive fines (Article 19(2) of Regulation 4056/86), and 50 to 1000 ECU for daily fines (Article 20(1) of Regulation 4056/86). For the ECU as unit of account, see Article 22 of Regulation 4056/86 in relation to Articles 207 and 209 EC.

tion 1/2003 provides merely for percentage fines and requires, like Regulation 4056/86,²³⁷ that fines must be in proportion to the gravity and duration of the infringement.²³⁸ Regulation 1/2003 empowers the Commission to impose fines according to the merits of the case.²³⁹ Although the amount of fines must be determined individually for each undertaking participating in the infringement, the Commission is not prevented from determining the overall amount of the fines to be imposed and then from spreading that total amount among the undertakings according to their “specific impact”. The lawfulness of this method of the Commission is affirmed by the CFI and also in maritime case law. In *CMA-CGM*,²⁴⁰ the CFI stated that a calculation whereby the Commission first determines the overall amount of the fines to be imposed and then spreads that total among the undertakings concerned by dividing them into groups according to the extent of their activities in the sector concerned is lawful. The way of allocation of a total amount of fines among undertakings according to specific impact was explained by the CFI in *Compagnie Maritime Belge (CEWAL)*:²⁴¹

“Moreover, the mere fact that the fine imposed on CMB is substantially greater than that imposed on the other undertakings is not in itself indicative of unequal treatment. In this case, the European Commission had regard to the fact that CMB controls a preponderant share of the trade, with the result that the impact of its actions on the market is significant, and that it occupies a decisive position within CEWAL. The Court further points out that, since the fine is also intended to dissuade the undertakings from committing the infringements in question anew, the European Commission was lawfully entitled to take account of the fact that vessels belonging to the CMB group carried, at the time when the Decision was adopted, almost all the cargoes of the conference. In those circumstances, the Court considers that, by imposing on CMB a fine substantially greater than that imposed on the other undertakings, the European Commission did not infringe the principle of equal treatment.”

8. Judicial Review

Article 31 of Regulation 1/2003 provides that the Commission’s decisions on fines are subject to the unlimited jurisdiction of the ECJ which can cancel, reduce or increase the imposed fines. This makes no change to the repealed Article 21 of Regulation 4056/86. The power to review concerns decisions of the Commission

²³⁶ Article 19(2) of Regulation 4056/86 allows a substantive fine of no more than 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement.

²³⁷ Article 19(2) para. 2 of Regulation 4056/86.

²³⁸ Article 23(2) of Regulation 1/2003.

²³⁹ For a detailed survey of the method of setting fines, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, O.J. 2006 C 210/2. See also *Ritter/Braun*, European Competition Law (2004), p. 1132 ff.

²⁴⁰ CFI 19 March 2003, case T-213/00 (*CMA CGM and Others v. Commission*), [2003] E.C.R. II-913, paras. 385 and 396.

²⁴¹ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 235.

in which a fine or a periodic penalty payment is fixed. Article 31 of Regulation 1/2003 is worded as if it were applicable only to the ECJ, but it actually also applies to the CFI.²⁴²

However, the judicial review in relation to the enforcement regime of Community competition rules should be evaluated more broadly. Generally, natural or legal persons have the right, pursuant to Articles 230 and 231 EC, to bring actions before the ECJ for the annulment of decisions by the Commission which have been directly addressed to them or directly or indirectly related to them. However, only those of the Commission's acts which have binding legal effects and affect substantive or procedural interests constitute acts or decisions within the meaning of Article 230 EC.²⁴³ Therefore, there are three kinds of appealable acts before the ECJ. First, appeals against the Commission's decisions can be brought before the ECJ; second, the Commission can be sued before the ECJ for its failure to take certain action which it is required to take under the EC Treaty or legislation enacted under the EC Treaty;²⁴⁴ third, when an appeal against a Commission decision has been lodged before the ECJ, the party filing the appeal may additionally ask the ECJ to grant an injunction suspending enforcement of the Commission decision or providing other interim relief.²⁴⁵ Since the last two kinds are of small importance for the procedural implementation of Community competition rules in the field of liner conferences, the following brief evaluation focuses on the first kind.

The appealable decisions of the Commission include, *inter alia*, decisions which are explicitly provided for in Regulation 1/2003, i.e. cease-and-desist orders, interim measures, decisions with commitments, decisions on fines and penalties, exemptions and negative clearance, decisions withdrawing or renewing exemption or decisions with commitments, and discovery as well as investigation orders. Furthermore, there are also a number of other acts of the Commission which are not expressly described as "decisions" falling under Regulation 1/2003 but affect the legal position of the addressees, such as decisions rejecting complaints, decisions refusing to issue an interim order, acts to disclose documents which are claimed to be confidential. These acts should also be considered appealable, though they lack the usual formality of a decision. As regards the rejection of

²⁴² It refers to the the general allocation of jurisdiction between the CFI and the ECJ under the first sentence of Article 225(1) EC in conjunction with Article 51 of the Statute of the ECJ, under which the CFI has jurisdiction for complaints by natural and legal persons against a body of the EC in the first instance. See *Karpenstein/Langner*, in: *Grabitz/Hilf*, Das Recht der EU, Band III, Art. 225 EGV, Rn. 4 (23. EL Jan. 2004).

²⁴³ The 37th Recital of Regulation 1/2003 states expressly that this Regulation respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union, O.J. 2000 C 364/1. Accordingly, Regulation 1/2003 should be interpreted and applied with respect to those rights and principles.

²⁴⁴ Article 232 EC in relation to ECJ 18 October 1979, case 125/78 (*GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v. Commission*), [1979] E.C.R. 3173.

²⁴⁵ Articles 242 and 243 EC.

complaints, it is stipulated that where the Commission has decided to reject a complaint without holding an investigation, the purpose of judicial review by the CFI is to ensure that the Commission's decision in question is not based on materially incorrect facts, and not vitiated by an error of law, manifest error of assessment or abuse of power.²⁴⁶

The grounds, on which the appellant can ask the ECJ to quash a decision of the Commission, are given in Article 230 EC. They include: 1) lack of competence (jurisdiction); 2) infringement of an essential procedural requirement; 3) infringement of the EC Treaty or of any rule of law relating to its application; 4) misuse of powers.²⁴⁷ If an appeal is upheld on some or all counts, the ECJ may, depending on how serious the infringement is, quash the decision in whole or in part. In this way the ECJ does not substitute the role of the Commission to make a decision, but requires the Commission to take necessary measures to comply with the ECJ's judgment and reconsider the case.²⁴⁸ Against the judgment of the CFI an appeal can be brought before the ECJ, but only on points of law.²⁴⁹

B. China's Procedural Rules of Competition Regulation on Liner Conferences

The RIMT contains a separate Chapter V entitled "Investigation and Settlement" which lays down the general procedural rules of competition regulation concerning international liner shipping services. These general procedural rules were supplemented by implementation rules in Chapter V of the IRRIMT. It is worthwhile to point out that Chapter V of the RIMT contains not only procedural rules but also penalty provisions. Chapter VI of the RIMT and Chapter VI of the IRRIMT are entitled "Legal Liability", but do not refer to sanctions or penalties on liner conferences due to anti-competitive practices. The only exception is Article 50 RIMT which, however, only gives a very general statement. In connection with the procedural and enforcement rules, an overview of the MOC as the main authority in charge of maritime regulation will be given below.

I. Initiation of Investigation

Article 35 RIMT provides for four substantive criteria for the initiation of the investigation. These four substantive criteria are not cumulative, but overlap. The

²⁴⁶ Cf. *Ritter/Braun*, European Competition Law (2004), p. 1148 ff.

²⁴⁷ For more details, see *Ritter/Braun*, European Competition Law (2004), p. 1157.

²⁴⁸ Article 233 EC. For more details, see *Ritter/Braun*, European Competition Law (2004), p. 1161.

²⁴⁹ Article 225(1) EC; Article 51 of the Statute of the Court of Justice; Articles 110 to 123 of the Rules of Procedure of the Court of Justice. For details, see *Peretz/Ward/Kreisberger*, in: Bellamy & Child – European Community Law of Competition (2008), Chapter 13, p. 1366, Rn. 13.252 *et seq.*

first criterion refers to liner conference agreements, operational agreements and freight rates discussion agreements which are concluded between international liner shipping undertakings concerning Chinese ports and may be detrimental to fair competition. The second criterion refers to all kinds of pools or alliances of international liner shipping undertakings which are established through agreements. When the services of such a pool or alliance involve more than 30% of the total transportation volume of a certain shipping route of a Chinese port for a period exceeding one year, and the services may be detrimental to fair competition, then the second criterion is fulfilled. The third criterion refers to the four categories of practices prohibitions laid down in Article 27 RIMT.

The last criterion is an open provision and refers to any other practices which may be detrimental to fair competition on the international maritime shipping market. Such an open provision is a frequent occurrence in Chinese legislation, as the Chinese legislator often feels that Chinese legislation still lags behind in comparison with the legislation of many developed countries and therefore needs more flexibility. However, such open provisions may initiate excessive government interference in commercial practice and reduce legal certainty and the predictability of legal implementation. In addition, due to the lack of provisions on assessment, the decision or judgment of the authorities, based on such an open provision, may be partial and favour the interests of the government, i.e. the MOC, and even the interests of some SOEs.

Investigations may be launched not only by the MOC on its own but also upon the request of interested parties.²⁵⁰ In case of a request of interested parties for investigations, the interested parties shall submit to the MOC an application in written form with the reasons for the investigations and necessary evidence.²⁵¹ The MOC shall, within 60 working days after the date of receipt of the request, evaluate the request and decide whether or not to start investigations. If the MOC considers that reasons given or evidence offered are insufficient, it shall decide not to start investigations and notify the applicant. The applicant can make a request for investigations again after adding new reasons or new evidence. An investigation shall be started if the MOC comes, after the request, to the conclusion that it is necessary to conduct investigations or if the MOC wants to conduct the investigation on its own pursuant to Article 35 RIMT. When it starts an investigation, the MOC shall inform the SAIC and the NDRC²⁵² of its evaluation and the relevant documents.²⁵³

²⁵⁰ Article 35 RIMT.

²⁵¹ Article 52(1) IRRIMT.

²⁵² The State Council department for price administration, mentioned here, is now the NDRC which was established on the basis of reorganisation of the previous State Development and Plan Commission.

²⁵³ Article 52(2) IRRIMT.

II. Investigation Authorities and Investigation Committee

1. Ministry of Communications (MOC)

The Ministry of Communications (MOC) of the State Council and the traffic departments of related regional governments²⁵⁴ are the authorities in charge of maritime administration and regulation within the meaning of Article 4 RIMT.²⁵⁵ The MOC is the national authority for maritime administration and the authority to decide on the regulation of competition in the maritime shipping market.

In October 1949, the MOC was established to be responsible for transport by road, air and ship and for construction. In July 1970, railway transport was added after the merger of the MOC and the Ministry of Railway. In January 1975, the MOC, suffering from another administrative reform, lost responsibility for railways and civil aviation.²⁵⁶ Therefore, the competence of the MOC covers only transport by ship (including international maritime transport and domestic waterway transport), port construction and road transport. Along with the dramatic development of maritime transport under the impact of reform and the opening after 1978, the MOC has been playing a more important role in Chinese shipping administration.

2. A New Regulatory Authority: Ministry of Transport

On 15 March 2008, the 11th NPC decided a reform of the State Council. According to the Reform Plan of the State Council,²⁵⁷ the MOC, the General Administration of Civil Aviation of China and the Urban Passenger Transport Agency of the Ministry of Construction²⁵⁸ were merged, becoming the new Ministry of Transportation.²⁵⁹ Most of the competences, organisation and personnel of the MOC were transferred to this new ministry. The old MOC is still relevant for the research as yet, especially in respect of the antitrust investigation against liner conferences in

²⁵⁴ The hereby mentioned “related regional governments” are principally the provinces and the direct-centrally ruled cities which have ports to and from which the international shipping transport services are carried out.

²⁵⁵ This provision is more clearly described in Article 2 IRRIMT.

²⁵⁶ The PRC Ministry of Railway and the PRC General Administration of Civil Aviation are, respectively, in charge for railway transport and civil aviation transport.

²⁵⁷ Reform Plan of the State Council 2008 [国务院机构改革方案 (2008年)], adopted at the 1st Session of the 11th NPC on 15 March 2008. For press release, see *Caijing Magazine* (Journal of Finance and Economics), 6/2008, p. 43 *et seq.*; *Zhengquan Bao* (China Securities Journal), 12. March 2008, p. A 07.

²⁵⁸ According to No. 7 of the Reform Plan of the State Council 2008, the Ministry of Construction are replaced by the new Ministry of Housing and Urban-Rural Development (MOHURD).

²⁵⁹ The Civil Aviation Administration of China (CAAC) and the State Post Bureau are administrated by the new Ministry of Transport. See No. 4 of the Reform Plan of the State Council 2008.

connection with Terminal Handling Charges (THC), which will be discussed below.²⁶⁰

3. Investigation Authorities

Article 36 RIMT determines the authorities in charge of the investigation. Under Article 36 RIMT, the MOC is the competent authority which carries out the investigation in cooperation with the SAIC and the NDRC. That means, the MOC, the SAIC and the NDRC are together referred to as “investigation authorities”.

The investigation of the investigation authorities shall be carried out by a specific “investigation committee”.²⁶¹ The investigation committee shall be established by the three investigation authorities together and at least consists of three members. An additional provision regarding the establishment of the investigation committee is given in Article 60(1) IRRIMT which requires, if an investigation is conducted on the cases specified in Article 38 IRRIMT, that personnel of the competent traffic department of the regional government where the investigated person has been registered for his qualification of services shall be included in the investigation committee.²⁶²

With regard to the competence of the investigation committee, there is a non-consonance in the provisions of the RIMT and the IRRIMT. Article 37(2) RIMT provides that the investigation committee shall inform the investigated person about the aim, cause and duration of investigation. However, this provision is lightly changed by Article 53(2) IRRIMT which requires the investigation authorities to inform the investigated person about the names of members of the investigation committee, cause and duration of investigation.

III. Investigation Procedure

1. Initiation and Duration of Investigation

The investigation shall be notified to the investigated person prior to the conduct of investigation.²⁶³ However, a clear period of time for this notification is not given. One question is the beginning of an investigation, which further refers to the calculation of the duration of an investigation.

It follows from the wording of Article 37(1) RIMT that the notification of investigation with the information on the aim of the investigation, its reasons and duration is not equal to the beginning of investigation, since the notification of investigation shall be carried out prior to the conduct of investigation. It could

²⁶⁰ See below Chapter VI. B. I.

²⁶¹ Article 37 RIMT in conjunction with Article 53(1) IRRIMT.

²⁶² Article 38 IRRIMT provides for the prohibition of anti-competitive practices conducted by International shipping agency operators, international vessel management operators, international maritime transport cargo storage business operators and international maritime transport container depot and stacking yard business operators. As to the registration of services qualification, see Article 22 IRRIMT.

²⁶³ Article 37(1) RIMT in conjunction with Article 53(2) IRRIMT.

give rise to a conflict of rules in respect of Article 53(2) IRRIMT which requires that the person under investigation shall reply to the investigation subject-matter within 30 days after the receipt of the notification. This provision implies that the notification of investigation is the beginning of investigation and the equal of the conduct of investigation. The determination of the beginning of an investigation is related to the calculation of the duration of investigation, since an investigation shall not exceed one year with the possibility of an extension.²⁶⁴

2. Right and Obligation of a Person under Investigation

The person under investigation shall, within 30 days after the receipt of the notification of investigation, reply to the subject matter of the investigation.²⁶⁵ However, it is not determined whether the reply shall be submitted in written form or may also be carried out orally. Generally it could be argued that the written form is necessary.

The IRRIMT provide that the person under investigation can request withdrawal of members of the investigation committee, if he considers that one or more members of the investigation committee have relevant interests in common with the investigation applicant.²⁶⁶ However, it is unclear to whom the person under investigation can put forward his application of withdrawal. It could be proper to say that the investigation authorities shall be in charge of such application of withdrawal, since they shall adjust the composition of the investigation committee when they consider the application of withdrawal justified.²⁶⁷

3. Scope of Investigation

As regards the scope of the investigation, Article 38 RIMT provides that the investigators may put questions to the person under investigation and enterprises or natural persons entertaining business relationships with the person under investigation. The investigators may also consult and make copies of the relevant documents, agreements, contracts, account books, business faxes, digital data and other pertinent data. However, there are no further provisions in respect of special measures such as the inspection of the related premises or the sealing of any relevant documents in case of urgency. Although it is also required that the person under investigation shall truthfully provide relevant information and material and shall not refuse investigation or conceal the true information or give false information,²⁶⁸ the penalty for the infringement of this information obligation is relatively light. According to Article 53 RIMT, those who refuse to cooperate in the investigations or conceal true information or give false information shall be ordered to make corrections and to pay a fine to the amount from 20,000 to 100,000 RMB.

²⁶⁴ Article 37(2) IRRIMT states that the time limit of an investigation can be extended for half a year where necessary and upon the approval of the investigation authorities.

²⁶⁵ Article 53(2) IRRIMT.

²⁶⁶ Article 53(3) IRRIMT.

²⁶⁷ The 2nd Sentence of Article 53(3) IRRIMT.

²⁶⁸ Article 39 RIMT in conjunction with Article 54(1) IRRIMT.

Therefore, it is questionable whether or not the investigation measures could be carried out effectively.

Another point in relation to the scope of investigation is the protection of business secrets. Investigators shall keep confidential business secrets of the investigated persons and the related enterprises as well as persons who have business relationships with the investigated persons.²⁶⁹ In this respect, the persons under investigation shall identify the business secrets to the investigation committee, and the investigation committee shall make a record of the business secrets in written form.²⁷⁰ If the investigated person finds that the members of the investigation committee disclose such business secrets and has sufficient evidence to support this blame, he has the right to make a complaint to the investigation authorities.²⁷¹ Further Provisions upon the administrative examination and decision pertaining to such infringement have not been given. The legal remedy for damages for the disclosure of business secrets by administrative organisations or their officials is not enough.²⁷²

4. The Right to be Heard

As regards the right of the parties pertaining to the investigation, the RIMT provides for the right to be heard. This right belongs not only to the person under investigation, but also to the other parties related such as the applicant. It is interesting to note that this right has been determined in the form of the obligation of the investigation authorities. Article 41 RIMT states that the investigation authorities shall inform the parties under investigation of the right to be heard before the investigation authorities decide on prohibitive or restrictive measures. The right to be heard may only be involved within a period of ten days after the receipt of the investigation authorities' notification of that right, see Article 59 IRRIMT.

5. Consultative Experts

The investigation committee can consult experts.²⁷³ However, the RIMT contains no further provisions on the organisation and activities of such consultative experts. Even the IRRIMT²⁷⁴ only state that the consultation with experts may be carried out before the authorities terminate the investigation. The subject-matter of such consultation has been limited to the assessment of the "degree of detriment to fair competition or to other parties of the transaction". Moreover, the provision on the withdrawal of members of the investigation committee in Article 53(3) IRRIMT is also applicable to consultative experts.²⁷⁵

²⁶⁹ Article 38(2) RIMT in conjunction with Article 54(2) IRRIMT.

²⁷⁰ Article 54(1) IRRIMT.

²⁷¹ Article 54(3) IRRIMT.

²⁷² The protection measures of confidential data are limited to administrative and criminal penalties imposed on the member(s) of the investigation group. Aside from that, there are no provisions relating to civil compensations for the person under investigation.

²⁷³ Article 37(1) RIMT.

²⁷⁴ Article 57(1) IRRIMT.

²⁷⁵ Article 57(2) IRRIMT.

6. Administrative Decision and Legal Remedy

After the investigation process has ended, the investigation authorities shall make a conclusion which shall be notified to the person under investigation and other related parties in written form.²⁷⁶ This conclusion is an administrative decision which shall have a given content in accordance with the three individual circumstances determined in Article 58 IRRIMT. Under the first circumstance that the “basic facts are not tenable”, the investigation authorities shall decide to terminate the investigation. However, the wording of “basic facts” is equivocal. Logically, it could be interpreted that the “basic facts” are infringements within the meaning of Article 35 RIMT in conjunction with Article 27 RIMT, namely practices detrimental to fair competition in the market of international maritime transport.

This interpretation of “basic facts” could be supported by further provisions relating to the conclusion of an investigation in respect of the second and third circumstances. Under the second circumstance that the “basic facts exist but are not in substance detrimental to fair competition in the market” the investigation authorities may decide not to take prohibitive or restrictive measures against the person under investigation. In respect of the term “may” instead of “shall”, it could be argued that the possibility of prohibitive or restrictive measures against infringement under the second circumstance shall not be excluded. Under the third circumstance that the “basic facts are clear and in substance detrimental to fair competition”, the investigation shall take prohibitive or restrictive measures pursuant to the RIMT. The prohibitive or restrictive measures as such are determined in Article 40 RIMT as follows:

- ordering the correction of relevant agreements;
- limiting the frequency of liner shipping services;
- suspending the carry-out of freight rates or the filing of freight rates; or
- ordering to regularly submit relevant documents.

In this respect, two points shall be noted. The first refers to the severity of such measures against anti-competitive practices. The second refers to the legal remedy against the administrative decision following the investigation.

a. Comparison with the General Penalty Provisions

In comparison with the penalty provisions laid down in the RIMT and the IRRIMT against infringements of general administrative law other than competition regulation, the prohibitive or restrictive measures in Article 40 RIMT are vague and light. The general legal liability including concrete penalty provisions has been set forth in Chapter VI of the RIMT and Chapter VI of the IRRIMT. The only provision pertaining to anti-competitive “investigation and settlement” in the RIMT and the IRRIMT²⁷⁷ is Article 50 RIMT which, however, only states a very general rule as follows:

²⁷⁶ Article 40(1) RIMT.

²⁷⁷ For example, Chapter V of the RIMT and Chapter V of the IRRIMT.

“Where, according to the conclusions reached by investigations, administrative penalties shall be imposed or parties have engaged in illegal conduct as stipulated in Article 27 of these Regulation, the departments responsible for communications, departments responsible for prices, or administrative departments responsible for industry and commerce shall impose penalties in accordance with the relevant laws and administrative regulations.”

Besides its vague and equivocal content of Article 50 RIMT,²⁷⁸ this provision only refers to the “relevant laws and administrative regulations”. It is a very general phenomenon that the Chinese legislator prefers to use the terms “relevant laws and administrative regulations” in order to supplement the legislative lacuna or to avoid ineffective enforcement. However, this legislative technique often causes more vagueness and uncertainty. Even in the case that the “relevant laws and administrative regulations” could refer to the Pricing Law, the LAUC as well as the related administrative regulations, it should be recalled that such laws and administrative regulations are, as shown above, not applicable to the regulation of liner conferences.²⁷⁹

Apart from Article 50 RIMT, the other penalty provisions laid down in Chapter VI of the RIMT and Chapter VI of the IRRIMT mainly refer to infringement of general administrative regulation such as license regulation, filing requirement, payment of surety bond, liaison office as well as illegal acts etc. The administrative penalties against such infringements are much sharper than the prohibitive or restrictive measures within the meaning of Article 40 RIMT, and often provide for measures like termination of operation, cancellation of operation permit, prohibiting vessels from entering the PRC ports, confiscation of illegal income, imposing fines and even criminal charges.²⁸⁰

b. Legal Remedy

The second point refers to the legal remedy for addressees of administrative decisions. Neither the RIMT nor the IRRIMT have laid down any provisions on legal remedies against the administrative decision concluding a competition investigation. It is unclear whether the administrative review can be applied for against such administrative decision. Therefore, the question arises whether the Administration Litigation Law²⁸¹ and the Administration Review Law²⁸² could apply as the general legal basis to supplement this legislative defect.

The scope of application of the Administration Litigation Law is determined in Article 11(1) of the Administration Litigation Law according to which proceed-

²⁷⁸ Zhang, *The Regulation of Competition Law in International Shipping Transport* (2005), p. 160.

²⁷⁹ See above Chapter II B. II. 2. b. and Chapter II B. II. 3. d.

²⁸⁰ E.g. Article 54 RIMT.

²⁸¹ Administration Litigation Law [行政诉讼法], adopted at the 2nd Session of the 7th NPC on 4 April 1989 and effective as of 1 October 1990.

²⁸² Administration Review Law [行政复议法], adopted at the 9th Session of the Standing Committee of the 9th NPC on 29 April 1999 and effective as of 1 October 1999.

ings can be initiated before the courts by natural or legal persons or other organizations against any of the following specific administrative acts:

- 1) administrative penalties such as detention, fine, revocation of a business license or permit, order of suspension of production or business or confiscation of property;
- 2) administrative measures of limiting personal freedom or sealing up, confiscating or freezing up property;
- 3) administrative infringement of lawful autonomy of business operation;
- 4) administrative refusal of issuance of or silence to the application for a permit or license pursuant to laws;
- 5) administrative repudiation of or silence to the application for performance of legal protection of personal rights and property rights;
- 6) administrative failure in duty to distribute a pension pursuant to law;
- 7) unlawful administrative request of obligation performance; and
- 8) administrative infringement of other personal and property rights.

In addition to the above provisions, Article 11(2) of the Administration Litigation Law adds an open clause that the people's court shall also accept other administrative proceedings which may be initiated in accordance with the provisions of relevant laws and regulations apart from the provisions in Article 11(1) of the Administration Litigation Law. Since the RIMT and the IRRIMT do not contain such provisions, the possibility for administration proceedings against administrative decisions within the meaning of Article 40 RIMT and Article 58 IRRIMT is excluded. As regards administrative review, Article 6 of the Administration Review Law settles the scope of application of the Administration Review Law and provides for eleven circumstances which are in large measure similar to the scope under Article 11 of the Administration Litigation Law.²⁸³ Since an administrative

²⁸³ The eleven circumstances under Article 6 of the Administration Review Law include 1) an administrative sanction, such as warning, fine, confiscation of illegal gains or property, order to suspend production or business, suspension or rescission of license or permit, administrative attachment, which one refuses to accept; 2) a compulsory administrative measure, such as restriction of personal freedom or the sealing up, seizing or freezing of property, which one refuses to accept; 3) an administrative decision of altering, suspending or discharging certificates, such as a license, permit, credit certificate, credential, which one refuses to accept; 4) an administrative decision of confirming ownership or the right to use of natural resources, such as land, mineral resources, rivers, forests, mountains, grasslands, unreclaimed land, beaches, maritime waters, which one refuses to accept; 5) infringement of one's managerial decision-making power, which, one holds, has been perpetrated by an administrative organ; 6) cases where an administrative organ, which has altered and nullified one's agricultural contract, is considered to have infringed upon one's rights and interests; 7) cases where an administrative organ is considered to have illegally raised funds, levied property, apportioned charge, or demanded the performance of duties; 8) cases where an administrative organ is considered to have illegally issued a certificate, such as a permit, license, credit certificate, or credential, or examining and approving or registering relative items, which one considers oneself legally qualified to apply for; 9) cases where an administrative

decision on anti-competitive practices does not fall within the scope of Article 6 of the Administration Review Law, the legal remedy of administrative review is also excluded. At last, it should be noted that this legislative deficiency refers not only to the person under investigation, but also to the investigation applicant whose market interest may be damaged by anti-competitive practices and who tries to initiate the investigation pursuant to Article 35 RIMT.

C. Conclusion

The effective implementation of competition rules depends on the effectiveness of procedural rules. The EC has adopted the general procedural rules for implementation of general competition rules at the very beginning (Regulation 17) and advanced a full-scaled modernization (Regulation 1/2003). Similar to the general competition rules of the Community, the general procedural rules are directly applicable to almost all fields of economic regulation, namely also to the regulation of liner conferences. The situation in China is different. Before the AML was adopted in 2007, no procedural rules in the general and common sense were available. The sector-specific regulation could only be carried out on its own procedural provisions.

Regulation 4056/86 contains also procedural provisions. However, these sector-specific procedural provisions deviate much from the previous notification system in Regulation 17 and come closer to the new system of legal exception in Regulation 1/2003. After the adoption of Regulation 1419/2006, the regulatory procedure on liner conferences shall, except for the monitoring provisions in Regulation 4056/86, directly follow the general procedural rules in Regulation 1/2003. China's regulatory procedures on liner conferences are primarily based on the procedural provisions in the RIMT and the IRRIMT. Although such procedural provisions cover the main aspects of regulation procedures, such as the investigation authorities, initiation of investigation as well as investigation measures and hearings etc., most of them are not detailed, conflicts between individual provisions can be found and an effective implementation is difficult to expect.

organ is considered to have failed to perform its statutory duty, according to law, of protecting one's rights of the person and of property, and one's rights to receive education, as one has applied for; 10) cases where an administrative organ is considered to have failed to issue a pension, social insurance money or minimum maintenance fee for living according to law; and 11) cases in which other specific administrative acts of an administrative organ are considered to have infringed other lawful rights and interests.

Chapter VI: Future Perspectives after the Change of the Regulation Regime

A. Liner Shipping beyond the Expiration of Block Exemption in the EU

I. Incompatibility of Regulation 4056/86 with Articles 81 and 82 EC: A Substantive Review

The review and the consequent repealing of Regulation 4056/86 were related to the question of incompatibility of Regulation 4056/86 with Articles 81 and 82 EC. This question has been analysed from the legislative point of view in the preceding research.¹ From the substantive point of view, it will be discussed in the following sections, so as to allow a complete understanding of the incompatibility of Regulation 4056/86 within the system of Community competition rules.

1. Decision Practice and Systematic Review

a. Restrictive Interpretation in Decision Practices

In its decisions related to Regulation 4056/86 the Commission has, with the support of the ECJ, favoured a restrictive interpretation of Regulation 4056/86.² From a historical point of view, the Commission began acquiring experience from 1987 to 1990 in maritime transport after the adoption of Regulation 4056/86 and made an effort to reconcile the paradoxical regulation regime of Regulation 4056/86 with the system of the primary Community competition rules. Until the early 1990s, the Commission appeared to believe that collusion within and without conferences could be tolerated, provided that the activities of the maritime cartels could be very directly controlled.³ Between 1990 and 1994 the Commission's interpretation of Articles 81 and 82 EC reached its maturity, as many of the decisions applying these provisions stem from this period.⁴ Thus, the interpretation and application of Regulation 4056/86 became more restrictive on an individual basis, while a generous block exemption remained in general. From 1995 a new stage began in view of two respects. The first is the definition of the limits of the

¹ See above Chapter II A. IV.

² Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Ver-kehr, C., p. 1527, Rn. 13.

³ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 142.

⁴ *Ibid.*

scope of the liner conference block exemption through the judicial control of Commission decisions; the second consisted in an extension of the Commission's interpretative approach to liner shipping practices seriously restricting competition.⁵ In the years afterwards, the Commission took a tough line in its decisions concerning the application of Regulation 4056/86 and Articles 81 and 82 EC⁶ and broadened its horizon to include large-scale concentrations in the liner shipping sector in relation to merger control.⁷ As a result, the exemption under Regulation 4056/86 could not, as declared and confirmed in related case law, signify that every restriction of competition brought about by liner conferences remains outside the general prohibition laid down by Article 81(1) EC.⁸

b. A Systematic Review in the Light of Articles 81 and 82 EC

The incompatibility of the block exemption for liner conferences with Articles 81 and 82 EC follows from their characteristic as “hard core cartels” and serious restrictive practices, which were justified and preserved under Regulation 4056/86, without any critical analysis based on competition rules and industry

⁵ *Ibid.*, p. 143.

⁶ For example, Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwal*), O.J. 1993 L 34/20 confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201 and ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365. Moreover, Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, “TAA”*), O.J. 1994 L 376/1; Commission Decision 94/985/EC of 21 December 1994 (*DSVK v. FEFC*), O.J. 1994 L 378/17; Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, “TACA”*), O.J. 1999 L 95/1; Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53; Commission Decision 2000/627/EC of 16 May 2000 (*Far East Trade Tariff Charges and Surcharges Agreement, “FETTCSA”*), O.J. 2000 L 268/1.

⁷ For example, Commission Decision of 19 December 1996 (Case No. IV/M.831 – *P&O Royal Nedlloyd*), O.J. 1997 C 110/7; Commission Decision of 7 May 1999 (Case No. IV/M.1474 – *Maersk/Safmarine*), O.J. 1999 C 176/9; Commission Decision of 6 October 1999 (Case No. IV/M.1651 – *Maersk/Sea-Land*), O.J. 1999 C 313/6; Commission Decision 99/421/EC of 26 January 1999 (*P&O Stena Line*), O.J. 1999 L 163/61; Commission Decision of 29 November 2002 (*Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine*) (COMP/M.2879), O.J. 2003 C 30/31; Commission Decision of 22 December 2004 (*ECT/PONL/EUROMAX*) (COMP/M.3576), not yet published; Commission Decision of 29 July 2005 (*Maersk/PONL*) (COMP/M.3829), not yet published; Commission Decision of 12 October 2005 (*TUI/CP SHIPS*) (COMP/M.3863), not yet published. See also *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 143 and 144.

⁸ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, para. 50; CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, “FEFC”*), [2002] E.C.R. II-1011, para. 253.

study,⁹ provided that the four cumulative criteria of Article 81(3) EC are fulfilled.¹⁰ This attitude simply accepted a standard argument in favour of the *status quo* of the liner shipping industry which enjoyed a vacuum of legislative review for a long time.¹¹

Therefore, it is necessary to reconsider Regulation 4056/86 in the light of Article 81(3) EC by examining each aspect of these four cumulative criteria. In addition, the market power of liner carriers in the form of their collective dominant position must be considered in judging their abusive activities within the meaning of Article 82 EC. That means, the fourth and last criterion of Article 81(3) EC, i.e. no elimination of competition for a substantial part of the products in question, is closely connected with the question of dominance and thus connected with Article 82 EC. This affects the analysis below.

The fourth criterion under Article 81(3)(b) EC prohibits a cartelization through elimination of effective residual competition and complies with the principle of the EC Treaty to ensure that competition in the internal market is not distorted.¹² Under the fourth criterion there are two main issues which concern the question whether anti-competitive agreements afford the participating undertakings the possibility of eliminating competition in respect of a substantial relevant product market. The first is how much competition remains between the participating undertakings of the agreement concerned (internal competition); the second is how much competition remains with outsiders (external competition). While internal competition deals with the question whether the cooperation between the participating undertakings extends to all competitive parameters or whether it leaves to the parties the possibility of individual market behaviour, the evaluation of external competition is based on the same factors as taken into consideration under Article 82 EC, i.e. market shares, dominant position and abusive activities.¹³ Therefore, the fourth criterion of Article 81(3) EC should be analyzed from the point of view of internal and of external competition respectively.¹⁴

⁹ See above Chapter II A. I. in conjunction with Chapter I A. I. 1.

¹⁰ The 8th Recital of Regulation 4056/86.

¹¹ As far as the position of the Commission is concerned, an attitude, that there was no need to change or even abolish the block exemption for price fixing practices of liner conferences and Article 3 of Regulation 4056/86 must only be interpreted narrowly in line with the EC Treaty, has been repeated until the start of the review of Regulation 4056/86. See *Fitzgerald*, *Stability v Competitiveness* (1999), p. 5; *Wood*, *Recent Commission Decisions Concerning the Scope of the Group Exemption for Liner Conferences* (1999), p. 18; *Lang*, *Current Issues in EC Maritime Competition Law* (1993), p. 406. Cf. *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 156; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; C., p. 1527, Rn. 13.

¹² *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht* (2004), § 13 Rn. 68, p. 356.

¹³ *Ibid.*, § 13 Rn. 68 *et seq.*, p. 356; *Ritter/Braun*, *European Competition Law* (2004), p. 157 ff.

¹⁴ See *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 161 ff. It is true that a dominant position is not a requirement of the fourth criterion of Article 81(3) EC and insofar cannot solely give the excluding effect of an exemption. In *TAA*, the Commis-

Accordingly, a review of a liner conference must include five aspects:

- 1) The agreement must contribute to improvement of production or distribution or to promotion of technical or economic progress, namely economic or technical advantage;
- 2) Consumers must be allowed a fair share of the resulting benefit, namely the economic advantages;
- 3) Any restrictions imposed must be indispensable to attaining the preceding objectives;
- 4) The agreement must not be capable of eliminating inside competition between the liner shipping companies which are members of the liner conference; and
- 5) The collective dominant position must not be abused with the aim of distorting or eliminating outside competition.

2. Economic or Technical Advantage

a. General Review

As to the first criterion of Article 81(3) EC, emphasis is given to “efficiency gains”.¹⁵ Efficiency claims must identify the nature of the efficiencies, the link with the agreement, their likelihood and magnitude, the means and any cost of

sion took the position that the members of the Trans-Atlantic Agreement (TAA) did not compete with each other in an effective manner and held market shares close to 70% (Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, “TAA”*), O.J. 1994 L 376/1, paras. 286 and 439). The CFI confirmed Commission’s findings concerning internal competition and market shares of the members of TAA, on one hand, but held on the other hand, that it was impossible to reach a definitive negative conclusion of admission of the fourth condition of the exemption solely on the basis of this information (CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission, “TAA”*), [2002] E.C.R. II-875, para. 330). Furthermore, the CFI stated that a dominant position cannot be treated, purely and simply, as the elimination of competition for the purpose of Article 81(3) EC and then declared that the prohibition on eliminating competition was a narrower concept than the existence or acquisition of a dominant position, and therefore the TAA could be considered as an agreement which did not eliminate competition within the meaning of Article 81(3)(b) EC and fulfilled the requirements of the exemption (CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission, “TAA”*), [2002] E.C.R. II-875, paras. 328–330; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, para. 939). As regards different arguments as to the relation between the elimination of competition within the meaning of Article 81(3) EC and a dominant position within the meaning of Article 82 EC, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 417 ff. w.f.r. in Fn. 52 and Fn. 55.

¹⁵ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, paras. 48–72. See CFI 14 July 1994, case T-77/92 (*Parker Pen Ltd v. Commission*), [1994] E.C.R. II-549, paras. 29–34. See also the exemptions granted for trade fairs, e.g. ECJ 9 July 1987, case 43/85 (*Associazione nazionale commercianti internazionali dentali e sanitari (Ancides) v. Commission*), [1987] E.C.R. 3131. Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 295.

achieving the efficiencies,¹⁶ otherwise the first criterion of Article 81(3) EC will not be met because of the lack of a clear contribution to an improvement in production or distribution or to technical or economic progress. For the contribution to improvement in production or distribution of products in question, the restrictions on competition of undertakings must be proven to be objectively capable of producing economic or technical advantages which are appreciable within the meaning of the first criterion of Article 81(3) EC. The advantages should be objective¹⁷ and appreciable.¹⁸ This rule derives from a classic judgment concerning the improvements referred to in the first criterion of Article 81(3) EC and was confirmed in numerous judgments and decisions.¹⁹

¹⁶ Cooperation may be justified and can lead to substantial economic benefits, in particular where companies need to respond to increasing competitive pressure and to a changing market driven by globalization, the speed of technological progress and the more dynamic nature of markets. See Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, paras. 32–33 and 56; also cf. Commission Decision 2003/300/EC of 8 October 2002 (*IFPI Simulcasting*), O.J. 2003 L 107/58, para. 84.

¹⁷ Objective advantages exist, in principal, when the parties to the restrictive agreement are not the only ones to benefit from them. On the contrary, subjective advantages, which contribute to the improvement of the parties, e.g. increase in profits, is not sufficient to fulfil the first condition of Article 81(3) EC. However, if the improvement in the parties' situation had a favourable effect on the market or on the economy in general, these advantages could not be overlooked. For more details, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 297, Fn. 51 w.f.r.

¹⁸ Advantages will be appreciable when the positive economic aspects of the agreements and restrictive practices not only equal but actually outweigh sufficiently the negative consequences for competition in the market.

¹⁹ For example in *Consten and Grundig*, the ECJ established that “improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition”. See ECJ 13 July 1966, joined cases 56 and 58/64 (*Consten and Grundig v. Commission*), [1966] E.C.R. 299, para 348. The possible advantages are alternatives. The Commission often accepts various advantages at the same time when justifying fulfilment of the first condition. Beyond the typical advantages such as cost reductions, an increase in the variety of products offered for sale or an improvement in their quality, the interpretation of this condition takes also into account advantages that are not purely economic. For example, the Commission has accepted the contribution to greater protection of the environment as an advantage for the purposes of Article 81(3) EC. The ECJ has accepted the possibility of considering the promotion or maintenance of full employment, which constitutes an advantage for workers and the economy in general, as coming with the objectives covered by Article 81(1) EC, since it is a contribution to improving the general conditions of production, particularly when the economic situation is unfavourable. But certain advantages of a general nature, such as social progress or regional development, may not be sufficient in themselves to justify fulfilment of the first condition of Article 81(1) EC if no economic advantages can be shown. Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 295 ff.; *Ritter/Braun*, European Competition Law (2004), p. 144 ff.

b. Liner Conferences

The first and most important advantage that Regulation 4056/86 attributed to liner conferences is that they make possible the stability of the scheduled maritime transport market. According to the 8th recital to Regulation 4056/86, “conferences have a stabilizing effect, assuring shippers of reliable services” and “they contribute generally to providing adequate efficient scheduled maritime transport services.” In this way, the secondary advantages implied in Regulation 4056/86 include reliability, regularity, adequacy and efficiency of services.²⁰

aa. Stability

Stability was defined by the Commission as follows: “the maintenance of freight rates at a more or less constant level by liner conferences, in accordance with a set structure ..., over a substantial period of time”.²¹ The core of this advantage is the stability of freight rates,²² in other words, freight rate fixing.

The stability through freight rate fixing resulted from the restriction and even elimination of price competition between carriers as members of liner conferences.²³ Price competition is the most visible and important, but by no means the only, form of competition.²⁴ In general, restrictive agreements on price fixing cannot satisfy Article 81(3) EC because of their severe detriment to consumer interests,²⁵ and “none of the substantive conditions for exemption can be considered to be met by a price fixing agreement which is patently intended merely to restrict competition.”²⁶ However, exemptions could also be granted in exceptional circumstances, especially in specific sectors. Against the opinions in favour of

²⁰ Ortiz Blanco, Shipping Conferences under EC Antitrust Law (2007), p. 299.

²¹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para. 388.

²² *Ibid.*, paras. 387–389; Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, para. 367.

²³ CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, “TACA”), [2003] E.C.R. II-3275, para. 1619.

²⁴ See ECJ 25 October 1977, case 26/76 (*Metro SB-Großmärkte GmbH & Co. KG v. Commission*), [1977] E.C.R. 1875, paras. 20–21. Price competition contributes to maintaining the price at the lowest possible level and encourages trade in goods between the Member States, thereby making possible an optimal allocation of resources based on the relative productivity and adaptability of undertakings, and giving consumers the benefits of a wide selection of goods and services, see ECJ 14 July 1972, case 48/69 (*Imperial Chemical Industries Ltd. v. Commission*), [1972] E.C.R. 619, para. 115.

²⁵ ECJ 10 December 1985, case 240/82 (*Stichting Sigarettenindustrie (SSI) and Others v. Commission*), [1985] E.C.R. 3831, paras. 83–85; Commission Decision 85/74/EEC of 23 November 1984 (*Peroxygen products*), O.J. 1985 L 35/1, para. 16.

²⁶ Commission Decision 86/399/EEC of 10 July 1986 (*Roofing Felt*), O.J. 1986 L 232/15, para. 98.

exemption of liner conferences,²⁷ it must be examined whether freight rate fixing could really contribute to stability.

First, as declared by the OECD Report 2002,²⁸ the conditions of liner shipping markets, as a whole, “are not unique to the liner shipping sector, but are faced by any capital intensive industry providing a guaranteed and/or scheduled service (e.g. air cargo, power generation, etc.)”. Hence, a particularly generous exemption for freight rate fixing within liner conferences cannot be justified any more only on the basis of the argument of fluctuation and instability which exist not only in maritime transport industry but also in other similar sectors.

Second, the question whether liner conferences can actually fulfil the function of stability requires an examination of the practical activities of liner conferences.²⁹ Empirical research shows that general rate increases have taken place excessively frequently and cannot meet the stability requirement of the UNCTAD Liner Code in the form of a period of a stated minimum duration.³⁰ Therefore, the causality between price fixing and the quality of transport services offered by liner conferences is questionable. According to the OECD Report 2002, the improvements in services do not appear to have resulted from the power of conferences in price fixing, but on the contrary from the circumstance that this power has waned

²⁷ The foremost opinion supporting exemption of liner conferences is the presumption that maritime transport is characterised by considerable fluctuation and instability and the freight rate fixing as a control through liner conferences has the stabilizing effect which is favourable for both carriers and transport users. Cf. the 8th Recital of Regulation 4056/86; Proposal of 13 October 1981 for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, COM (81) 423 final, O.J. 1981 C 282/4, Commission Memorandum, pp. 6–7.

²⁸ OECD, Final Report on Competition Policy in Liner Shipping (2002), paras. 33 and 119–121.

²⁹ For a more comprehensive analysis, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 326 ff.

³⁰ The UNCTAD Liner Code provides for “General Freight-rate Increases” in its Article 14 and requires especially that conferences should institute any general freight-rate increases effective in accordance with this Code for a period of a stated minimum duration. (Article 14(9) of the UNCTAD Liner Code). These provisions serve to promote the stability effects in the related market. Since Regulation 4056/86 should be interpreted in accordance with the UNCTAD Liner Code (see the 4th Recital of Regulation 4056/86), it is accepted that a stability effect through the control of “General Freight-rate Increases” is also expected by Regulation 4056/86 from liner conferences. However, the empirical study shows that the “General Freight-rate Increases” take place, at most, every 12 months, and sometimes even less time passes between them. Even if the carriers’ claim was regarded that principally conference tariffs have remained stable in the 10-year period up to 2003, an opposite argument could be convincing that conferences have not offered stability, fundamentally because of the frequency of “General Freight-rate Increases” and the imposition of new and increasingly more substantial surcharges. See *ELAA*, Reponse to Consultation Paper on the Review of Regulation 4056/86 (2003), pp.13–14, paras. 3.29–3.35; and *ELAA*, Comments on responses submitted by third parties (2003), p. 5, para. 2.8. Cf. *AUTF*, Public Hearing on Review of Regulation 4056/86 (2003), pp. 16–20.

in recent years and carriers have had to seek new strategies to remain viable in a more competitive environment.³¹ Furthermore, the increase in the size of vessels leads to overcapacity which derives from the economic inevitability of cartelisation in the liner shipping market but in practice did strengthen rather than reduce the instability in that market.³² As regards the tariff structure, discriminatory tariffs³³ of liner conferences in practice often resort to cross-subsidies, favouring certain members and restraining the competition from independents, which serves the aim of profit maximisation but often fails to maintain the stability of freight rates.³⁴ As far as the controversial nature of malpractices within the common or uniform freight rate system is concerned,³⁵ there still is a great paradox unsolved under Regulation 4056/86. As far as the stability function of liner conferences to avoid destructive competition in the form of price wars³⁶ is concerned, price wars have often been used as a weapon to cope with outside competition, i.e. the independents and have been a source of instability.³⁷ Ancillary surcharges which derive partly from common discount practices and partly from price wars also constitute an instability factor. The amount of surcharges is increasing and the structure of total tariffs becomes more complicated. The lack of transparency relating to the surcharges, especially the questionable risk management strategy, could aggravate uncertainty, cost burden and fluctuation on the side of shippers.³⁸

³¹ *OECD*, Final Report on Competition Policy in Liner Shipping (2002), para. 121.

³² For more details on economic theoretical analysis, see *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 328.

³³ As to the justification of discriminatory pricing to different transport goods and its compliance with the requirement of common or uniform freight rates, see above Chapter IV A. I. 3, Chapter IV A. II. 3. b. and Chapter IV A. III. 1.

³⁴ See *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 329 ff.

³⁵ See above Chapter IV A. II. 3. b.

³⁶ The argument favouring liner conferences centers on the inside relation between the carriers as members of liner conferences by arguing that price wars would lead carriers members to a suicidal downward spiral.

³⁷ The adjustment of common or uniform freight rates within liner conferences often leads to instability, and the stability within and outside the liner conferences would be achieved again often on the basis of further restriction on competition. For example, after a period of time of price wars, the independents may be unable to continue the battle with liner conferences' price cutting and abandon the trades; or the independents become associated with liner conferences on acceptable conditions either as a full member or as a tolerated outsider. See *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 334.

³⁸ The amount of surcharges is increasing and the structure of total tariffs becomes more complicated. The lack of transparency relating to the surcharges, especially the questionable risk management strategy, could aggravate uncertainty, cost burden and fluctuation on the side of shippers. Cf. *OECD*, Final Report on Competition Policy in Liner Shipping (2002), paras. 98–100; see also Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, "TACA"*), O.J. 1999 L 95/1, para. 475.

In conclusion, stability through freight rate fixing could actually not be guaranteed within the system of liner conferences.

bb. Reliability and Regularity

As regards liner shipping, reliability is defined by the Commission as “the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their need.”³⁹ Thus reliability derives directly from stability, which consists principally in the form of price fixing.⁴⁰ Regularity is considered by the Commission as “the very essence of liner services; it constitutes their special feature compared with unscheduled tramp services.”⁴¹ Therefore regularity can not be seen as an advantage within the meaning of Article 81(3) EC.⁴²

cc. Adequacy and Efficiency

Adequacy is a concept generally directly related to quality of transport services and refers to shippers’ service requirements and should be measured according to whether and to what extent the services of liner conferences have met these ser-

³⁹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para 388.

⁴⁰ Ortiz Blanco, Shipping Conferences under EC Antitrust Law (2007), p. 300, 321.

⁴¹ Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement*, “TAA”), O.J. 1994 L 376/1, para 388. The Commission stated in its decision of TACA that “liner services are, by their nature, regular in the sense of an evenly-spread timetable” (Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, para. 330). In applying Community competition rules in a more general sense, the ECJ has considered on one occasion regularity of supplies to be a sufficient advantage to show that consumers had received a fair share of the benefit resulting from the advantages derived from the restrictions on competition permitted by the Commission, see ECJ 25 October 1977, case 26/76 (*Met-ro SB-Großmärkte GmbH & Co. KG v. Commission*), [1977] E.C.R. 1875, para. 48.

⁴² The exclusion of reliability and regularity as effective advantages deriving from stability is also related to a wider interpretation of stability which was held by the carriers. This opinion argued a wider interpretation of stability which included not only freight rates, but also the permanence of conference members on the routes where they operate and as well as stability in the provision of services, in the sense of durability, or the uninterrupted presence of carriers on their different routes. See e.g. CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission*, “TAA”), [2002] E.C.R. II-875, paras. 114–116; ELAA, Reponse to Consultation Paper on the Review of Regulation 4056/86 (2003), p. 6, para 3.5; ELAA, Issues Paper on the Review of Regulation 4056/86 (2003), pp. 21 and 25, paras. 7.8 and 7.24 ff.; ELAA, Proposal for a New Regulatory Framework for the Liner Shipping Industry (2005), para. 2.1. This wider interpretation, however, was not accepted by the Commission and classified as “an incorrect view of the stability of services, according to which the stability of transport means the protection of all existing services and requires protection against all competition, which is considered destructive”. See Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement*, “TACA”), O.J. 1999 L 95/1, para. 347; Ortiz Blanco, Shipping Conferences under EC Antitrust Law (2007), p. 301.

vice requirements.⁴³ “Efficiency” is defined by the Commission as “supplying the right product at the right price”.⁴⁴ This complies with the interpretation of the OECD.⁴⁵

In order to achieve adequacy and efficiency, liner conferences must carry out rationalisation agreements or the control of supply,⁴⁶ since price fixing alone is not enough to restrain the natural impulse of competition within the system of liner conferences.⁴⁷ However, the OECD Report 2002 shows that liner conferences have historically failed to achieve efficiency on two points: liner conferences have always sought to protect the least efficient carriers and overcapacity is a constant and distinct trend in this industry.⁴⁸ In conclusion, adequacy and efficiency could not be considered as advantages of liner conferences any more.

3. A Fair Share of Benefits for Consumers

a. General Review

Consumers must be allowed a fair share of the resulting benefits in order to justify the grant of an exemption under Article 81(3) EC. The definition of “consumers” should not be interpreted narrowly and generally refers to the customers of the parties to the agreement and subsequent purchasers, e.g. undertakings or final consumers.⁴⁹ As regards the scope of consumers to be taken into account, the decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers.⁵⁰

For a “fair share”, it is required that the passing-on of benefits must compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1) EC. Consequently, if such consumers are worse off following the agreement, the second condition of Article 81(3)

⁴³ Commission Consultation Paper of 27 March 2003 on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, para. 63; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 337.

⁴⁴ Commission Consultation Paper of 27 March 2003 on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, para. 64.

⁴⁵ It is said that economic efficiency requires that markets meet two more conditions: 1) each unit of output is consumed by those most willing to pay for it; 2) the right amount of output is produced so that prices reflect cost. *OECD*, Final Report on Competition Policy in Liner Shipping (2002), para. 122.

⁴⁶ Such as market sharing through geographical and temporal distribution of sailings, calls and transport capacity between the cartel members.

⁴⁷ Cf. *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 351.

⁴⁸ *OECD*, Final Report on Competition Policy in Liner Shipping (2002), para. 122.

⁴⁹ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 84. See also *Ritter/Braun*, European Competition Law (2004), p. 152; *Pace*, European Antitrust Law (2007), p. 87.

⁵⁰ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 87. See also CFI 21 March 2002, case T-131/99 (*Shaw and Others v. Commission*), [2002] E.C.R. II-2023, para. 163.

EC is not met.⁵¹ However, in respect of the qualitative requirement of the “fair share” of the benefits, it is not required that consumers receive a share of each and every efficiency gain identified under the first criterion of Article 81(3) EC. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement.⁵²

As regards the analytical principle for assessing the passing-on of benefit, the Commission holds the opinion that the second criterion of Article 81(3) EC incorporates a sliding scale. The greater the restriction of competition found under Article 81(1) EC the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. On the contrary, if the restrictive effects of the agreement are substantial and the cost savings are relatively insignificant, it is very unlikely that the second condition of Article 81(3) EC will be met. In relation to this assessing method, the impact of the restriction of competition depends on the intensity of the restriction and the degree of competition that remains following the agreement.⁵³ This method of assessment complies with Community case law.⁵⁴

b. Liner Conferences

As far as the liner shipping market is concerned, the term “consumers” mainly refers to shippers as transport users. They are not final consumers in the general meaning but industrial or commercial undertakings which utilize schedule liner shipping services to obtain import goods or transport export goods to other distant markets. These goods will still go through various stages of transport services until they reach final consumers in general meaning.

In the liner shipping market, the assessment of the fair share of benefits for consumers should take two points into account. First, the intensity of the restriction on competition directly affects the sliding scale as a measurement instrument. As shown in the precedent analysis, in the liner shipping market the restrictive effects of liner conferences are substantial and the economic efficiency gains are relatively insignificant. Therefore, it is unlikely that the second criterion of Article 81(3) EC could be considered to have been fulfilled. Second, the second criterion of Article 81(3) EC is closely linked with, even dependent on the first criterion of

⁵¹ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 85.

⁵² *Ibid.*, para. 86.

⁵³ *Ibid.*, paras. 90–91.

⁵⁴ In *SPO*, the CFI held that a restrictive agreement whose benefits are limited (i) in comparison with the inconveniences that the consumer must stand and (ii) in comparison with the benefits obtained by undertakings which put it into practice, could not be authorized. Accordingly, Article 81(3) EC cannot apply when the relation between the benefits obtained by the undertakings and those obtained by consumers is not proportionate. See CFI 21 February 1995, case T-29/92 (*Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) and Others v. Commission*), [1995] E.C.R. II-289, para. 295.

Article 81(3) EC. Therefore, the evaluation of the economic advantages resulting from the restrictive agreements is important. It is perhaps for that reason that the Commission has, to a lesser extent in comparison with the other criteria of Article 81(3) EC, focused on verifying that consumers receive a fair share of the efficiency gains but often taken for granted that a sufficient passing-on of benefits occurred under the condition that competition was not eliminated.⁵⁵ As regards the liner shipping industry, it is logical to say that a qualitative analysis of “fair share” and passing-on effects of the benefits or economic advantages could hardly be imagined, if the claimed economic advantages could not be proved.⁵⁶ In other words, liner conferences cannot produce sufficient advantages to compensate for the much greater damage that they do as regards competition.

4. Indispensable Nature of the Restrictions on Competition

a. General Review

If a restrictive agreement fulfils the first and second criteria of Article 81(3) EC, the function of the third criterion of Article 81(3) EC is to prevent a legal exception or block exemption from being granted to this agreement when its restrictive nature is not indispensable for the attainment of economic advantages.⁵⁷ This means, it is necessary to evaluate whether legitimate objectives can be achieved with less restrictive means,⁵⁸ in other words, whether the restrictive agreement

⁵⁵ Cf. *Kjolbye*, The New Commission Guidelines on the Application of Article 81(3) (2004), p. 573.

⁵⁶ For more detailed discussion, see *Ortiz Blanco*, Shipping Conferences under EC Anti-trust Law (2007), p. 358 ff.

⁵⁷ In *Matra Hachette*, the CFI interpreted “indispensable” to mean “strictly indispensable”, which is a well-known interpretation of the third condition of Article 81(3) EC. See CFI 15 July 1994, case T-17/93 (*Matra Hachette SA v. Commission*), [1994] E.C.R. II-595, para 138. More cf. Commission Decision 2003/300/EC of 8 October 2002 (*IFPI Simulcasting*), O.J. 2003 L 107/58, paras. 96–115; See ECJ 15 May 1975, case 71/74 (*Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit “Frubo” v. Commission and Vereniging de Fruitunie*), [1975] E.C.R. 563, paras. 40–43.

⁵⁸ Commission Decision 2002/914/EC of 24 July 2002 (*VISA International-Multilateral Interchange Fee*), O.J. 2002 L318/17, paras. 99–103; Commission Decision 2003/300/EC of 8 October 2002 (*IFPI Simulcasting*), O.J. 2003 L 107/58, para. 97; ECJ 20 February 1979, case 120/78 (*Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*), [1979] E.C.R. 649, para. 8; ECJ 13 December 1990, case C-238/89 (*Pall Corp. v. P. J. Dahlhausen & Co.*), [1990] E.C.R. I-4827, para. 12; ECJ 18 May 1993, case C-126/91 (*Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*), [1993] E.C.R. I-2361, para. 12; ECJ 6 July 1995, case C-470/93 (*Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*), [1995] E.C.R. I-1923, para. 15; ECJ 26 November 1996, case C-313/94 (*F.lli Graffione SNC v. Ditta Fransa*), [1996] E.C.R. I-6039, para. 17.

allows performing the activity in question more efficiently than without such agreement or restriction.⁵⁹

Therefore, indispensability is closely linked to the principle of proportionality in Community law⁶⁰ and often used as a synonym of “necessity” and “proportionality”.⁶¹ A restriction of competition must not extend beyond what is necessary, in scope, territory and duration, for achieving the legitimate objectives of the agreement in the sense of the first and the second criteria of Article 81(3) EC.⁶² Accordingly, a two-fold test for assessment of the third criterion of Article 81(3) EC has been developed:

“First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.”⁶³

The first step of the test requires that the technical or economic advantages are specific to the restrictive agreement, that means, that there is no economically viable and less restrictive method of achieving them.⁶⁴ Once the necessity of restriction is justified, the second step is to evaluate the indispensable nature of each restriction of competition that flows from it. A restriction will be considered to be indispensable if its absence eliminates or substantially reduces the advantages of an agreement or makes it far more improbable to obtain them. In addition, it should be considered whether less restrictive alternatives exist.⁶⁵ Further, a restriction may be indispensable only for a given period, that is the period of time necessary to obtain the advantages which justify the application of Article 81(3) EC.⁶⁶

⁵⁹ Guidelines on the Application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 74.

⁶⁰ The principle of proportionality is established by Article 30 EC and also Article 86(2) EC.

⁶¹ The decision practice of the Commission and Community case law show that the terms “indispensable”, “necessary” and “proportionate” are sometimes used as synonyms, which reflects their similarity as concepts in the context of the third criterion. *Cf. Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 373.

⁶² See ECJ 25 October 1977, case 26/76 (*Metro SB-Großmärkte GmbH & Co. KG v. Commission*), [1977] E.C.R. 1875, para. 21; CFI 23 February 1994, joined cases T-39/92 and T-40/92 (*Groupeement des Cartes Bancaires “CB” and Europay International SA v. Commission*), [1994] E.C.R. II-49, para. 114; CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957, para. 105.

⁶³ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 73.

⁶⁴ *Ibid.*, para. 75.

⁶⁵ *Ibid.*, paras. 78–80.

⁶⁶ *Ibid.*, para. 81.

b. Liner Conferences

As far as liner conferences are concerned, the Commission considers restrictions blacklisted in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices as probably not indispensable.⁶⁷ Here, freight rate-fixing as the foremost restrictive practice of liner conferences is a so-called “hardcore restriction” and at the centre of the assessment process. The assessment of indispensability is also linked to other aspects of Regulation 4056/86, namely rationalization agreements, other authorized restrictions and the unlimited duration of Regulation 4056/86.

According to the two-fold test for assessment of the third criterion of Article 81(3) EC shown above, an assessment of the indispensability of freight rate-fixing consists of two steps: the first is to verify whether the freight rate-fixing of liner conferences could achieve the economic advantages, *inter alia*, stability of the liner shipping market; the second is to examine whether freight rate-fixing is substantially and reasonably necessary for the attainment of the argued economic efficiency and whether less restrictive alternatives exist. The first step is based on the negative conclusion of the preceding analysis.⁶⁸ As regards the second step, the negation of the inevitable or absolute causality between freight rate-fixing and the argued primary economic efficiencies rules out the justification of the indispensability of freight rate-fixing.

The repudiation of indispensability of freight rate-fixing is also concluded in the OECD Report 2002. Its research shows that even carriers themselves recognise implicitly that freight rate-fixing may no longer be the most effective response to market conditions, since many carriers sometimes operate as conference members and sometimes as independents, depending on the particular trade situation in question.⁶⁹ The frequency of malpractices of conference members shows that conferences are becoming less and less relevant to carriers’ business strategies. At the same time, carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition. Price fixing perhaps remains an industry “benchmark”, but in fact restricts efficiency, as rates are still oriented towards inefficient rather than efficient operators’ costs. Price fixing is no longer an inevitable feature of a stable liner shipping industry.⁷⁰

Moreover, as regards rationalization agreements, it is claimed to be ancillary to price fixing, as primarily a way of avoiding competition and only secondarily intended to improve services. Although rationalization agreements are allowed under Regulation 4056/86,⁷¹ their ancillary nature to freight rate-fixing is questionable, since outside the framework of conference agreements there also exist other effective maritime transport practices such as consortia which aim at in-

⁶⁷ *Ibid.*, para. 79.

⁶⁸ See above Chapter VI A. I. 2.

⁶⁹ *OECD*, Final Report on Competition Policy in Liner Shipping (2002), para. 162.

⁷⁰ *Ibid.*, Summary Section 4.

⁷¹ Article 3(a) to (d) of Regulation 4056/86.

creasing efficiency of transport economy but do not include rules on price fixing.⁷² Another example could be active competition from independents. Through the use of multimodal transport favoured by containerization and the supply of other flexible services such as non-principal ports and wide catchment areas, independents carry out active and effective competition, which demonstrates the dispensability of the rationalization agreements allowed by Regulation 4056/86.⁷³

Finally, the Commission feels that in some cases a restriction may be indispensable only for a certain period of time, therefore an appropriate assessment of indispensability should regard this period of time required for the parties to achieve the efficiencies justifying the application of the exception under Article 81(3) EC.⁷⁴ Regulation 4056/86 does not provide for a time limit of the block exemption for liner conferences.⁷⁵ However, an unlimited duration of a block exemption could be inappropriate. On one hand, it could not comply with the general principle of proportionality in Community law, since proportionality requires the strict interpretation of the primary Community rules and the compliance of the secondary Community provisions with the primary rules. On the other hand, in respect of the third criterion of Article 81(3) EC, dynamic developments in market structure and technological improvements may change the conditions which previously justified the indispensability, or bring forth new less restrictive alternative practices.⁷⁶

⁷² *Dinger*, The Future of Liner Conferences in Europe (2004), p. 159. The example of consortia refers to the important technological development of containerisation which has brought out dramatic revolution in the liner shipping industry. Under the effect of containerisation, consortia constitute a structural cooperation that can also resolve the structural problem of fluctuation or instability in the liner shipping market but do not require the implementation of freight rate-fixing.

⁷³ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 159 ff.; *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 397.

⁷⁴ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 81. See also CFI 15 September 1998, joined cases T-374/94, T-375/94, T-384/94 and T-388/94 (*European Night Services Ltd (ENS) and Others v. Commission*), [1998] E.C.R. II-3141, para. 230.

⁷⁵ Such time limit is a common component of roughly all block exemption regulations except Regulation 4056/86. Therefore, the unlimited duration of Regulation 4056/86 is very extraordinary, as demonstrated in Community case law that “the authorisation granted for an unlimited period to liner conferences to cooperate in fixing rates for maritime transport is exceptional in the light of the relevant regulations and competition policy”. See ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafralines A/S v. Commission*), [2000] E.C.R. I-1365, para. 115; CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission, “FEFC”*), [2002] E.C.R. II-1011, paras. 254 and 484; CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, paras. 1381 and 1615.

⁷⁶ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 405.

5. No Substantial Elimination of Internal Competition

a. General Review

The fourth criterion of Article 81(3) EC is that the agreement must not allow the undertakings concerned to eliminate competition in respect of a substantial part of the products concerned. This criterion recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.⁷⁷ If the agreement eliminates competition in one of its most important expressions, the fourth criterion of Article 81(3) EC could not be supposed to be fulfilled. This is particularly true for the case of elimination of price competition through restrictive agreements.⁷⁸

b. Liner Conferences

Regulation 4056/86 allows for the block exemption for liner conferences especially by requiring “common or uniform freight rates”. Freight rate-fixing in conferences agreements aims at the total elimination of price competition among the conferences members, although this aim has often not been attained because of “malpractices” of conference members. Rationalization agreements allowed under Regulation 4056/86 are considered as ancillary to freight rate-fixing and also serve to restrain possible competition among conference members, since freight rate-fixing often is not enough to achieve a total control of the natural impulse of competition from inside.⁷⁹

Community case law relating to maritime transport has never ignored the importance of the fourth criterion of Article 81(3) EC. In *TACA*, the CFI stated that the fourth criterion of Article 81(3) EC is an autonomous Community law concept specific to Article 81(3) EC.⁸⁰ In respect of the nature of liner conferences as “hardcore restriction”, incompatibility with the fourth criterion arises from the exemption under Regulation 4056/86.

6. External Competition in Relation to Abuse of Collective Dominance

a. General Review

In contrast to Article 81(1) EC the application of which still depends on the verification of a possible exemption pursuant to Article 81(3) EC (rule of reason), Arti-

⁷⁷ In the Commission’s view, when competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices. See Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 105.

⁷⁸ Guidelines on the application of Article 81(3) of the EC Treaty, 2004/C 101/08, O.J. 2004 C 101/97, para. 110.

⁷⁹ *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007), p. 351.

⁸⁰ See CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, “*TACA*”), [2003] E.C.R. II-3275, para. 939. Cf. CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission*, “*TAA*”), [2002] E.C.R. II-875, para. 330.

cle 82 EC is a *per se* rule, which means that the abuse of a dominant position excludes any possibility of exemption from Article 82 EC and leads directly to the infringement of Article 82 EC. As already clarified by the court judgements, exemptions pursuant to Article 81(3) EC do not block the applicability of Article 82 EC.⁸¹ As regards liner conferences, Article 8 of Regulation 4056/86 allows for the possibility to revoke the legal benefit of a block exemption because of a violation of Article 82 EC.⁸² The application of Article 82 EC to liner conferences restricts the prominence of the block exemption in Regulation 4056/86 and mainly refers to external competition between conference members and outsiders, since a collective dominant position of a liner conference is often found to possess.

Where two or more undertakings are operating in a market, there may be collective dominance, if the involved undertakings together are not subject to effective outside competition. It has been one of the most complex and controversial issues in Community competition rules whether so-called “collective dominance” falls within the scope of application of Article 82 EC. Debates on this issue can be traced back to the early 1970s, and judicial practice on this point developed considerably in 1998, 1999 and 2000.⁸³ Finally, a wide as opposed to a narrow interpretation of Article 82 EC⁸⁴ was favoured by Community case law, especially in the ECJ’s judgments in *France, SCPA and EMC*⁸⁵ and *Compagnie Maritime Belge (CEWAL)*,⁸⁶ and the CFI’s judgment in *Gencor*.⁸⁷

The establishment of (collective) dominance requires an examination of various indicators of market power, such as market structure, the position of the undertakings concerned, market entry barriers, the characteristics of the undertakings and

⁸¹ See e.g. ECJ 11 April 1989, case 66/86 (*Ahmed Saeed Flugreisen and Ohters v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*), [1989] E.C.R. 803, para. 32; CFI 10 July 1990, case T-51/89 (*Tetra Pak Rausing SA v. Commission*), [1990] E.C.R. II-309, para. 29; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 135. For more detailed analysis, see *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht* (2004), § 15 Rn. 12 f., p. 381 f.; *Eilmansberger*, in: *Hirsch/Montag/Säcker*, *Competition Law* (2008), Part 2 Article 82, p. 1075 f., Rn. 2-15-035 f.

⁸² For more details see above Chapter V A. III. 3. b.

⁸³ For more details, see *Whish*, *Competition Law* (2001), p. 47 ff.

⁸⁴ In summary, the narrow view argues that the reference to more than one undertaking refers to different legal entities within the same corporate group. For more details, see *Whish*, *Competition Law* (2001), p. 473.

⁸⁵ ECJ 31 March 1998, joined cases C-68/94 and C-30/95 (*French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*), [1998] E.C.R. I-1375.

⁸⁶ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365.

⁸⁷ CFI 25 March 1999, case T-102/96 (*Gencor Ltd v. Commission*), [1999] E.C.R. II-753.

the type and the results of their market behaviour.⁸⁸ For the establishment of collective dominance, it is necessary to determine whether the involved undertakings have the ability to behave independently of competitors, trading partners and consumers to a significant degree, or are able to effectively obstruct outside competitors with common measures.⁸⁹ Further, it refers to the ability of the undertakings concerned to act uniformly on the market, which presupposes the presence of correspondingly strong links between these undertakings by which a certain level of group discipline can be enforced.⁹⁰ A collective dominant position can also be created by less intense structural links between undertakings.⁹¹ Even the oligopolistic reaction interdependence can be one of linking factors and enables a uniform market presence by undertakings which are in themselves economically independent, especially when under considerable transparency of the market every member of the leading oligopoly could monitor with sufficient precision and speed the behaviours of the others.⁹² In this regard, the oligopoly market dominance requires an effective sanctioning mechanism on deviating members to discourage them from any attempt to push forward in competition.⁹³

b. Liner Conferences

aa. Liner Conferences and Association of Carriers

As explained above, Regulation 4056/86 grants the block exemption to certain arrangements between members of one or several liner conferences, but not to liner conferences themselves or to the basic agreement setting up the conferences.⁹⁴ This gives rise to the question whether liner conferences themselves could be addressees of measures of competition regulation. This depends on the question

⁸⁸ For more details see *Eilmansberger*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 Article 82, p. 1098 f., Rn. 2-15-103 f.

⁸⁹ CFI 7 October 1999, case T-228/97 (*Irish Sugar plc v. Commission*), [1999] E.C.R. II-2969, para. 46; CFI 25 March 1999, case T-102/96 (*Gencor Ltd v. Commission*), [1999] E.C.R. II-753, para. 274.

⁹⁰ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 39; CFI 7 October 1999, case T-228/97 (*Irish Sugar plc v. Commission*), [1999] E.C.R. II-2969, para. 46; CFI 6 June 2002, case T-342/99 (*Airtours plc v. Commission*), [2002] E.C.R. II-2585, para. 62. For more details, see *Eilmansberger*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 Article 82, p. 1091, Rn. 2-15-081 f.

⁹¹ *Eilmansberger*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 Article 82, p. 1092, Rn. 2-15-084.

⁹² CFI 6 June 2002, case T-342/99 (*Airtours plc v. Commission*), [2002] E.C.R. II-2585, para. 60. For more details, see *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 16 Rn. 40, p. 407; cf. *Eilmansberger*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 Article 82, p. 1093 f., Rn. 2-15-087 f.

⁹³ CFI 6 June 2002, case T-342/99 (*Airtours plc v. Commission*), [2002] E.C.R. II-2585, para. 62.

⁹⁴ See above Chapter IV A. II. 1. Cf. also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1547, Rn. 38.

whether liner conferences can constitute associations of “undertakings” within the meaning of Article 81 EC. The term “undertaking” is not defined in the EC Treaty, but was interpreted in Community case law. The ECJ explained that any entity that is engaged in an economic activity, regardless of its legal status and the way in which it is financed, constitutes an undertaking in the sense of Article 81 EC.⁹⁵ The CFI stated further that undertakings are entities established with some permanence for a collective purpose.⁹⁶ Therefore, only individual carriers as members of liner conferences, but not liner conferences themselves, are undertakings within the meaning of Article 81 EC. Also in respect of content, restrictive agreements between carrier members contain anti-competitive stipulations, but the basic agreement setting up a conference does not.

bb. Collective Dominance of Liner conferences

The significance of the judgment in *Compagnie Maritime Belge (CEWAL)*,⁹⁷ i.e. the ECJ’s decision following the appeal against the CFI’s judgment,⁹⁸ consists not only in the verification of the application of Article 82 EC on collective dominance in respect of development of Community competition rules, but also in that it directly refers to liner conferences.

In this case the ECJ stated that collective dominance implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that, from an economic point of view, “they present themselves or act together on a particular market as a collective entity”.⁹⁹ Furthermore, the ECJ stated that in order to establish the existence of such a collective entity, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned, especially the economic links which enable the undertakings concerned to act together independently of their competitors, their customers and consumers.¹⁰⁰ Although in the ECJ’s opinion the mere fact that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article

⁹⁵ ECJ 23 April 1991, case C-41/90 (*Höfner and Elser v. Macroton*), [1991] E.C.R. I-1979, para. 21.

⁹⁶ CFI 10 March 1992, case T-11/89 (*Shell International Chemical Company Ltd v. Commission*), [1992] E.C.R. II-757, para. 312.

⁹⁷ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365.

⁹⁸ CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201.

⁹⁹ With this expression upon the interpretation of collective dominance, the ECJ emphasized that it is how the expression collective dominant position, as used in the remainder of this judgment, should be understood. See ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 36.

¹⁰⁰ ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 41 and 42.

81(1) EC does not, of itself, constitute a sufficient basis for a finding of collective dominance, the ECJ emphasized that an agreement, decision or concerted practice (whether or not covered by an exemption under Article 81(3) EC) may undoubtedly result in an (economic) link between undertakings concerned that is so close that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers. In this way, the ECJ demonstrated for the first time that the oligopolistic reaction interdependence could enable a uniform market presence by economically independent undertakings. This oligopolistic reaction interdependence is a mechanism which prompts the oligopoly members, even knowing the probable lack of immediate consequences, should they not act in conformity with the other members, to desist from such initiatives as price cuts and instead to partake in the excessive price levels which are due to the all-round abandonment of competition (oligopolistic peace).¹⁰¹ Further, a collective dominant position can derive from the ability of uniform conduct of the undertakings concerned, which establishes strong links and a certain level of group discipline. This point was also confirmed by the ECJ.¹⁰²

The existence of a collective dominant position may therefore flow from the nature and terms of the related agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it.¹⁰³ In line with this interpretation, the ECJ concluded that a liner conference, as defined under Regulation 4056/86, can be characterized as a collective entity by its very nature and in the light of its objectives, and is incompatible with Article 82 EC.¹⁰⁴ Not only was this interpretation of collective dominance confirmed in Community case law,¹⁰⁵ but the unequivocal confirmation of the “collective position” of liner conferences was followed in further judgments of the ECJ and the decisions of the Commission.¹⁰⁶

¹⁰¹ Eilmansberger, in: Hirsch/Montag/Säcker, Competition Law (2008), Part 2 Article 82, p. 1093, Rn. 2-15-087; cf. Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht (2004), § 16 Rn. 40, p. 407.

¹⁰² ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, para. 39.

¹⁰³ *Ibid.*, paras. 43–45.

¹⁰⁴ *Ibid.*, para. 48.

¹⁰⁵ CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, para. 595.

¹⁰⁶ For example, Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, “TACA”*), O.J. 1999 L 95/1, para. 526. This decision was upheld by CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, “TACA”*), [2003] E.C.R. II-3275, para. 601. In this case, the CFI confirmed that belonging to a conference, with all characteristics by nature (which implies such as existence of a freight rate tariff, the enforcement provisions and penalties, having a secretariat and annual business plans, all very standard in conferences system) was enough to establish the existence of a collective position, without there being any need to examine the importance of other possible ties. See CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Con-*

cc. Abuse of Collective Dominance

An infringement of Article 82 EC requires 1) a (collective) dominant position of the undertakings or the association of the undertakings concerned, and 2) the existence of abusive behaviour based on this (collective) dominant position, defined in Community case law as:¹⁰⁷

“an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

Article 82 EC gives a number of examples of abuses of a dominant position but does not provide a closed list. In relation to liner conferences, the Commission's decisions show several types of behaviour by liner conferences abusive of their collective dominance.¹⁰⁸ In *French-West African Carriers' Committees*, the Commission dealt with, though not directly liner conferences, but shipping companies operating between French ports and the ports serving West and Central African States within the framework of cartels in the form of “carriers' committees”. The Commission found that such “carriers' committees” were set up for the purpose of sharing liner cargo among their members, therefore the market position of the shipping companies as members of the committees had to be assessed collectively.¹⁰⁹ In conclusion, the Commission stated that the practices of liner shipping companies as members of the carriers' committees concerned aimed at eliminating effective competition from non-committee shipping lines and constituted an abuse of a dominant position within the meaning of Article 82 EC.¹¹⁰ In *Compagnie Maritime Belge (CEWAL)*, the Commission's decision dealt with several kinds of abusive behaviour on the basis of collective dominance of liner conferences. One was agreements of conferences with certain national authorities in order to use the government measures to eliminate competition from outsiders or squeeze the competitors out of the market.¹¹¹ Another included the use of “fighting ships” and

tainer Line AB and Others v. Commission, “TACA”), [2003] E.C.R. II-3275, paras. 592, 597, 598 and 629.

¹⁰⁷ ECJ 13 February 1979, case 85/76 (*Hoffmann-La Roche & Co. AG v. Commission*), [1979] E.C.R. 461, para. 91.

¹⁰⁸ For a brief summary, see also Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1564, Rn. 62.

¹⁰⁹ Commission Decision 92/262/EEC of 1 April 1992 (*French-West African shipowners' committees*), O.J. 1992 L 134/1, para. 58.

¹¹⁰ *Ibid.*, para. 67, also cf. para. 68 (i).

¹¹¹ Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, paras. 64–67, confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, paras. 105–109; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports*,

similar destructive measures such as predatory pricing vis-à-vis non-conference shipping companies,¹¹² and the use of blacklists of shippers or excessive conditions in loyalty agreements as sanctions against certain shippers who had employed the services of independents.¹¹³ In *TACA*, the Commission found that the members of TACA agreed to restrict the availability and the contents of service contracts and in this way abused their collective dominant position by means of altering the competitive market structure to reinforce their dominant position.¹¹⁴

The question of incompatibility of Regulation 4056/86 with Article 82 EC is also linked to Article 8 of Regulation 4056/86. In *Compagnie Maritime Belge (CEWAL)*, the ECJ stated that Article 8 of Regulation 4056/86 should serve to avoid a liner conference having effects incompatible with Article 82 EC, since it is by its conduct, or by its nature, that a liner conference holding a dominant position may abuse this dominant position.¹¹⁵ But with their abusive practice against external competition, liner conferences infringe Article 82 EC, and that contributes to the incompatibility of Regulation 4056/86 with Article 82 EC.

II. Beyond Regulation 1419/2006

The adoption of Regulation 1419/2006 was a historic mile stone and turning point of competition regulation in the liner shipping sector. The future development of the liner shipping sector in the post-conferences time will be interesting. The liner shipping industry may tend to further market concentration through mergers and acquisitions, since cooperation in the form of liner conferences will undoubtedly be prohibited after 18 October 2008. Competition regulation will probably focus on the block exemption for consortia. Finally, the Guidelines on the application of

Compagnie Maritime Belge and Dafra-Lines A/S v. Commission), [2000] E.C.R. I-1365, paras. 61 ff.

¹¹² Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, paras. 75–83, confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, paras. 139–141; ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 112–120.

¹¹³ Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20, paras. 29, 86 and 91, confirmed by CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201, paras. 183 and 185.

¹¹⁴ Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, "TACA"*), O.J. 1999 L 95/1, paras. 551–558, confirmed by CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission, "TACA"*), [2003] E.C.R. II-3275, paras. 1105–1159.

¹¹⁵ See ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365, paras. 48 and 49.

Article 81 EC to maritime transport services¹¹⁶ (the Guidelines), which was adopted by the Commission on 1st July 2008 following a public consultation on a draft,¹¹⁷ shows the Commission's effort to provide the undertakings concerned with more assistance for competition assessment of their future market behaviour, especially the possible system of information exchange among liner shipping companies. The following section will start with a brief introduction to Regulation 1419/2006, then give an overview of the block exemption under Regulation 823/2000, and finally discuss the Guidelines.

1. Regulation 1419/2006

The Commission's reasoning in Regulation 1419/2006¹¹⁸ focused on the four cumulative criteria of Article 81(3) EC and declared the incompatibility of Regulation 4056/86 with Article 81(1) EC. The question of incompatibility with Article 82 EC is not discussed directly in Regulation 1419/2006.

First, the Commission argues that liner conferences can neither successfully enforce the conference tariff nor contribute to more stability or more reliable shipping services than would be the case in a fully competitive market. Consequently, the Commission is of the opinion that the alleged causal link between the restrictions (price fixing and supply regulation) and the claimed efficiencies (reliable services) appears too tenuous to meet the first condition of Article 81(3) EC.¹¹⁹ Secondly, the Commission emphasizes the serious negative effect of liner conferences in the form of freight rate-fixing as a hard-core restriction on one hand, and points out on the other hand that up to now no clearly positive effects have been identified, and comes to the conclusion that the second criterion of Article 81(3) EC could not be fulfilled.¹²⁰ Thirdly, the Commission states that consortia and individual service agreements could substitute the conferences, and that, therefore the conferences' freight rate-fixing could be dispensed with. Since the indispensability of liner conferences presumed under Regulation 4056/86 has up to now not been identified, the third criterion of Article 81(3) EC is also not satisfied.¹²¹ Finally, the Commission attributes the existing price competition to the weakening of the conference system and points out that little price competition upon surcharges and ancillary charges has been promoted between conferences and non-conference carriers. Another important point, according to the Commission, is the increase of cooperation between carriers of liner conferences, of consortia and independents, by the exchange of commercially sensitive information and in collusion on price and capacity arrangements. Concerning the possible elimination of

¹¹⁶ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2008 C 245/2.

¹¹⁷ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3.

¹¹⁸ For a summary of Regulation 1419/2006, see also *Munari*, Liner Shipping and Antitrust after the Repeal of Regulation 4056/86 (2009), pp. 48–51.

¹¹⁹ The 4th Recital of Regulation 1419/2006.

¹²⁰ The 5th Recital of Regulation 1419/2006.

¹²¹ The 6th Recital of Regulation 1419/2006.

internal and external competition, the Commission emphasizes the complexity of the situation and demands a case-by-case assessment.¹²² In sum, the Commission comes to the conclusion that liner conferences no longer fulfil the four cumulative criteria of Article 81(3) EC and should therefore be abolished.

2. Block Exemption for Consortia: Regulation 823/2000

a. General Review

In respect of the gravity of restriction on competition, consortia and liner conferences are fundamentally different agreements of liner shipping companies. While the conference primarily aims at increasing profits through restriction of competition especially by freight rate-fixing, consortia focus on the reduction of costs, the rationalisation of shipping services and the achievement of economies of scale.¹²³ Nevertheless, consortia also constitute joint operations of liner shipping companies and are liable to restrict competition which may lead to infringements of Community competition rules. On the basis of the preceding brief introduction to the legislative development of the block exemption for consortia, it is interesting to note that the European Council and the Commission held different views on the legislative reasoning.¹²⁴ In Council Regulation 479/92, which empowers the Commission to adopt the block exemption for consortia, the European Council pointed out on one hand that the rationalizing function of consortia can help to improve the productivity of liner shipping services and promote technical and economic progress, and emphasized on the other hand that the legalization of consortia is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community.¹²⁵ The Commission admitted also the rationalizing function of consortia,¹²⁶ but emphasized the fulfilment of the criteria of Article 81(3) EC and the compatibility with Article 81 EC.¹²⁷ In spite of the primary consensus on the compatibility of consortia with Community competition rules, a further review of Regulation 823/2000¹²⁸ is necessary, since the situa-

¹²² The 7th Recital of Regulation 1419/2006.

¹²³ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 127.

¹²⁴ For more details see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1578 ff., Rn. 3 and 4.

¹²⁵ The 4th and 6th Recitals of Regulation 479/92.

¹²⁶ In the 4th Recital of Regulation 823/2000, the Commission states that consortia generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities.

¹²⁷ On the basis of experience since Regulation 870/95, the Commission argued that it is possible to define a category of consortia which are capable of falling within the scope Article 81(1) EC but which can normally be regarded as satisfying the conditions laid down in Article 81(3) EC. See the 2nd Recital of Regulation 823/2000.

¹²⁸ In October 2008, the Commission has launched the revision of Regulation 823/2000 and invited comments on a Preliminary Draft Regulation replacing Regulation (EC) No 823/2000. Preliminary Draft Regulation on the application of Article 81 (3) of the Trea-

tion of liner conferences will be changed fundamentally through the repeal of Regulation 4056/86.¹²⁹

b. Scope of Application and Definition

aa. Consortia

Regulation 823/2000 is applicable to consortia and defines, in Article 2(1), the term “consortium” by broad description¹³⁰ of consortia from five aspects.

The first aspect of a consortium as an agreement between two or more vessel-operating carriers is that the parties to this agreement provide international liner shipping services. As defined in Article 2(2) of Regulation 823/2000, “liner shipping” means the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment. Tramp shipping services are not subject to Regulation 823/2000.¹³¹ The second aspect is that the international liner shipping services referred to deal exclusively with the carriage of cargo, not with passenger transport or ferry services.¹³² The third aspect is that these international liner shipping services concerned should be carried out chiefly by container.¹³³ The fourth aspect is that consortia operate one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service. It is a character-

ty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2008 C 266/1.

¹²⁹ The validity of Regulation 823/2000 was extended by Regulation 611/2005 to 25 April 2010. As required in the 3rd Recital of Regulation 611/2005, the review of Regulation 823/2000 is also necessary pending the review of Regulation 4056/86. This review necessity was further stressed in the Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 6.

¹³⁰ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 128.

¹³¹ The definition of tramp vessel services is defined in Article 2(3)(a) of Regulation 4056/86. Although the international tramp shipping services do not fall under Regulation 823/2000, the application of Regulation 1/2003 to this mode of international maritime transport services is granted after Regulation 1419/2006 repeals Article 32 of Regulation 1/2003 which previously excluded the application of Regulation 1/2003 to tramp vessel services. Cf. *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; D., p. 1579, Rn. 5.

¹³² See *Negenman*, in: *Schröter/Jakob/Mederer*, *Kommentar zum Europäischen Wettbewerbsrecht* (2003), p. 1190, Rn. 115; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; D., p. 1579, Rn. 6.

¹³³ See the 3rd Recital of Regulation 479/92. The reason for this provision relates to an argument that liner shipping is a capital intensive industry and the containerization has increased pressures for cooperation and rationalization in order to have more competitiveness on the basis of economies of scale. A confirmation of this argument could also be found in the 6th Recital of Regulation 823/2000. For a detailed survey of container economy, especially in relation to modernization like port facilities as well as the assessment of “chiefly by container”, see *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; D., p. 1579, Rn. 6.

istic of liner shipping that it involves transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade.¹³⁴ Different from Regulation 870/95, Regulation 823/2000 replaces the expression “relating to a particular trade” with the term “relating to one or more trades”. In this way, Regulation 823/2000 provides for a broader scope of application, which also could include a global alliance.¹³⁵ The fifth aspect is that consortia should help to improve the productivity and quality of liner shipping services by cooperation within the consortia. This means that consortia should bring rationalization to the activities of their member companies, create economies of scale and help to promote technical and economic progress by facilitating and encouraging utilization of containers and more efficient use of vessel capacity.¹³⁶

Regulation 823/2000 applies only to agreements concluded between the members of a consortium, but not to restrictive agreements concluded between consortia or one or more of their members on one hand and other shipping companies on the other hand, nor to restrictive agreements between different consortia operating in the same trade or between the members of different consortia as such.¹³⁷ As to the territorial scope of Regulation 823/2000, its Article 1 requires that the international liner transport services provided by consortia should cover services from or to one or more Community ports. This provision is similar to the requirement in Article 1(2) of Regulation 4056/86 and consequently the interpretation of this provision under Regulation 823/2000 may refer to the interpretation of Article 1(2) of Regulation 4056/86.¹³⁸

bb. Other Definitions

Besides the definitions of “consortium” and “liner shipping”, Article 2 of Regulation 823/2000 defines “service arrangement”, “transport user” and “independent rate action”. Definitions of “commencement of the service” and “substantial new investment” were added by Regulation 611/2005. These definitions are less relevant for the interpretation of the scope of application of Regulation 823/2000.¹³⁹

c. Block Exemption

aa. Block Exemption for Consortia under Article 3 of Regulation 823/2000

Article 3 of Regulation 823/2000 grants a block exemption to consortia. It has three parts. Article 3(1) of Regulation 823/2000 provides the general rule of non-applicability of Article 81(1) EC to consortia and links the definition of a consor-

¹³⁴ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 10.

¹³⁵ For more details, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1580, Rn. 7.

¹³⁶ The 4th Recital of Regulation 823/2000.

¹³⁷ See the 21st Recital of Regulation 823/2000 in comparison with the 8th Recital and Articles 5 and 6 of Regulation 823/2000.

¹³⁸ See above Chapter III A. II. For a detailed survey, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1581, Rn. 8.

¹³⁹ *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1582, Rn. 13.

tium in Article 2(1) of Regulation 823/2000 and the legal conditions and obligations under Regulation 823/2000.¹⁴⁰ Article 3(2) of Regulation 823/2000 lists activities to which the declaration of non-applicability under Article 3(1) shall apply. As a supplement to Article 3(2)(g) of Regulation 823/2000, Article 3(3) regulates two ancillary activities.¹⁴¹ Two points must be explained here. The first is the equivocal wording of Article 3(2) of Regulation 823/2000, because it is not the activity itself that can lead to infringement of Article 81(1) EC. The block exemption is granted to the agreements in the form of consortia which contain one or more activities listed in Article 3(2).¹⁴² The second point concerns the word “only” in the first sentence of Article 2 of Regulation 823/2000. It means that the list of collusive activities that can be exempted from the application of Article 81(1) EC according to Article 3(2) of Regulation 823/2000 is exhaustive.¹⁴³

bb. Block Exemption for Vertical Agreements under Article 10 of Regulation 823/2000

Article 10 of Regulation 823/2000 provides a distinctive block exemption for vertical agreements between a consortium and transport users or their representative organisations. First, it demands of a consortium as one party to such an agreement that this consortium should fulfil the requirements under Regulation 823/2000 and be exempted under Article 3 of Regulation 823/2000. Secondly, such vertical agreements concern conditions and quality of liner shipping services provided by the consortium and all general questions connected with such services. Thirdly, such agreements should be reached on the basis of the consultation required under Article 9(2) of Regulation 823/2000. This provision does not contain any conditions or obligations like those attached to the block exemption for consortia under Article 3 of Regulation 823/2000, but it helps to improve the negotiation position of transport users against consortia, similar to the special block exemption under Article 6 of Regulation 4056/86.¹⁴⁴

d. Conditions and Obligations

The block exemption for consortia under Article 3(1) of Regulation 823/2000 requires the fulfilment of certain conditions and obligations, determined in Articles 4 to 9 of Regulation 823/2000. The differentiation between conditions and obligations is declaratory, since consortia agreements which do not fully comply with either conditions or obligations conflict with Article 81(1) EC.¹⁴⁵ Under the

¹⁴⁰ See Articles 5, 6, 8 and 9 of Regulation 823/2000.

¹⁴¹ For more detailed discussion of the activities listed in Article 3(2) and (3) of Regulation 823/2000, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1584, Rn. 15 *et seq.*

¹⁴² *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1584, Rn. 14.

¹⁴³ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 132.

¹⁴⁴ For a relevant analysis, see above Chapter IV A. II. 5. See also *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1594, Rn. 30.

¹⁴⁵ *Dinger*, The Future of Liner Conferences in Europe (2004), p. 132.

severability principle in Community law, if a clause that contradicts to any of the conditions or obligations under Articles 4 to 9 of Regulation 823/2000 can be separated from the rest of the consortium agreement, then the rest of the agreement remains valid.¹⁴⁶

aa. Article 4 of Regulation 823/2000

Although Article 4 of Regulation 823/2000 is adjacent to Article 3 in Chapter II “Exemption” and is not included in Chapter III “Conditions for Exemption”, it determines an important condition concerning the non-utilisation of existing capacity. According to this condition, any consortium which includes arrangements for the non-utilisation of existing capacity and whose members restrict competition by leaving a certain percentage of the capacity unused should not enjoy the exemption under Article 3 of Regulation 823/2000. Article 3(2)(b) of Regulation 823/2000 allows temporary capacity adjustments. The reason is that the ability to make capacity adjustments is an essential feature inherent in consortia in respect of the rationalizing function of consortia to establish and operate a joint service.¹⁴⁷ However, the non-utilisation of a certain percentage of vessel capacity within a consortium is not an essential feature of consortia and may lead to a restriction on competition incompatible with Article 81(1) EC.¹⁴⁸

bb. Article 5 of Regulation 823/2000

Article 5 of Regulation 823/2000 contains several alternative conditions to ensure that a sufficient degree of competition still remains in the markets where the consortium operates.¹⁴⁹ Consortia may only operate within a conference if there is effective competition on prices or in relation to the quality of service. Notwithstanding the question whether or not a consortium exists inside or outside a conference, the conditions of Article 5 are fulfilled if actual or potential competition exists from shipping companies that operate outside the consortium.¹⁵⁰

¹⁴⁶ *Ibid.*

¹⁴⁷ The 7th Recital of Regulation 823/2000.

¹⁴⁸ The capacity management of liner conferences primarily does not fall within the exemption under Article 3 of Regulation 4056/86. It is argued that the Commission used the condition in Article 4 of Regulation 823/2000 to avoid that member carriers of liner conferences circumvent such prohibition by transferring a clause on capacity arrangement from a liner conference agreement into a consortium agreement that exists within a liner conference. See Commission Working Paper: Report on Commission Regulation No. 870/95 (28 January 1999), available online at <http://ec.europa.eu/comm/competition/antitrust/report_comm_reg_870_95_en.pdf>, para. 57; *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 135.

¹⁴⁹ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 132; *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; D., p. 1587, Rn. 21.

¹⁵⁰ *Dinger*, *The Future of Liner Conferences in Europe* (2004), p. 132. Cf. *Basedow*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht Kommentar* (2007), *Verkehr*; D., p. 1588, Rn. 22.

cc. Article 6 of Regulation 823/2000

Article 6 of Regulation 823/2000 requires a consortium not to exceed a certain market share in order to benefit from the block exemption. If a consortium operates within a conference and has a market share below 30% on all markets within which it operates, or if a consortium operates outside a conference, it automatically qualifies for the exemption according to Article 6 of Regulation 823/2000 under the condition that other conditions and obligations contained in Regulation 823/2000 are fulfilled. If the market share of a consortium exceeds the above limit but still remains below 50% on all markets within which it operates, then the agreement must be notified to the Commission. The consortium automatically enjoys the block exemption if the Commission has not opposed the agreement within six months from the date of notification. A consortium that has a market share of more than 50% in any market within which it operates, cannot enjoy the block exemption under Regulation 823/2000.¹⁵¹

dd. Article 8 of Regulation 823/2000

Article 8 of Regulation 823/2000 determines four cumulative conditions. They deal with the availability of individual service contracts, the right to withdraw from the consortium and the right to engage in independent marketing when the consortium operates a joint marketing structure. Article 8(1) of Regulation 823/2000 requires that consortia allow their members to enter into service contracts on an individual basis. Article 8(4) of Regulation 823/2000 contains a non-discrimination clause; regarding this clause, we refer to the preceding analysis of the non-discrimination under Regulation 4056/86.¹⁵²

ee. Article 9 of Regulation 823/2000

Article 9 of Regulation 823/2000 lays down four cumulative obligations which deal with several issues including consultation with shippers or their representative organisations, the availability of service details to the shippers, notification of any results of arbitration measures to the Commission and the availability of proof of the Commission that a consortium conforms to the requirements of Articles 5 to 9 of Regulation 823/2000.¹⁵³

3. Guidelines on the Application of Article 81 EC to Maritime Transport Services

a. General Introduction

After the repeal of the block exemption for liner conferences on 18 October 2008, liner companies will have to assess themselves whether their business practices comply with Community competition rules. On 1st July 2008, the Commission adopted the Guidelines on the application of Article 81 EC to maritime transport

¹⁵¹ For a detailed survey, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1589 ff., Rn. 23–26.

¹⁵² See above Chapter IV A. III. 1.

¹⁵³ For more details, see *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; D., p. 1593 ff., Rn. 28 and 29.

services¹⁵⁴ (the Guidelines) following a public consultation on a draft published on 14 September 2007¹⁵⁵ (the Draft). The Guidelines aim at providing the principles for future competition assessment in the maritime transport sector which will be “directly affected by the changes brought about by” Regulation 1419/2006,¹⁵⁶ helping maritime operators to understand the implications of the legal changes, providing the guidance on self-assessment¹⁵⁷ and ensuring that the new regime fosters competitive markets.¹⁵⁸ It is worth pointing out as one of the significant changes of the regulatory framework that “as of 18 October 2006, all maritime transport services sectors are subject to the generally applicable procedural framework”.¹⁵⁹

In accordance with the earlier guidances given by the Commission,¹⁶⁰ these Guidelines refer to the market definition of maritime transport services and focus on parts of maritime transport services characterised by extensive horizontal cooperation agreements between market participants, especially technical agreements, information exchange and pool agreements in tramp shipping. After the repeal of the block exemption for liner conferences on 18 October 2008, the question arises whether and to what extent liner shipping companies could continue cooperating, in compliance with Community competition rules, by the way of information exchange. Therefore, the Guidelines clarify this subject at great length (Paragraphs 38 to 59 of the Guidelines). The following discussion focuses on the issue of information exchange in the Guidelines in a comparative view of the Draft and the final version (the Guidelines).

b. The Information Exchange System

aa. General on the Information Exchange System

An information exchange system means that competitors cooperate in producing, appraising and distributing market relevant information and key figures. It is mostly based on statistics and the so-called “benchmarking” of information by

¹⁵⁴ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2008 C 245/2. For an introduction to the Guidelines, see *Camesasca/Schmidt*, EC Commission’s Post-Conference Maritime Transport Guidelines (2009).

¹⁵⁵ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3. For an overview of the Draft, see *Dreyer*, Informationsaustausch zwischen Wettbewerbern und Kartellrecht im Seeverkehr (2008); *Schmidt*, Im Netzwerk der Unwägbarkeiten (2008).

¹⁵⁶ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para. 1.

¹⁵⁷ *Ibid.*, para. 2.

¹⁵⁸ Commission, Press Release IP/08/1063 of 1 July 2008: Antitrust: Commission adopts Guidelines on application of competition rules to maritime transport services.

¹⁵⁹ Cf. Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para. 3.

¹⁶⁰ *Ibid.*, para. 5: “As maritime transport services are characterised by extensive cooperation agreements between competing carriers, the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements and the Guidelines on the application of Article 81(3) of the Treaty are particularly relevant.”

gathering data of other undertakings for the purpose of a systematic comparison with own data.¹⁶¹ Usually, institutionalised reporting agencies such as lobbying bodies, trade associations and other co-operative organisations are responsible for the organization and operation of such an information exchange system by collecting the relevant data from the participating undertakings, analysing the data and disseminating the conclusions about the state and development of the market.¹⁶²

The function and the impact of information exchange on competition in a given market are variable and inconsistent. On one side, information exchange is recognised as a good means to increase market transparency and customer knowledge, and thus may promote efficiencies and improve the competitiveness of the economy.¹⁶³ On the other side, the exchange of information may constitute a “facilitating mechanism” or “supporting mechanism”¹⁶⁴ for the implementation of anti-competitive practices, even if it rarely leads to agreements fixing prices or market shares.¹⁶⁵ This will happen especially in the case of concerted practices such as tacit collusion with the aim of reaching and holding an above-competitive price, or in the case of monitoring the conduct of members within a cartel.¹⁶⁶

The dilemma of information exchange, namely its pro-competitive and its anti-competitive aspects,¹⁶⁷ arises from a complex of various factors which affect market structure and the characteristics of the information exchanged. For instance, market transparency, which may be enhanced through the exchange of information, can lead to an intensification of competition in an already competitive market, but it could also restrain competition by bringing about an artificial market transparency that may eliminate existing secret competition.¹⁶⁸ The relevant factors for the evaluation of the effects of the exchange of information on competition, especially according to Community case law, could in general be divided into

¹⁶¹ Wollmann, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 521, Rn. 2-2-131.

¹⁶² *Ibid.*

¹⁶³ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 9 Rn. 37, p. 256.

¹⁶⁴ Cf. Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 40; Wollmann, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 522, Rn. 2-2-133.

¹⁶⁵ Cf. Wollmann, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 522, Rn. 2-2-133.

¹⁶⁶ For more details see *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 9 Rn. 36 and 37, p. 255 ff. Cf. Wollmann, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 522, Rn. 2-2-132 and 2-2-133.

¹⁶⁷ Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 9 Rn. 37, p. 256.

¹⁶⁸ For detailed discussion of market transparency as well as its effects in different market structure, see *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004), § 9 Rn. 37–39, p. 256. As to Community case law, see Commission Decision 92/157/EEC of 17 February 1992 (*UK Agricultural Tractor Registration Exchange*), O.J. 1992 L 68/19, confirmed by CFI 27 October 1994, case T-34/92 (*Fiatagri UK Ltd and New Holland Ford Ltd v. Commission*), [1994] E.C.R. 905; CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957; ECJ 28 May 1998, case C-8/95 P (*New Holland Ford Ltd v. Commission*), [1998] E.C.R. I-3175.

three groups. The first concerns the market structure. The second includes the characteristics of the information exchanged, for example, whether the information referred to is already in the public domain, and whether the information is individual or aggregated, as well as whether certain relations between the age of data, the content of information and the frequency of exchange could be proven to be commercially sensitive and restrictive of competition. The third includes what results from a hypothetical analysis of the potential effects that the information exchange could have in the market compared to the competitive situation that would occur in the absence of the information exchange agreement.¹⁶⁹

The Guidelines confirm these three groups of factors to be considered in the competition assessment of information exchange and includes further concrete considerations concerning the liner shipping market after the end of conferences.

bb. Pure Information Exchanges and Those as Facilitating Mechanism

Information exchange is defined in the Guidelines as a system which “entails an arrangement on the basis of which undertakings exchange information amongst themselves or supply it to a common agency responsible for centralizing, compiling and processing it before returning it to the participants in the form and at the frequency agreed”.¹⁷⁰ The Guidelines accept the general opinion that an information exchange system does not constitute an infringement of Article 81(1) EC *per se* and aim at helping liner shipping companies to assess the compatibility of information exchanges with Articles 81(1) and 81(3) EC. Paragraph 58 of the Guidelines calls attention to “efficiencies” created by exchanges of information and states clearly that “[i]f all four cumulative conditions set out in Article 81(3) are fulfilled, the prohibition of Article 81(1) does not apply”.

However, as regards the scope of application of the Guidelines in respect of information exchanges, there were debates which mainly referred to Paragraphs 38 and 40 of the Draft. It was argued that the wording of Paragraph 40 of the Draft likely leads to a misunderstanding that “the guidelines ... [are] limited in scope to ‘pure information exchanges’, as opposed to those linked to cartels or concerted practices”¹⁷¹ and that “there should be no reference to cases or precedent which concern the assessment of cartels or concerted practices under Article 81(1)”.¹⁷² In this respect, three aspects of the Draft come into consideration.

First, two kinds of information exchanges could be distinguished: (1) pure information exchanges and (2) information exchanges serving as a “supporting mechanism” of an explicit cartel organisation and/or an implicit concerted practice. The compliance of a pure information exchange system with Community competition law is dependent on various factors such as, in particular, the age of data, the content of information, and the frequency of the exchange as well as

¹⁶⁹ For example, ECJ 28 May 1998, case C-7/95 P (*John Deere Ltd v. Commission*), [1998] E.C.R. I-3111, para. 75–77.

¹⁷⁰ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para. 38.

¹⁷¹ ESC, The Submission of ESC in Relation to the Draft Guidelines (2007), p. 8, para. 5.

¹⁷² *Ibid.*, p. 8, paras. 6 and 7.

market structure.¹⁷³ Therefore, the competition assessment of a pure information exchange should be carried out on a case-by-case basis. But also an information exchange serving as “supporting mechanism”, within, for example, a cartel or even a “hard core cartel”, could not be considered as *per se* infringing Article 81 EC. An information exchange ancillary to cartel cooperation which enjoys a Community block exemption, for example the consortia block exemption under Regulation 823/2000, is justified under Article 81(1) EC. Another example occurs in the insurance sector. As regards price fixing arrangements, Regulation 358/2003¹⁷⁴ grants exemption to certain specific information agreements in relation to the supply of insurance services. Furthermore, an individual exemption for information exchanges serving as “supporting mechanism” is also possible. In *TEKO*,¹⁷⁵ the Commission found that the exchange of information for the purpose of coordinating risk assessment and the setting of a common premium by a number of insurance companies, although falling within the scope of Article 81(1) EC, qualify for individual exemption.

Second, in the liner shipping sector, the Draft allows possible exemptions for information exchanges not only within the framework of the consortia block exemption, but also outside this block exemption. As to the former, the Draft supplements the condition that they “are permitted to the extent that they are ancillary to and necessary for joint operation of liner transport services and the other forms of cooperation covered by the block exemption in Commission Regulation (EC) No 823/2000 or respective”. Outside the block exemption for consortia, the Draft adds the condition that information exchanges are permitted “if and to the extent that they can be individually justified on the basis of Article 81 of the Treaty”.¹⁷⁶ Therefore, the scope of the Draft covers not only “pure information exchanges”, but also extends to the information exchanges serving as “supporting mechanism”.

Third, the last sentence of the Paragraph 40 of the Draft could lead to conflicts with other parts of the Draft, which justify information exchanges serving as “supporting mechanism” under Community competition law. For example, the references to Community case law in the Draft, such as in the footnotes 41 and 45,¹⁷⁷ would be questionable, since these cases confirmed the non-infringement of

¹⁷³ Cf. *Wollmann*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 522, Rn. 2-2-135.

¹⁷⁴ Commission Regulation (EC) No. 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, O.J. 2003 L 53/8.

¹⁷⁵ Commission Decision 90/22/EEC of 20 December 1989 (*TEKO*), O.J. 1990 L 13/34.

¹⁷⁶ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 38.

¹⁷⁷ ECJ 16 December 1975, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Coöperatieve Vereniging “Suiker Unie” UA and Others v. Commission*), [1975] E.C.J. 1663; ECJ 31 March 1993, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 (*Ahlström Osakeyhtiö and Others v. Commission*), [1993] E.C.R. I-1307.

Article 81(1) EC in specific circumstances.¹⁷⁸ Furthermore, Paragraph 38 of the Draft directly refers to information exchanges outside the scope of the consortia block exemption, which are information exchanges serving as a “facilitating mechanism” within the meaning of Paragraph 40 of the Draft. Furthermore, a competition assessment of information exchanges between consortia members outside the scope of the consortia block exemption concerns specific characteristics of information exchanges serving as “supporting mechanism”. Guidance on these is included in the Draft.

In the final version, Paragraph 42 of the Guidelines replaced Paragraph 40 of the Draft with a little supplement; Paragraph 40 of the Guidelines replaced Paragraph 38 of the Draft with significant changes. Paragraph 40 of the Guidelines deleted, as regards exchanges of information in liner consortia, the possibility of permissions “outside the scope of the block exemption, if and to the extent that they can be individually justified on the basis of Article 81 of the Treaty”. This Paragraph adds further that “[t]he present Guidelines do not deal with these information exchanges”. In this way, the Guidelines limit their application to the “pure information exchange” without any further discussion on such exchange as “supporting mechanism”. Then, Paragraph 40 of the Guidelines stands in accordance with Paragraph 42 of the Guidelines.

cc. Market Structure and Trade Associations

As correctly stated in the Draft, the level of concentration and the structure of supply and demand on a given market are key issues in assessing the compliance of an information exchange system with Article 81(1) EC.¹⁷⁹ The realisation of market transparency through information exchanges has different impacts on market competition, which are mostly dependent on market structure. In a truly competitive market or a fragmented market, improved transparency would often lead to the intensification of competition.¹⁸⁰ In a concentrated or even oligopolistic market, the achieved artificial transparency is likely to restrain competition,¹⁸¹ in particular, by eliminating remaining competition among existing competitors¹⁸² or preventing potential competition by means of high entry barriers.¹⁸³

¹⁷⁸ See *ESC*, The Submission of ESC in Relation to the Draft Guidelines (2007), p. 8, para. 7.

¹⁷⁹ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 47.

¹⁸⁰ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht* (2004), § 9 Rn. 38, p. 256.

¹⁸¹ See CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957, para. 88; Commission Decision 92/157/EEC of 17 February 1992 (*UK Agricultural Tractor Registration Exchange*), O.J. 1992 L 68/19, para. 13; Commission Decision 98/4/ECSC of 26 November 1997 (*Wirtschaftsvereinigung Stahl*), O.J. 1998 L 1/10, para. 39.

¹⁸² CFI 27 October 1994, case T-34/92 (*Fiatagri UK Ltd and New Holland Ford Ltd v. Commission*), [1994] E.C.R. 905, para. 91.

¹⁸³ *Wollmann*, in: *Hirsch/Montag/Säcker*, *Competition Law* (2008), Part 2 B., p. 524, Rn. 2-2-139.

A concrete analysis needs to consider each case separately and also to assess the independence of each market participant.¹⁸⁴ In the liner shipping sector, this assessment of independence must take into account the “structural links” within the specific industry. These “structural links” have been established in liner conferences and also in consortia. In view of the century old history of liner conferences and the tendency towards concentration in the post-conferences development of the liner shipping industry, it should be expected that these “structural links” shall neither disappear at once nor fade away quickly, but struggle to remain by using other existing forms, especially certain forms of information exchanges. In this sense, any institutionalised information exchange shall most likely enhance these “structural links”, rather than loosen such organisational links. In consequence, the independence of the individual liner shipping company shall be endangered.

It has been claimed that “the liner shipping industry is not prone to collusion, and the data that it suggests should be exchanged would not be sufficient to effectively monitor individual competitor’s commercial behaviour. Also there will be no effective means for any group of liner carriers to punish another carrier that deviates from a ‘collusive’ agreement.”¹⁸⁵ In the situation described above, this can hardly be supported. Rather, it might be argued that the Draft does not sufficiently emphasize the “structural links” in the liner shipping sector.¹⁸⁶ Thus a revision as demonstrated in the ESC’s submission to the Draft might be desirable.¹⁸⁷

The final version of the Guidelines might recognize this deficiency and try to clarify the issue of “structural links” within the framework of guidance on “trade associations”. The Subsection 3.2.4 of the Draft was renamed “Trade Associations” in the final version, which states that “[i]n liner shipping, ..., discussions and exchanges of information can take place in a trade association provided the association is not used as (a) a forum for cartel meetings, (b) a structure that issues anti-competitive decisions or recommendations to its members or (c) a means of exchanging information that reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted while not fulfilling the Article 81(3) conditions.”

¹⁸⁴ This point was well demonstrated in the opinion of Advocate General Mr. Ruiz-Jarabo Colomer to ECJ 28 May 1998, case C-7/95 P (*John Deere Ltd v. Commission*), [1998] E.C.R. I-3111, available online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995C0007:EN:HTML>>, para. 47: “The independence of traders to decide on their commercial policy clearly disappears when they enter into an agreement which restricts their future freedom of action on the market. Such independence may also be undermined when traders set up cooperation arrangements to promote a common economic interest, which, whilst not directly providing the basis for anti-competitive practices, affects competition between manufacturers.”

¹⁸⁵ ELAA, Comment on the Draft Guidelines (2007), p. 2.

¹⁸⁶ ESC, The Submission of ESC in Relation to the Draft Guidelines (2007), p. 16, para. 39.

¹⁸⁷ *Ibid.*, p. 16, para. 41.

dd. Characteristics of the Information Exchanged

Subsection 3.2.3 of the Draft gives the essential characteristics of the information exchanged which are to be taken into account in the competition assessment. Fundamentally, the market sensitiveness of information plays the key role for the whole assessment. Market sensitive information consists of certain data that allow market participants to identify strategies or behaviour of other market participants or competitors, leading to concerted practices of competitors, since the uncertainty of the market and the resulting rivalry between market competitors will be reduced by exchanging such sensitive information. Therefore, the exchange of market sensitive information is usually regarded as anti-competitive and is often viewed by the Commission as an instrument of cooperation against competition.¹⁸⁸ Data which would be held as market sensitive information could vary from prices¹⁸⁹ to costs,¹⁹⁰ from non-aggregated market shares of individual undertakings¹⁹¹ to individualised data of individual undertakings and their products or customers,¹⁹² from forecast of production and capacities¹⁹³ to the disclosure of production activities¹⁹⁴ as well as undertakings' commitment to report their immanent investments.¹⁹⁵

The final version added Paragraph 50 as a leading paragraph of the Subsection 3.2.3, in order to emphasize the commercial sensitivity of data relating to parameters of competition. By assessment of commercial sensitivity of information, the following main criteria should be taken into account: the publicity dimension, the time dimension and the processing form dimension.

1) Information in Public Domain

The Draft states that "[t]he exchange of information already in the public domain does not constitute an infringement of Article 81(1) of the Treaty." Generally, there is no objection under Article 81(1) EC if information as to prices or services of particular undertakings is made publicly available under the auspices of a trade association provided that the information is sufficiently historical that it no longer

¹⁸⁸ Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3, para. 1; Commission Decision 78/252/EEC of 23 December 1977 (*Vegetable parchment*), O.J. 1978 L 70/54, para. 67.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Lindsay/Scola*, in: Bellamy & Child – European Community Law of Competition (2008), Chapter 4, p. 260, Rn. 4.035.

¹⁹¹ CFI 5 April 2001, case T-16/98 (*Wirtschaftsvereinigung Stahl and Others v. Commission*), [2001] E.C.R. II-1217 (2001), para. 29.

¹⁹² Commission Decision 77/592/EEC of 8 September 1977 (*COBELPA/VNP*), O.J. 1977 L 242/10, para. 27.

¹⁹³ Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3, paras. 14 and 17.

¹⁹⁴ Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement, "EATA"*), O.J. 1999 L 193/23, para. 148.

¹⁹⁵ Commission Decision 84/405/EEC of 6 August 1984 (*Zinc Producer Group*), O.J. 1984 L 220/27, para. 67.

has any real impact on future behaviour.¹⁹⁶ But the private exchange between competitors of information normally kept confidential, for example, a breakdown of deliveries by product or customer, or the disclosure of invoices or of capacity utilisation, will often infringe Article 81(1) EC. Any “market transparency” attained is offset by the fact that the information remains private to the undertakings concerned.¹⁹⁷ Therefore, the final version of the Guidelines correctly adds the emphasis on “the level of transparency of the market” and on “accessibility”.¹⁹⁸

Three additional points must be discussed. The first is that some sort of agreement between market participants is necessary for such an information exchange system to exist, but does not require a formal agreement. In *John Deere*,¹⁹⁹ the CFI decided that the transmission of information by certain undertakings to an association of undertakings can constitute at least a tacit agreement between the undertakings concerned, as – without the existence of such agreement – the disseminated information may not be analysed in a uniform manner.²⁰⁰

The second point concerns those participants of the exchange, such as market research institutes, who are no competitors but participate in the information exchange by assembling, compiling information and make their studies publicly available. These so-called “services of third parties” usually do not carry any intent to exchange sensitive information in a certain industry in an anti-competitive manner.²⁰¹ But, according to Community case law, it is irrelevant whether information is provided by competitors or by “third parties”.²⁰²

The third point concerns the purpose of the information exchanged. That the information is publicly available does not *per se* exclude the application of Article 81(1) EC.²⁰³ Whether Article 81(1) EC is violated depends on the purpose of the exchange. In *Cement*,²⁰⁴ the Commission emphasized the importance of the pur-

¹⁹⁶ Commission Decision 92/157/EEC of 17 February 1992 (*UK Agricultural Tractor Registration Exchange*), O.J. 1992 L 68/19, para. 50; on appeal, CFI 27 October 1994, case T-34/92 (*Fiatagri UK Ltd and New Holland Ford Ltd v. Commission*), [1994] E.C.R. 905 and CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957; on further appeal, ECJ 28 May 1998, case C-7/95 P (*John Deere Ltd v. Commission*), [1998] E.C.R. I-3111 and ECJ 28 May 1998, case C-8/95 P (*New Holland Ford Ltd v. Commission*), [1998] E.C.R. I-3175.

¹⁹⁷ For more detailed discussion, see Barr, in: Bellamy & Child – European Community Law of Competition (2008), Chapter 5, p. 359, Rn. 5.090.

¹⁹⁸ In the final version of the Guidelines, Paragraph 51 replaced Paragraph 50 of the Draft with some wording changes.

¹⁹⁹ CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957.

²⁰⁰ *Ibid.*, para. 66.

²⁰¹ Wollmann, in: Hirsch/Montag/Säcker, Competition Law (2008), Part 2 B., p. 522, Rn. 2-2-134.

²⁰² Commission Decision 98/4/ECSC of 26 November 1997 (*Wirtschaftsvereinigung Stahl*), O.J. 1998 L 1/10, para. 58.

²⁰³ CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957, para. 84.

²⁰⁴ Commission Decision 94/815/EC of 30 November 1994 (*Cement*), O.J. 1994 L 343/1.

pose of information exchanges and held that the intent of the participating competitors is relevant for the evaluation of the legality of information exchanges. The Commission said that even when the information exchanged is public, but shared for the purpose and in view of the discussions held among cartel members, the exchange of information will be ancillary to the Cartel.²⁰⁵ In the appeals²⁰⁶ against the CFI's judgment²⁰⁷ in *Cement*, the appellants argued that the exchange of information was lawful because the information exchanged was in the public domain or concerned historical or purely statistical data. The ECJ upheld the CFI's rejection of this argument, holding that there is an infringement of Article 81(1) EC where the information exchange underpins another anti-competitive arrangement. Actually, it is relatively difficult to prove that an information exchange is a mere compilation of market data and conditions and therefore does not form a basis for further-reaching cooperation of the participating undertakings.²⁰⁸ As "structural links" in the liner shipping industry still are strong and consortia in particular often still have the form of cartels, hardly any information exchange can be exempted from the suspicion of an anti-competitive purpose, except the already exempted information exchange system under Regulation 823/2000.

2) Period and Frequency

As to the age of data, the Draft distinguishes between historic, recent and future information. In accordance with the constant practice of the Commission, "historic" data means data older than one year,²⁰⁹ while information less than one year old can be considered recent.²¹⁰ The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market.²¹¹ In respect of liner shipping, the Draft had more tolerance and allowed that "exchanges of historic data on volume

²⁰⁵ *Ibid.*, para. 47.

²⁰⁶ ECJ 7 January 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (*Aalborg Portland and Others v. Commission*), [2004] E.C.R. I-123.

²⁰⁷ CFI 15 March 2000, joined cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 (*Cimenteries CBR and Others v. Commission*, "*Cement*"), [2000] E.C.R. II-491.

²⁰⁸ Commission Notice concerning Agreements, Decisions, and Concerted Practices in the Field of Co-operation between Enterprises, O.J. 1968 C 75/3 corrected by O.J. 1968 C 93/3 (now withdrawn), Section II. 1.

²⁰⁹ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 53 (in the final version, para. 54) in comparison with Commission Decision 92/157/EEC of 17 February 1992 (*UK Agricultural Tractor Registration Exchange*), O.J. 1992 L 68/19, paras. 50 and 61. See also *Wollmann*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 523, Rn. 2-2-137.

²¹⁰ The Draft has referred to the Commission Decision 98/4/ECSC of 26 November 1997 (*Wirtschaftsvereinigung Stahl*), O.J. 1998 L 1/10, para 17.

²¹¹ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 53 (in the final version, para. 54).

and capacity, even on a disaggregated basis, are unlikely to be restrictive of competition; whether data can be considered historic must be determined by the effects its disclosure is likely to have on the relevant market.”²¹² The final version reduced this tolerance and states only that “[t]he time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual” and “[e]xchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers’ or carriers’ transactions cannot be identified either directly or indirectly”.²¹³

Future data are considered “particularly likely to be problematic, especially when they relate to prices or output”.²¹⁴ While information concerning the future, such as expectations and predictions of a general nature, will in most cases be uncritical, detailed and substantiated predictions, e.g. regarding the expected price level, will often lead to anti-competitive effects.²¹⁵

As regards the frequency of exchange, the Guidelines, following the Draft, state that “the more frequently the data are exchanged, the more swiftly competitors can react”, which is liable to lower the incentives to initiate competitive actions and restrict the secret competition.²¹⁶ As a general rule, the larger the period between the information flows, the more likely the future contact of competitors will not be influenced and the information exchange will not be considered an infringement of Community competition rules.²¹⁷ However, the wording of the Draft is rather general; the Commission does not discuss this issue very precisely, especially in respect of the liner shipping industry. In its decisions, the Commission objected to the weekly transfer of data in an exchange system and demanded intervals of at least two weeks, with data on a one-month observation period.²¹⁸

3) Processing Form: Individual or Aggregated

The Draft, as remained in the final version, distinguishes between individual and aggregated information.²¹⁹ In the practice of the Commission, the exchange of information concerning a “designated or identifiable undertaking” is more likely

²¹² *Ibid.*, para. 55.

²¹³ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para. 54.

²¹⁴ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 53 (in the final version, para. 54).

²¹⁵ Cf. Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3, para. 10. See also *Wollmann*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 523, Rn. 2-2-137.

²¹⁶ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 54 (in the final version, para. 55).

²¹⁷ Cf. *Wollmann*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 524, Rn. 2-2-138.

²¹⁸ Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3, para. 18.

²¹⁹ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 52 (para. 52 of the final version).

to be viewed as anti-competitive, while the gathering and dissemination of sensitive data usually is permissible when the data have been aggregated to a sufficient level.²²⁰ The Draft emphasizes the level of aggregation and notes that it must be impossible to “disaggregate” the information so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.²²¹ Usually, the Commission requires the aggregation of market data of at least three undertakings.²²² Additionally, the Commission requires that the more sensitive the exchanged information, the more aggregated the data should be. For example, in *CEPI-Cartonboard*, the Commission held that aggregated turnover figures of three or more undertakings can be exchanged, while the transmission of an obviously sensitive order receipt will only be permissible where the aggregated data pertain to at least ten undertakings.²²³

As regards liner shipping, the Draft, as retained in the final version, refers to “price indexes” and requires that a price index should be “based on appropriately aggregated price data” and “the level of aggregation is such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors”.²²⁴ Further, the final version changed the arrangement of the text²²⁵ and pays more attention to exchanges of capacity forecasts in aggregated form: “[i]n liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.”²²⁶

ee. Potential Effects by Absence of Information Exchange

Unlike price fixing agreement, information exchange usually does not directly limit the operative freedom of market participants. However, an information ex-

²²⁰ *Ibid.* Cf. Wollmann, in: Hirsch/Montag/Säcker, Competition Law (2008), Part 2 B., p. 523, Rn. 2-2-136.

²²¹ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 52.

²²² Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3, para. 16.

²²³ *Ibid.* Cf. Wollmann, in: Hirsch/Montag/Säcker, Competition Law (2008), Part 2 B., p. 523, Rn. 2-2-136.

²²⁴ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, paras. 57 (para. 57 of the final version).

²²⁵ Para. 52 of the final version replaced para. 52 of the Draft. Para. 56 of the Draft was replaced by para. 53 in the final version, directly following para. 52 of the Guidelines. In this way, the final version reached better structure and more clearance than the Draft.

²²⁶ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para. 53.

change can still lead to restriction of competition, especially by reducing the independence of market participants. Therefore, a hypothetical competition assessment is necessary to examine whether those competition conditions could exist, which deviate from the normal market circumstances.²²⁷ This means to examine how the market competition would probably be without such an information exchange.

The Guidelines, following the Draft, state that “the assessment must also consider the potential effects that the information exchange could have in the market compared to the competitive situation that would result in the absence of the information exchange agreement.”²²⁸ This is in accordance with Community case law²²⁹ and also with the Commission’s opinion in its Guidelines on the application of Article 81(3) EC which state:

“While sources of actual competition are usually the most important, as they are most easily verified, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing undertakings that are not already competing within the relevant market. Any assertions by the parties that there are low barriers to market entry must be supported by information identifying the sources of potential competition and the parties must also substantiate why these sources constitute a real competitive pressure on the parties.”²³⁰

B. Liner Conferences after the Adoption of the Anti-Monopoly Law in China

I. Antitrust Investigation in Practice: Investigation of the Terminal Handling Charges (THC)

1. Introduction

On 30 December 2002 the MOC announced an antitrust investigation on the terminal handling charges (THC) which were imposed by certain line conferences and international liner shipping companies. After a prolonged investigation, the Decision on the Results of the THC Investigation²³¹ (the THC Decision) was is-

²²⁷ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht* (2004), § 9 Rn. 41, p. 257.

²²⁸ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3, para. 45 (now para. 45 of the final version).

²²⁹ ECJ 28 May 1998, case C-7/95 P (*John Deere Ltd v. Commission*), [1998] E.C.R. I-3111, paras. 76 and 77.

²³⁰ Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004 C 101/97, para. 114.

²³¹ The full name of the THC Decision is the Notice on Publication of the Decision Relating to the Investigation on the Collection of THC in International Container Liner Services [关于公布国际班轮运输码头作业费(THC)调查结论的公告], which was issued jointly by the MOC, the NDRC and the SAIC on 18 April 2006, Doc. No. MOC 9/2006. The THC Decision is also translated officially into English. The English ver-

sued by the MOC jointly with other administrative bodies on 18 April 2006. Since the adoption of the RIMT and the IRRIMT, the *THC* case was the first and the most important administrative antitrust investigation carried out by the MOC according to the procedural investigation rules under the RIMT and the IRRIMT. The special significance of the *THC* Decision consists also in that it refers directly to anti-competitive practices of liner conferences. The *THC* Decision shows how and to what an extent the existing competition rules in Chinese maritime legislation have been implemented. Below, following the background of the *THC* investigation, the investigatory process and the *THC* Decision are described, followed by a discussion of the proceedings and the *THC* Decision in respect both of substantive and of procedural provisions. Finally, a conclusion will be drawn on the basis of the preceding analysis.

2. Background of the *THC* Investigation

In December 2001, Chinese shippers and freight forwarders were notified by the FEFC that *THC* would be introduced in Mainland China as of 15 January 2002.²³² The FEFC justified the introduction of *THC* in China in its notice which read: "The practice of applying and collecting *THC* locally is an accepted international practice existing in all Asian countries and most countries worldwide. It enables shipping lines to be able to offer rate quotations that truly reflect market supply and demand conditions and allows overseas buyers to compare costs among various countries on an equal basis." Apart from the FEFC, the Asia Westbound Rate Agreement (AWRA), the Eastbound Management Agreement (EMA) and the Mediterranean Rate Agreement (MRA) and all other shipping lines involved in the Middle East and Intra-Asia trades were to charge *THC* in Chinese ports at a similar level, and so were independent carriers such as COSCO and China Shipping.²³³ On all Chinese shippers for the related routes, *THC* would be imposed at fixed rates as follows:²³⁴

Type of Container	Dry Cargo		Reefer Cargo	
	20' Container	40' Container	20' Container	40' Container
RMB (Yuan)	370	560	410	610
USD (Dollar)	44.76	67.74	49.60	73.80

sion is available online at <http://www.moc.gov.cn/06zhengwugg/shuiluys/200604/t20060420_32545.html>.

²³² The Notice of FEFC is available online at <<http://www.snet.com.cn/news/sdbd/200201/huzhul.htm>>. Meanwhile, the original receiving charges (ORC), which has been imposed on Chinese shippers in ports of North China (Guangdong, Guangxi, Yunnan, Hainan and Fujian) already since 1997, was renamed to *THC*. For more details, see also *Zhu*, Comments on the Dispute of *THC* (2002), p. 15; *Zhu*, The Dispute of *THC* Between Chinese Shippers and Liner Companies (2003), p. 24.

²³³ *Zhu*, Comments on the Dispute of *THC* (2002), p. 15.

²³⁴ Currency conversion calculated at 1 RMB = 0.12097 US Dollar as at 1 January 2002.

The imposition of THC in Mainland China was opposed strongly by Chinese shippers.²³⁵ The China Shippers' Association (CSA),²³⁶ an organization representing all Chinese shippers, estimates that Chinese shippers have paid a total of 1.6 billion US Dollar for THC since 2002.²³⁷ Due to the tough resistance of Chinese shippers, consultations on THC were held on 19 December 2001, 23 January 2002 and 15 March 2002,²³⁸ however, no consensus was reached.²³⁹

The CSA strongly criticized the imposition of THC and considered it an abusive practice, alleged that such practices were against Chinese laws and regulations and appealed to the MOC for governmental intervention.²⁴⁰ However, the MOC was initially of the opinion that the imposition of THC was a mere commercial matter which should be negotiated and resolved between the parties involved, i.e. mainly between shippers and liner shipping companies. A governmental intervention was at first considered improper.²⁴¹ Surprisingly, the MOC issued a first Notice on THC on 29 November 2002 (the MOC-Notice 7/2002), almost one year after the Notice of the FEFC. The MOC-Notice 7/2002 was named the Notice on Strengthening the Supervision and Administration of International Maritime Transport²⁴² and referred directly to THC imposed by certain international liner shipping companies since the beginning of 2002. In the MOC-Notice 7/2002, the MOC warned liner conferences to comply with Chinese laws and regulations and declared that the parties concerned could expose any anti-competitive practices,

²³⁵ In 2002, several Chinese shippers' councils, such as the Liaoning Shippers' Council, the Anhui Shippers' Council and the Ningbo Shippers' Council, issued respectively the statement to require the cancellation of THC.

²³⁶ Being approved by the former Ministry of Foreign Trade and Economic Cooperation, the CSA was established in 1989. As an industry association, the CSA is now supervised by the MOFCOM. The main functions of the CSA are: (i) to submit its research reports and opinions to the government; (ii) to safeguard interests of foreign trade enterprises, such as to hold consultation meetings with liner conferences, shipping companies, freight forwarders.

²³⁷ ASEAN Shippers support China on Freight Charge, news of 22 October 2003 in China Daily, available online at http://www.chinadaily.com.cn/en/doc/2003-10/22/content_274240.htm.

²³⁸ *Cheng*, The Impact of the THC Collection on Carriers and Shippers (2005), p. 180 ff.

²³⁹ As regards, for instance, the consultation meeting on 19 December 2001, see the Minutes of the consultation meeting on the THC issue, available online at <http://www.china-commerce.com.cn/2002/hzxh/qxwj/2001-87-01.htm>.

²⁴⁰ On 25 April 2002 the National Conference of the Chinese Shippers was held in Peking and then this national conference made public on the following day a joint statement on united boycott of THC. The CSA, the Chinese Association of Foreign Invested Enterprises (CAFIE) and the Chinese Association of International Freight Forwarders (CAIFF) made public another joint statement on united boycott of THC. See also *Cheng*, The Impact of the THC Collection on Carriers and Shippers (2005), p. 180 ff.

²⁴¹ Transparent THC Proposal Could Give Clearer Picture of Port Costs, South China Morning Post (Hong Kong), 11 March 2003, p. 4.

²⁴² Notice on Strengthening the Supervision and Administration of International Maritime Transport [关于加强对国际海运经营活动监督管理的公告], Doc. No. MOC 7/2002, issued by the MOC on 29 November 2002.

inform the MOC or request an investigation. One month later, the MOC issued a Notice to initiate the antitrust investigation on THC²⁴³ (the MOC-Notice 9/2002). In the MOC-Notice 9/2002, the MOC stated that this investigation was initiated upon the request of the CSA pursuant to Article 35 RIMT.²⁴⁴ In this case, the CSA was described as the “interested party” within the meaning of Article 35 RIMT, since the CSA was not an undertaking but an association of Chinese shippers.

3. The Investigation Process

The MOC-Notice 9/2002 demonstrated the organisation of the investigation committee, the object of the investigation, the investigated international liner shipping companies and the investigation period. According to the MOC-Notice 9/2002, the investigation committee was established by the MOC together with the NDRC and the SAIC, and the office of the investigation committee was located in the Department of Water Transportation of the MOC.²⁴⁵ The object of the investigation included:²⁴⁶

- 1) whether or not the agreements involving THC for Chinese shippers made between the investigated international liner conferences or between international liner shipping companies are detrimental to fair competition;
- 2) whether or not the imposition of THC on Chinese shippers referred to discriminatory prices or other restrictive conditions has adverse effects on the other party of the transaction;
- 3) whether or not the international liner conferences or international liner shipping companies under investigation have conducted other illegal practices damaging to the other party of the transaction or the market order of international maritime transport services.

The investigation period was to be six months from the date of the publication of the MOC-Notice 9/2002, and the international liner conferences and international liner shipping companies under investigation had to submit the documents and proof to the investigation committee within 60 days from the date of the publication of the Notice. The CSA and Chinese shippers who have paid THC were required to submit their complaints and proof within 45 days from the date of the publication of the Notice.²⁴⁷

On 9 April 2003 the MOC issued the Notice on the THC Hearing,²⁴⁸ according to which a two-day hearing was to be held in Peking on 10–11 May 2003. This hearing was postponed to 21–22 August 2003 and the end of the THC investiga-

²⁴³ Notice on Launching the Investigation of THC [关于开展码头作业费问题调查的公告], Doc. No. MOC 9/2002, issued by the MOC on 30 December 2002.

²⁴⁴ The Preamble of the MOC-Notice 9/2002.

²⁴⁵ Para. 3 of the MOC-Notice 9/2002.

²⁴⁶ Para. 2 of the MOC-Notice 9/2002.

²⁴⁷ Para. 3 of the MOC-Notice 9/2002.

²⁴⁸ Notice on the THC Hearing [关于召开码头作业费调查会的通知], issued by the MOC on 9 April 2003.

tion was set down on 31 October 2003.²⁴⁹ Meanwhile, a total of 13 experts were invited by the investigation committee to help the evaluation in the THC investigation.²⁵⁰ The investigation hearing was held on 21–22 August 2003 in Peking and shall examine and discuss totally 18 investigatory questions drafted by the investigation committee and attached to the Notice on the THC Hearing.²⁵¹ However,

²⁴⁹ See the Notice on Issues of the THC Investigation [关于THC调查有关事项的公告], Doc. No. MOC 10/2003, issued by the MOC on 24 June 2003.

²⁵⁰ Notice Listing the Names of the Members of the Group of Experts in the THC Investigation [关于调整THC调查咨询专家组成员名单的公告], Doc. No. MOC 8/2003, issued by the MOC on 30 May 2003. They included four officials from the governmental departments (WANG Changbin <Department of Law and Regulation in the SAIC>, CHEN Fuzhi <Department of Industry, Transport and Commerce in the Legislative Office of the State Council>, SAN Lin <Department of Fair Transaction in the SAIC> and DAI Guanlai <Department of Economic Politic Cooperation in the former State Planning Commission, now the NDRC>), seven scholars from the universities and research institutes (YU Shicheng <Shanghai Maritime Transport Institute>, WANG Yongzhi <Institute for Macro-economy Research in the former State Planning Commission>, SHI Jichun <Chinese People's University>, YANG Changchun <University for Foreign Economy and Trade>, HU Zhengliang <Dalian Maritime University>, GAO Yongfu <Shanghai Foreign Trade Institute> and LI Xiaoxian <University for Foreign Economy and Trade> and two judges (LIU Shoujie <The Highest People's Court> and CHEN Mantang <Shanghai Maritime Court>).

²⁵¹ Notice on the THC Hearing [关于召开码头作业费调查会的通知], issued by the MOC on 9 April 2003. The investigatory questions were divided into four categories:

Category I: Questions relating to the UNCTAD Liner Code:

- 1) What is the character of liner conferences under the UNCTAD Liner Code? Shall liner conferences be registered in China in order to provide shipper services in China?
- 2) Did liner conferences or their representatives consult Chinese shippers associations or their representatives about THC? If yes, what was the outcome of the consultation?
- 3) Does the UNCTAD Liner Code provide that liner conferences can collect THC, if liner conferences and shippers associations fail to reach agreement on THC?
- 4) Does the UNCTAD Liner Code have any provisions relating to handling or mediation of disputes between shipper associations and liner conferences?
- 5) Shall THC be considered as a surcharge according to the UNCTAD Liner Code, or as other costs?

Category II: Questions relating to Chinese administrative regulations, such as the RIMT, the IRRIMT and the Pricing Law:

- 6) Can liner conferences and liner companies enter into agreements or take concerted action concerning freight rates or other service charges on the routes touching Chinese ports?
- 7) Is the collection of THC by liner conferences and liner companies in China a case of Article 14(1) of the Pricing Law, which provides that business operators are forbidden to work collaboratively with others to control market prices to the detriment of the lawful rights and interests of other business operators or consumers?

neither the protocol of the hearing nor the individual arguments of the participating representatives of liner conferences and international liner shipping companies on the hearing have been made public by the MOC or the investigation committee on public media.²⁵² After the hearing, the 13 consulting experts were asked to submit recommendations, on the basis of which the investigation committee formulated a draft “Investigation Conclusion”, submitted to the State Council for further instructions. Neither the recommendations nor the draft Investigation Conclusion have been made public.²⁵³

- 8) Does the collection of THC violate Article 27 RIMT? I.e., is the collection of THC by liner companies “discriminatory pricing”? Is the collection of THC harming the other party by “restrictive conditions”?
- 9) Is the collection of THC by liner conferences and liner companies illegal monopolistic behaviour? Are there any antitrust provisions in Chinese laws and administrative regulations?

Category III: Questions relating to predatory pricing:

- 10) Does the collection of THC constitute predatory pricing, if liner conferences and shippers associations fail to reach agreements on THC?
- 11) Under what conditions may carriers (liner companies) legally detain bills of lading or retain goods when performing a contract of international carriage of goods by sea? Conversely, under what conditions is it illegal or does it constitute predatory pricing?

Category IV: Other related questions, such as the liner terms, the situation of THC in other countries:

- 12) What is the relation between liner freight and THC? What is the basis of THC? What is the standard of THC in China? How are THC collected by liner companies in China?
- 13) What are the main contents of the liner terms? Are the liner terms mandatory? Must the behaviour of liner companies be in conformity with the liner terms?
- 14) Shall international trading customs be applied with regard to the collection of THC by liner companies? What are the main contents of international trading customs concerning THC?
- 15) In which countries (regions) do liner companies collect THC? How are THC collected and at what rates?
- 16) In which countries (regions) is the collection of THC prohibited or interfered with by the government?
- 17) Were there disputes on the collection of THC between liner companies and shippers or shippers associations in other countries (regions)? How were the disputes resolved?
- 18) Please put forward the proposal on how to resolve the THC issue and give the reasons.

²⁵² As to the CSA’s opinions on the collection of THC in China, see CSA, Answer to the Investigatory Questionnaires of the THC Issue (2003) and CSA, The General Statement of the CSA on the THC (2003). The opinions of the liner conferences and the international liner companies are not published.

²⁵³ It is interesting to note that not the State Council but the MOFCOM commented these recommendations and the draft Investigation Conclusion. On 23 February 2004, the MOFCOM handed over these comments (the MOFCOM Comments) to the MOC with

Although the investigation period was officially to end on 31 October 2003, no official investigation conclusion was made public until 18 April 2006, a delay of almost two and half years. The THC Decision, which was signed and made public by the MOC, the NDRC and the SAIC on 18 April 2006, ended the THC investigation. A table of the main issues of the investigation process follows.

Table of the THC Investigation

29 November 2002	Notice on Strengthening the Supervision and Administration of International Maritime Transport, Doc. No. MOC 7/2002, in which the MOC noted that the MOC may, upon request of interested parties, launch an antitrust investigation concerning on THC.
30 December 2002	Notice on Launching the Investigation of THC, Doc. No. MOC 9/2002, in which the MOC announced that upon the request of the CSA, the MOC would, in accordance with Article 35 RIMT, conduct an investigation on the THC issue with the NDRC and the SAIC.
22 January 2003	Notice on the Submission of Opinions on THC.
9 April 2003	Notice on the THC Hearing, which announced that the THC hearing would be held on 10–11 May 2003 and listed the issues to be investigated.
30 May 2003	Notice Listing the Names of the Members of the Group of Experts in the THC Investigation, Doc. No. MOC 8/2003.
24 June 2003	Notice on Issues of the THC Investigation, Doc. No. MOC 10/2003, which the MOC announced that the THC hearing would be postponed to 21–22 August 2003 and officially prolonged the period of the THC investigation to 31 October 2003.

a proposal regarding the recommendations and the draft Investigation Conclusion submitted by the MOC. See Official Letter of the MOFCOM to the MOC regarding the Recommendations and the Draft of Investigation Conclusion submitted by the MOC [商务部给交通部去函对THC咨询报告和调查结论提出意见和建议] (the MOFCOM Comments), issued on 23 February 2004 and available online at <http://news.cnshipper.com/read_10264.html>. In its comments, the MOFCOM said that the imposition of THC was detrimental to Chinese shippers and the national interest, was against the international business practice, and violated Chinese laws and regulations such as the Maritime Code, the RIMT, the Pricing Law as well as the UNCTAD Liner Code. The MOFCOM discussed the draft Investigation Conclusion of the MOC and proposed that the MOFCOM should be invited to carry out a joint-investigation together with the MOC, the NDRC and the SAIC. A new draft Investigation Conclusion should be formulated on the basis of the new joint-investigation of the four ministries and be submitted to the State Council. It is unknown whether and how the MOC has reacted to the MOFCOM Comments. Obviously, a legal basis for the request of the MOFCOM to join the investigation does not exist, since Article 36 RIMT has stated clearly that an administrative investigation shall be carried out by the MOC jointly with the State Council's department for the administration of industry and commerce and the department for price regulation. The final Investigation Conclusion of THC on 18 April 2006 was signed by the MOC, the SAIC and the NDRC. The MOFCOM was not mentioned.

21–22 August 2003	The THC hearing was held in Peking, China.
23 February 2004	Official Letter of the MOFCOM to the MOC regarding the Recommendations and the Draft Investigation Conclusion submitted by the MOC (the MOFCOM Comments).
18 April 2006	Notice on Publication of the Decision Relating to the Investigation on the Collection of THC in International Container Liner Services (the THC Decision).

4. The THC Decision

The THC Decision starts with a general introduction of the arguments of the CSA on one side and the arguments of the liner conferences and international liner shipping companies on the other side, and states six points as its investigation conclusion.

Point 1, on the nature of THC, the THC Decision declared that THC are considered to be a component of freight rates of international container liner shipping services, which are used in major trading countries and areas but are opposed in some other countries and areas.

Point 2, as to freight rates-fixing by liner conferences and international liner shipping companies, the THC Decision stated that liner conferences and international liner shipping companies have the right to fix freight rates collectively, but that such practice must not be detrimental to fair competition and the order of international maritime transport services, and that the freight rates must be filed with the MOC.

Point 3, as to the so-called “non-binding statement”, the THC Decision pointed out that the imposition of THC was made public by a joint notice of liner conferences. This joint notice did not contain a so-called “non-binding statement”, saying that the decision to impose THC in the liner conference agreements was not binding upon the member carriers, and that the member carriers had the right not to impose THC. The THC Decision considered the notice on the imposition of THC by liner conferences without a “non-binding statement” a *de facto* restriction of the freedom of choice of shippers, which by *de facto* binding the carriers harmed normal price competition among liner shipping companies and to a certain extent disturbed the order of the international shipping market. Therefore, the investigation authorities made the following two administrative decisions:²⁵⁴

- a) The MOC shall exhort liner conferences and freight discussion agreements organisations as well as their members to avoid such practices in the future and order the liner conferences and freight discussion agreements to revise the notices or declarations.
- b) The MOC will, in accordance with Article 48 RIMT, impose a penalty on the members of liner conferences and freight discussion agreements who had reached collective freight agreements but failed to file them as required.

²⁵⁴ In order to keep the original text of the THC Decision, the following two paragraphs and the Point 4 of the Notice are directly cited from the official English translation by the MOC.

Point 4, two further requirements. The first refers to a consultation mechanism between shippers and liner shipping carriers provided for neither in the RIMT nor in the IRRIMT. The THC Decision required that “an effective consultation mechanism” shall be established and “full and effective consultation” shall be carried out before any freight rates agreements and other surcharge agreements covering Chinese ports, are implemented. The second requires that for liner conferences and freight discussion agreements, liaison offices or representatives within Chinese territory are appointed in advance. The names and addresses of such liaison offices or representatives shall be made public and filed with the MOC.

Point 5 concerns an individual penalty relating to the MOC-Notice 9/2002, which required liner conferences and international liner shipping companies to submit the relevant documents and proof materials to the investigation committee within 60 days from the date of the Notice publication. On international liner shipping companies, which have not complied with this requirement, a penalty will be imposed pursuant to Article 53 RIMT, according to which those who do not accept an investigation legally conducted by the investigation authorities and their officials, or conceal truthful information or give false information, shall be ordered to make corrections and fined a sum between 20,000 RMB and 100,000 RMB. However, the names or a list of such violators were given neither in the THC Decision nor in any official notices the MOC made public later.

Point 6 concerns the CSA’s complaint that the international liner shipping companies detained bills of lading and cargoes when Chinese shippers failed to pay THC. In the THC Decision, the investigation authorities neither mention any evidence for such practices collected by the investigation committee, nor confirm that such practices existed. It is only said that “if the case was true, it was related to the formulation or performance of the transport contracts”. Therefore, the interested parties shall settle the case through judicial channels in accordance with the Maritime Code and the other relevant laws and regulations.

5. Comment on the THC Investigation

The THC investigation was the first antitrust investigation launched by the Chinese government against liner conferences and freight discussion agreements. At the time of this THC Decision, there was no general antitrust law in China.²⁵⁵ The investigatory authorities tried to solve the THC dispute within the framework of the maritime law system, in particular the RIMT and the IRRIMT. This first administrative proceeding was a step in the evolution of Chinese competition regulation in the maritime sector. However, the THC investigation and the THC Decision show deficiencies not only in the substantive and procedural provisions but also in actual law enforcement.

²⁵⁵ The THC Decision was issued by the investigatory authorities on 18 April 2006, while the AML was adopted on 30 August 2007 and will come into force on 1 August 2008.

a. Substantive Aspects

aa. Essence of the THC Dispute

The CSA considered the imposition of THC by liner conferences such as the FEFC and the other liner shipping companies from the same date and at the same level an infringement of the UNCTAD Liner Code and the RIMT. The CSA did not mention any concrete rules of the UNCTAD Liner Code or the RIMT that might be infringed, and did not detail this accusation of concerted practices or the abuse of market power, but switched to emphasize that THC should be a component of freight rates, to which the business practice of “whoever pays the freight rate takes the burden of THC” should apply. Furthermore, the CSA complained that the liner conferences failed to enter into meaningful negotiations with Chinese shippers and detained bills of lading as well as cargoes when Chinese shippers failed to pay THC.

The liner conferences held that THC were not a part of freight rates; THC were meant to recover the costs of container handling at terminals; and changes of THC were caused mainly by changes in charges collected by terminal operators. The liner conferences justified the separation of shore-side charges and ocean freight rates, as in the *THC* case, with the intent to maintain transparency in shipping charges and claimed that the collection of THC by liner carriers was a standard practice of both conference and non-conference ocean liners.²⁵⁶

The CSA argued that the imposition of THC on Chinese shippers was illegal.²⁵⁷ However, this argument is difficult to support, as Chinese law does not contain any provisions which directly and explicitly refer to the legality of THC. This also seems to be the reason by the rather vague and equivocal attitude of the THC Decision.²⁵⁸ Point 1 of the THC Decision favours the CSA to a certain extent by declaring that THC are by nature a component of freight rates for international container liner shipping services; but Point 2 of the THC Decision favours liner conferences by confirming their right to reach freight rate agreements collectively.²⁵⁹ It follows, since this right of collective freight rates-fixing is confirmed and THC are considered a component of freight rates, that liner conferences and international liner shipping companies can fix and impose THC. However, the THC Decision does not give any reason for the determination of THC as a component of freight rates, but only mentions that THC are imposed in the major trading countries and areas. Though providing for warning and corrections as well introducing new obligations like consultation and filing, the THC Decision, *finally*, does not prohibit the imposition of THC by liner conferences on Chinese shippers in Chinese ports. When all is said and done, the THC Decision fails to

²⁵⁶ *Tai/Tang/Wong*, Note and Comments on the First Decision Based on the RIMT Concerning THC (2007), p. 119.

²⁵⁷ As to the CSA's opinion on THC, see CSA, Answer to the Investigatory Questionnaires of the THC Issue (2003) and CSA, The General Statement of the CSA on the THC (2003).

²⁵⁸ *Tai/Tang/Wong*, Note and Comments on the First Decision Based on the RIMT Concerning THC (2007), p. 117.

²⁵⁹ *Ibid.*

answer the question whether liner conferences and international liner shipping companies may impose THC on Chinese shippers in Chinese ports.

As regards the essence of the THC Dispute, the dispute focused superficially on the question whether THC were a component of normal freight rates for international liner shipping services.²⁶⁰ But in fact, the core issue should not be the clarification of the nature of THC, but the question whether the imposition of THC by certain liner conferences and international liner shipping companies from the same date and at the same level constitutes a concerted practice and/or an abuse of market power, which has as its object or effect the restriction of competition and must be considered an infringement of competition rules.

In practice, the liner conference tariffs often incorporate the principal charges and the surcharges, such as THC, less-than-container-load service charges (LCLSC), detention charges and demurrage charges etc.²⁶¹ Although such surcharges often are not directly included in the calculation of maritime transport costs, they are generally inseparable from the related maritime transport services and often amount to a very high percentage of the total transport costs or actual freight rate.²⁶² Such explicit agreements or concerted practices on surcharges between conference members can exercise their market power on shippers, impact independent carriers through the effect of a “price-rates index” and finally distort competition and damage market efficiency.²⁶³ In the *THC* case, the CSA did not go further on this issue, the liner conferences did not respond to this issue, and the MOC did not discuss this issue.

bb. Aim, Legal Basis and Reasoning

There are three questions referring to the substance of the THC Investigation: (1) what was the aim of the THC investigation? (2) what was its legal basis? (3) did it apply the law properly and give convincing reasons?

As stated above, the core issue should be the question whether the imposition of THC carried out by liner conferences constituted an infringement of applicable competition rules. This issue was also covered in the MOC-Notice 9/2002, which states that the aim of the THC investigation was to determine:

- 1) whether the agreements involving THC reached among international liner conferences or between international liner shipping companies were detrimental to fair competition;
- 2) whether the imposition of THC led to discriminatory prices or other restrictive conditions which caused damage to the other party of the transaction;
- 3) whether international liner conferences or international liner shipping companies carried out other illegal practices causing damage to the other party of the transaction or the market order of international maritime transport services.

²⁶⁰ *Ibid.*

²⁶¹ See e.g. Commission Decision 2000/627/EC of 16 May 2000 (*Far East Trade Tariff Charges and Surcharges Agreement*, “FETTCSA”), O.J. 2000 L 268/1, paras. 28–30.

²⁶² *Ibid.*, para. 32.

²⁶³ For more related discussion, see also Basedow, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1540, Rn. 28.

As to the second question the THC investigation was started under Article 35 RIMT. The competition rules, which in accordance with Article 35 RIMT were applicable here, were Article 27 RIMT, Articles 55 and 56 IRRIMT, and Article 35 RIMT itself.²⁶⁴ As shown above,²⁶⁵ neither the RIMT nor the IRRIMT provide for the application of other competition rules like the LAUC, the Pricing Law and the PRCPM, and the LAUC, the Pricing Law and the PRCPM can on their own hardly be used as a sector-specific competition regulation of liner conferences, and in particular in the *THC* case. This is confirmed by the THC Decision, in which these three Laws and Regulation are not mentioned at all. Besides, the IRRIMT was adopted on 25 December 2002 and came into effect on 1 March 2003, after the initiation of THC on 15 January 2002, and they do not provide for retroactive application or refer to any pending cases. It might be argued that the IRRIMT were *Administrative Rules* issued by the MOC to implement the RIMT which was an *Administrative Regulation* adopted by the State Council and that, therefore, the IRRIMT were just as applicable as the RIMT. However, in the THC Decision, the investigation authorities did not explicitly refer to the IRRIMT, but simply reasoned that “the freedom of choice of shippers concerning carriers was *de facto* restricted”. This reasoning obviously referred to Article 56(1) IRRIMT but did not explicitly say so. The investigation authorities simply did not mention any individual statutes as legal basis for their competition assessment in the THC Decision.

The legal reasoning of the THC Decision is to be found in its Points 1, 2, 3 and 6. Point 1 simply stated that THC are a component of freight rates of international container liner shipping services. No further reasons are given, and logical relation can be found between this statement and the substantive analysis in the following points.

Point 2 confirmed the right of liner conferences and international liner shipping companies to conclude agreements fixing freight rates. This is based explicitly on the RIMT and the UNCTAD Liner Code. But this is questionable. No provisions in the RIMT state explicitly that liner conferences and international liner shipping companies have the right to conclude agreements fixing freight rates. It can only be derived implicitly from Article 22 RIMT that such agreements fixing freight rates are not prohibited. As regards the UNCTAD Liner Code, the investigation authorities neither discussed the applicability of this international convention in the Chinese jurisdiction,²⁶⁶ nor referred to any individual articles of the UNCTAD Liner Code. Point 2 further stated that “such agreements fixing freight rates shall not be detrimental to fair competition and disturb the order of the international shipping market, and shall be filed with the MOC”. This only repeats Articles 22 and 35(1) RIMT.

Point 3, i.e. its first paragraph, gave the main reasons of the THC Decision. It contains several contradictory arguments:

²⁶⁴ For more details, see above Chapter IV B. III. 1.

²⁶⁵ For more details, see above Chapter II B. II.

²⁶⁶ For a detailed survey of the applicability of the UNCTAD Liner Code, see above Chapter I B. IV. 2. c.

“Liner conferences and freight discussion agreements, through collective agreements, announced in the form of joint notices or declarations that they would start to collect THC in China at the same time and the same level. It was not stated in those joint notices or declarations that the decision of collecting THC was not compulsory to the members of liner conferences or freight discussion agreements and the members had the right to act independently. Such a decision *de facto* limited the right of shippers to choose carriers freely. This harmed normal price competition among liner companies and disturbed the order of the international shipping market to a certain extent.”

First, a legal basis for the necessity of the so-called “non-binding statement” can be found neither in the RIMT and the IRRIMT, nor in other maritime legislation. Also in the general competition rules like the LAUC, the Pricing Law and the PRCPM, provisions containing related rules do not exist. Secondly, the so-called “non-binding statement” refers to the joint notices or the declarations which were sent to inform the shippers of the imposition of THC, but not to liner conference agreements or freight discussion agreements. It would be contradictory, if such joint notices or declarations had to contain the so-called “non-binding statement” while the very agreements of liner conferences or freight discussion agreement do not need to contain such statement. *Vice versa*, if liner conference agreements contain such a “non-binding statement”, it would constitute a fundamental contradiction. As described above, “liner conference agreements” are defined in Article 3(14) IRRIMT as follows:

“Liner conference agreements” shall refer to all types of agreements between members of liner conferences and between liner conferences which conform to the definition given in the Convention on a Code of Conduct for Liner Conferences (Geneva, 1974).

This means that it is accepted in Chinese maritime legislation that the carriers as members of a liner conference conclude agreements “within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services”. Whether THC are or are not be considered a component of freight rates, a so-called “non-binding statement” for THC is incompatible with the legal nature of liner conference agreements. This fundamental contradiction continues to exist, since a similar substantive provision is introduced in the MOC-Notice 2007 which explicitly requires that the related agreements or minutes as well as decisions among liner conferences contain a so-called “non-binding statement”.²⁶⁷ But liner conferences would lose their essential nature without the compulsory nature of their agreements. It seems that the Chinese legislator does not understand the definition of liner conferences. This is probably the reason why there is no definition of liner conferences under the RIMT and the IRRIMT. The legitimacy of liner conferences under Chinese law is not clear. The filing policy provided by the RIMT and the IRRIMT acknowledges the existence of liner conferences in China, while the THC Decision requires liner conference agreements not to bind their members. In addition,

²⁶⁷ For more details see above Chapter IV B. III. 2. c.

even if liner conference agreements, such as the agreement on the collection of THC, are not compulsory, it would be difficult in practice to see how the liner operators who had agreed collectively to set the same rate of THC would act independently with different rates in favour of the shippers.²⁶⁸

Thirdly, the investigation authorities were of the opinion that the lack of “non-binding statement” resulted in restricting competition. They reasoned that the freedom of shippers to choose carriers was *de facto* limited and normal price competition between liner carriers hampered, because the members of liner conferences could not act independently without the so-called “non-binding statement”. Obviously, the investigation authorities have realized the anti-competitive aspect of liner conferences, namely that competition, first of all price competition, between conference members is restricted or eliminated by freight rate-fixing in the form of liner conference agreements. However, it is a fundamental contradiction, if the binding effects of liner conference agreements are legitimized on one side, and liner conference agreements are considered an infringement of competition rules just because of the lack of a so-called “non-binding statement”. The reason for this inherent contradiction might be the deficiency of Chinese legislation. Applicable general competition rules are lacking, and Chinese maritime legislation does not contain provisions, according to which liner conferences are considered anti-competitive, but granted antitrust immunity under certain conditions and obligations.

Furthermore, it must be pointed out that not only the members of liner conferences, but also the main independents, especially COSCO, China Shipping and SinoTrans, imposed THC on Chinese shippers at the same time and at the same level. Even if any agreements for concerted practices between liner conferences and independents could not be proved, tacit collusion was obvious. It must therefore be said that not only liner conferences but also independents must be accused of restrictive practices here. The investigation authorities did not touch upon the issue of tacit collusion. In addition they seemed to have held a double standard as regards the addressees of the allegations and the penalties. Although the MOC-Notice 9/2002 clearly stated that the persons under investigation included all liner conferences and international liner shipping companies who have imposed THC on Chinese shippers,²⁶⁹ the THC Decision only accused the liner conferences as well as their members of restriction of competition and imposed the penalties only on them.

Point 6 of the THC Decision stated that when liner shipping companies compelled the shippers to pay THC by detaining bills of lading and cargoes, this was a contractual dispute and handled as such by the courts. This was questionable. Although contract performance and contractual liability are also referred to in this case, such detaining practices principally served as a means of compulsion and were used as the proof of abuse of dominant position. This was not considered in

²⁶⁸ *Tai/Tang/Wong*, Note and Comments on the First Decision Based on the RIMT Concerning THC (2007), p. 120.

²⁶⁹ Point 2 of the MOC-Notice 9/2002.

the THC Decision when it declared such practice as a contractual dispute and urged the parties to resort to judicial remedy.

The THC Decision came to the conclusion that the collection of THC in China was against the law, but did not mention a concrete legal basis for this conclusion. The THC Decision considered that the lack of a “non-binding statement” “harmed normal price competition among liner companies and disturbed the order of the international shipping market to a certain extent”, but supported its opinion by contradictory legal reasoning. The investigation did not touch on the issue of concerted practices or tacit collusion, nor did it provide any competition analysis relating to the determination of a dominant position, nor did it come to a conclusion whether an abuse of a dominant position exists in the *THC* case. Finally, the THC Decision neither touched upon Article 27(3) RIMT, nor kept to the aim prescribed in the MOC-Notice 9/2002, namely to decide whether the imposition of THC resulted in discriminatory prices or other restrictive conditions which caused damage to the other party of the transaction.

cc. Penalty, Consultation Mechanism and Filing Requirement

Following the discussion of competition law in Point 3, the THC Decision determines penalties, a consultation mechanism and filing requirements.

The first penalty is “an exhortation to liner conferences and freight discussion agreements as well as their member carriers to avoid similar practices in the future”. However, exhortation as a penalty has no legal basis in the RIMT and the IRRIMT. Penalties for competition violations are provided for in Article 40(2) RIMT which allows the investigation authorities to demand:

- 1) corrections of the agreements concerned;
- 2) a limitation of number of liner voyages;
- 3) a temporary suspension of the list of freight tariffs or the filing freight rates;
- 4) regular reports of relevant information.

The second penalty is the order to correct joint notices or declarations; this seems to comply with Article 40(2) RIMT. However, Article 40(2) RIMT provides for the correction of agreements while the second penalty only refers to joint notices and declarations, not to the freight rates agreements themselves. Also, what exactly would have to be corrected is not stated. According to the reasoning in Point 3, the main failure in the joint notices and declarations is the lack of a so-called “non-binding statement”. Therefore, the correction would result in the publication of new notices or declarations on THC with a “non-binding statement”. It should, however, not be forgotten that these joint notices and declarations on THC have been made public mainly in December 2001, and that since then THC have actually been collected in most Chinese ports. The THC Decision did not state what the legal nature of paid THC was and whether paid THC should be repaid. As the THC Decision considers THC unlawful, it seems ridiculous that the second penalty seems intended to legitimize the unlawful gain of the carriers, since the corrected joint notices and declarations would be lawful after supplementing a so-called “non-binding statement” which, however, would not enforce any competition regulation against anti-competitive practices, especially in the case of tacit collusion between members of liner conferences and even between them and in-

dependents. Moreover, the first and second penalties were imposed only on liner conferences and freight discussion agreements as well as their members. Independent carriers involved, especially the main SOEs like COSCO, China Shipping and SinoTrans, were not touched upon.

The third penalty concerns the infringement of the filing requirement in Article 22 RIMT. A penalty according to Article 48 RIMT shall be imposed on a carrier who has participated in collective freight rates agreements but failed to fulfil the filing requirements. However, the penalty provisions in Article 48 RIMT²⁷⁰ are less sharp and might lead to *ex post* legitimization of the infringing practice.

Point 4 of the THC Decision demands the establishment of a consultation mechanism between liner conferences and freight discussion agreements on one side and shippers and shippers' organisations on the other side. A legal basis for this demand is to be found neither in the RIMT nor in the IRRIMT, and the efficiency of such a consultation mechanism without any binding effects and regulatory control is questionable. Point 4 further requires that "liner conferences and freight discussion agreements appoint liaison offices or representatives in China in advance before they carry out activities in China within the Chinese legal framework" and that "the name and addresses of such liaison offices or representatives be made public and filed with the MOC". Now, firstly, this filing requirement has no legal basis in the RIMT and the IRRIMT. Article 22 RIMT and Article 32 IRRIMT only refer to liner conference agreements and similar agreements. Article 34 RIMT which provides for the right of establishing liaison offices with the approval of the MOC only refers to individual foreign enterprises for international shipping services or auxiliary services. Secondly, the meaning of "liner conferences and freight discussion agreements [that] carry out activities in China within the Chinese legal framework" is unclear. Until now, there is no liner conference whose member carriers exclusively are Chinese legal persons. The doctrine of effect has never been unequivocally adopted in Chinese competition or maritime legislation. Therefore, it is not clear which activities of a liner conference are carried out "in China" and whether it is sufficient if one or more member carriers of that liner conference conduct business in China.

b. Procedural Aspects

Contradictions can also be found in respect of procedural points. First, the THC Decision refers to Article 35 RIMT according to which an antitrust investigation may be initiated by the MOC upon the request of an interested party or on its own. In the MOC-Notice 7/2002, the MOC has expressed its concern regarding the infringing practices in the imposition of THC. However, the MOC did not carry out an initial examination on its own decision, but called on the interested parties to complain or request an investigation. Then, in the MOC-Notice 9/2002, the

²⁷⁰ Article 48 RIMT states that whoever fails to fulfil the procedures laid down by the RIMT to file for the record shall be required to fulfil the supplementary procedures formalities; whoever fails to finish the supplementary formalities within a prescribed period of time will be imposed on a fine of 10,000 RMB to 50,000 RMB and deprived of corresponding qualification.

MOC confirmed that the investigation on THC was started upon the request of the CSA. For the reluctance to start an investigation on its own, the MOC did not give any reason.

Secondly, Article 37(2) RIMT requires that the party under investigation shall be informed about the aim, reasons and period of time of the investigation before the investigation. This implies that an investigation may be carried out only after the party has been informed, normally in written form and with the information of the beginning date. Otherwise the duration of the investigation could not be calculated. Article 53(2) IRRIMT requires that the party under investigation replies within 30 days from the delivery of the investigation information. It can be concluded from Article 53(2) IRRIMT that the investigation begins on the date of delivery. But the MOC-Notice 9/2002 simply stated that the investigation would begin on the date of the publication of this Notice, i.e. 30 December 2002.

Thirdly, Article 37(2) RIMT provides for an investigation period of one year which may be prolonged for six months with the approval of the investigation authorities. This means that the total duration of an investigation shall not exceed 18 months. The MOC-Notice 9/2002 determined an investigation period of six months, from 30 December 2002 to 29 June 2003. The Notice on Issues of the THC Investigation, which extended the investigation period to 31 October 2003, was made public on 24 June 2003. There were no further official notices or decisions prolonging the investigation. But the THC Decision as the final administrative decision was made public only on 18 April 2006.

Lastly, the MOC-Notice 9/2002 which initiated the THC investigation was made public on 30 December 2002, five days after the adoption of the IRRIMT on 25 December 2002. Therefore, the MOC had time enough to avoid deviations from the IRRIMT. However, deviations can be found on several points. Article 52 IRRIMT demands a preliminary examination by the investigation authority as prerequisite of an investigation. The MOC-Notice 9/2002 stated in its first paragraph that an investigation on THC would be initiated upon the request of CSA, but required in its last paragraph that the CSA should submit the complaint and proof within 45 days from the publication of this Notice. This means that the THC investigation was initiated upon the request of the CSA, but that no proof had been submitted and the authority for the investigation had not been examined. Article 53(2) IRRIMT provides for a period of 30 days from the delivery of investigation information, within which the party under investigation has to reply and discuss the investigation issues. However, the MOC-Notice 9/2002 required the liner conferences and international liner shipping companies to submit documents and materials to the investigation committee within 60 days from the date of publication of this Notice. Furthermore, the MOC-Notice 9/2002 did not say what individual investigation issues the party under investigation should discuss. Only in the MOC Notice on 22 January 2003²⁷¹ three questionnaires were delivered to the international liner shipping companies, liner conferences and Chinese shippers, respectively, for input and feedback.

²⁷¹ Notice on the Submission of Opinions on THC [关于提供码头作业费调查材料的公告], issued by the MOC on 22 January 2003.

II. Anti-Monopoly Law

The Anti-Monopoly Law (AML) of 30 August 2007 is the first codification of antitrust rules in China and constitutes a milestone of the development of competition laws in this country. Following a general introduction of the relevant parts of this law, the applicability of the AML to liner conferences is to be analyzed in respect of the scope of application, the substantive legitimization of liner conferences as a hard-core cartel, the anti-monopoly investigation procedures, the legal liability and the legal remedy.

1. Introduction

The Anti-Monopoly Law (AML) was adopted at the 29th Session of the Standing Committee of the 10th NPC on 30 August 2007 and came into force on 1 August 2008, twenty years after anti-monopoly legislation was included in the working plan of the 7th NPC in 1988.²⁷² In 1988, a working group drafted the Interim Regulations on Anti-Monopoly and Anti-Unfair Competition, which met with intense opposition.²⁷³ As a result, only the part opposing unfair competition was enacted in 1993, namely the Law Against Unfair Competition (LAUC). The part against monopolies was not adopted due to disagreement about the need for anti-monopoly legislation at China's current stage of economic development.²⁷⁴ The drafting of an "Anti-Monopoly Law" restarted in 1994 when this issue was officially included in the *Legislation Plan* of the Standing Committee of the 8th NPC.²⁷⁵ The whole process of legislation, including study and research of domestic and foreign legislation and enforcement and drafting of the law and discussion of the drafts, lasted 13 years.²⁷⁶ The first "outline" of the AML, finalized on 30

²⁷² The Working Plan of the Standing Committee of the 7th NPC.

²⁷³ *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003), p. 19; *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 225.

²⁷⁴ *Jung/Hao*, The New Economic Constitution in China (2003), p. 112; *Wang*, The Prospect of Antimonopoly Legislation in China (2002), pp. 225–226. One relatively popular opinion stated that monopolies can only arise in advanced markets where intense competition renders it possible for large companies to become monopolies or oligopolies while China's economy was still in the early stages of development, and therefore any monopolization was not yet apparent. The average size of the enterprises was still too small and horizontal alliances were just beginning to develop. Therefore, adopting anti-monopoly legislation at this stage would have a negative effect on Chinese industrial policy.

²⁷⁵ *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003), p. 19.

²⁷⁶ In the process of drafting and revising the outline of the AML, the drafting group not only solicited the opinions of Chinese anti-monopoly experts, but also received support and assistance from both international organizations (such as, the OECD, the World Bank, the UNCTAD, the APEC) and several countries (such as, the U.S., Germany, Japan, Australia, and South Korea). From 1997 to 1999, the OECD organized international symposiums with the AML drafting group and with Chinese anti-monopoly experts, conducting article by article discussions on the outline of the AML. See *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 224.

November 1999, consists of eight chapters and 56 articles.²⁷⁷ Since then, more than ten versions of the AML were drafted.²⁷⁸ In February 2004, a draft of the AML was submitted by the MOFCOM and the SAIC together to the State Council. The Legal Affairs Office of the State Council established a leading team, a working team and an expert team, to study and revise the AML drafts. In June 2006, the State Council finally submitted the formal AML Draft to the Standing Committee of the 10th NPC for legislative consideration. After the first reading of the draft at the 22nd Session of the Standing Committee of the 10th NPC on 22 June 2006, the revised draft was distributed to the relevant ministries and commission of the State Council, the regional governments, important SOEs and research organisations in universities and institutes. A lot of hearings, symposiums and meetings have been held by the Standing Committee of the NPC, by the State Council and between its departments. The second official draft for legislative consideration was submitted to the Standing Committee of the NPC in June 2007. After several small but also essential changes and revisions, the third official draft for legislative consideration was submitted to the 29th Session of the Standing Committee of the NPC in August 2007, at which this draft was adopted with absolute majority.²⁷⁹

The AML was highly praised as a milestone of China's economic reform and legislation and as the "economic constitution" of China's socialist market economy,²⁸⁰ but it was a matter of general concern whether it would be effectively implemented, some provisions, in particular those on monopolies of SOEs, administrative anticompetitive practices and the organisation of anti-monopoly enforcement authorities were sharply criticized.²⁸¹ It still remains doubtful whether the competition policy implied in the AML is compatible with a market economy based on private freedom and competition²⁸² and to what extent the AML is hampered by the constitutional requirements of the Chinese socialist market economy.

²⁷⁷ For an overview of the first draft of AML, see *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 224–225.

²⁷⁸ *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003), p. 20.

²⁷⁹ For an overview of the AML, see *Lorenz*, Das neue chinesische Kartellgesetz (2008); *Jones*, China's New Anti-Monopoly Law (2007); *Masseli*, Das Antimonopolgesetz der VR China (2007). For detailed survey on monopoly agreements, the abuse of dominant position, merger and acquisition, see *Lorenz*, Änderungen der Rechtspraxis durch das neue chinesische Kartellgesetz (2007); *Mao/Glass*, Das chinesische Antimonopolgesetz im Lichte des deutschen Kartellrechts (2008); *Meyer/Chen*, Fusionskontrolle in der VR China (2009); *Masseli*, Die chinesische Fusionskontrolle im Lichte der ersten Nebenbestimmungen zum Antimonopolgesetz (2009).

²⁸⁰ *Wang*, Antimonopoly Law is Milestone of China's Economic Reform (2007); *Wang*, Challenges for Antimonopoly Law at the Stage of Initial Enforcement (2007).

²⁸¹ Cf. *Wang*, Challenges for Antimonopoly Law at the Stage of Initial Enforcement (2007); *Zhou*, Antimonopoly Law Protects Fair Competition for Undertakings (2007); *Masseli*, Das Antimonopolgesetz der VR China (2007), p. 262 ff.; *Jones*, China's New Anti-Monopoly Law (2007), p. 3 ff.

²⁸² For detailed comments on the AML draft, see *Jung/Hao*, The New Economic Constitution in China (2003), p. 109 ff.

2. General Overview

a. Aim and Principles

aa. General Rules

According to the intention of the legislature, an accurate understanding of the AML should primarily rely on its Chapter I (General Provisions) expressing the purpose and fundamental principles of the law.²⁸³ According to Article 1 AML, the purpose of the law is: 1) to prevent and restrain monopolistic actions; 2) to protect fair competition on the market; 3) to improve economic efficiency; 4) to safeguard the interests of the consumers and the public interest; and 5) to promote the healthy development of the socialist market economy.

The prohibition of “monopolistic actions” is given as the first aim of the AML. As already demonstrated by the name of the law, it is directed against monopolies. However, the term “Monopoly” is neither defined in previous legislation, nor in the AML itself.²⁸⁴ Chinese legislation also does not use the term “anti-competitive actions” which might have been more appropriate as a general term. Article 3 AML differentiates kinds of “monopolistic actions”: monopoly agreements, abuse of a dominant market position, concentration of undertakings. In this way, the AML adopts the three pillars of the U.S. and the EU antitrust laws.

Furthermore, Article 1 AML specifies the objects to be protected by the AML. These are fair competition in the market, economic efficiency, consumer welfare, public interest and healthy development of the socialist market economy. These – apart from the last one – are the objects accepted worldwide in competition theories and many countries’ competition legislation, enforcement and case law. However, “public interest” can be interpreted very widely, including, *inter alia*, promoting national economic development, enhancing the competitiveness of domestic enterprises in the international market, protecting the national interest in foreign trade, implementing social policy concerning employment, protection of the environment as well disaster relief.²⁸⁵ The consideration of public interest can lead to the exemption of certain monopolistic actions, for instance in the case of “saving energy, protecting the environment as well as providing disaster relief” (Article 15(4) AML), or “for the purpose of protecting legitimate interests in foreign trade and foreign economic cooperation” (Article 15(6) AML). But it may result in the prohibition of a concentration of undertakings in the case of danger for national security (Article 27(5) AML), or again in official approval if the undertakings can prove that their concentration is compatible with the public interest (Article 28 AML). In any case, “public interest” might be interpreted excessively or arbitrarily at the discretion of the Anti-Monopoly Enforcement Authorities, which would result in the loss of legal predictability.

While preventing and restraining monopolistic actions including concentration of undertakings, the AML still more emphasizes the freedom of economic action. Article 5 AML states that undertakings may, through fair competition and a volun-

²⁸³ Guo, *Anti-Monopoly Law Safeguards Fair Competition* (2007).

²⁸⁴ As to the necessity of a definition of “monopoly” in the AML, see Chen, *Current State and Problems of Anti-Monopoly Legislation in China* (2003), p. 44 ff.

²⁸⁵ NPC, *Legislative Consideration of AML* (2007), p. 4 ff.

tary alliance, carry out concentration, expand their scale of operation and improve their market competitiveness in accordance with the law. This was a matter of severe concern in the debate during the preparation of the AML. Many argued that most Chinese enterprises are still very small in comparison with multinational companies. Too severe limitation of the concentration of undertakings would restrain Chinese domestic enterprises in international competition. On the other side, national economic security might be endangered by foreign investors securing their market share in China through mergers and acquisitions. Article 5 AML reflects these concerns. It should be born in mind here that it is a fundamental national economic policy in China that the state must encourage and support domestic enterprises, especially SOEs, to cooperate and combine in order to establish “national champions”.

Maybe the most important aim of the AML is that last mentioned, to promote the healthy development of the “socialist market economy”. Article 4 AML adds:

The State shall enact and implement competition rules appropriate for the socialist market economy, improve macroeconomic measures and enhance a united, open, competitive, and well-ordered market system.

This is the fundamental principle of the AML.²⁸⁶ As “constitution” of the Chinese economy, the AML must be interpreted starting from this principle. In short, the “socialist market economy” is an economic order in which the market competition functions under state planning in the form of administrative macroeconomic measures. An essential requirement of the socialist market economy is the maintenance of the dominant position of SOEs in “key” or “strategic industries”, i.e. in sectors that affect the national economic lifeline and national security, but also in sectors like cigarette and salt production and sales²⁸⁷ in which SOEs are assigned monopolies by law. This is especially reflected in Article 7 AML and will be discussed more in detail below.

bb. State Economic Monopoly

Article 7(1) AMG says that “[t]he State shall protect the lawful business activities of undertakings in sectors that affect the national economic lifeline and national security and are controlled by the State-owned economy as well as sectors in which exclusive operations and exclusive sales are implemented; the State shall supervise and regulate the conduct of business and the prices of goods and services of such undertakings in accordance with the law, safeguard the interests of consumers and promote technological advances.”

Article 7 AML refers to “state economic monopolies” and requires that “the State shall protect the lawful business activities” of SOEs in key industries,²⁸⁸ without touching the issue of equal treatment of SOEs and private enterprises. In this way, the dominant position and monopolistic actions of SOEs in “key” and

²⁸⁶ *Ibid.*, p. 11.

²⁸⁷ *Ibid.*, p. 44.

²⁸⁸ Wu, Antimonopoly Law Legitimizes the Control of State Economic Section in Key Industries (2007).

legal monopoly industries (state economic monopolies) are legitimized. Although possible anti-competitive actions of SOEs are not neglected, the main remedies are state supervision by the economic administration and the self-regulation of SOEs. Article 7(2) AML provides for two remedies in order to prevent a possible abusive conduct of such undertakings²⁸⁹ and “to safeguard the interests of the consumer and to promote technological progress”. The first is that “the State shall supervise and regulate the business conduct and the prices of goods and services of such undertakings in accordance with the laws”. But Article 7 AML does not say which “laws” are meant here. Does the AML itself also belong to these “laws”? According to the opinion of the Chinese legislature, state economic monopolies tend to abuse their dominant position; since the AML prohibits the abuse of dominant market position, the addressees of the AML should also include such SOEs.²⁹⁰ In this sense, it seems that the Chinese legislature holds that Article 7 AML does not except state economic monopolies from the application of the AML. However, the Chinese legislature did not directly refer to the issue of applicability of the AML to such undertakings, but continued to state that “the government and the relevant authorities shall supervise and regulate the pricing activities pursuant to the Pricing Law, the Law on Protection of Consumer Rights and Interests as well as other laws and administrative regulations.”²⁹¹ The relationship between the AML and the other laws and regulations is still unclear. The second remedy is the self-regulation of such undertakings that they “*shall operate in accordance with the law, act in good faith, implement strict self-regulation, accept monitoring by the public and may not use their controlling position or exclusive operation/sale position to harm the interests of consumers*”. But in China the interests of the State have priority, superpeding the interests of consumers. The SOEs and especially those in the state economic monopolies have detained a share of the investments and are the main economic tools of the State, and therefore represent the interests of the State. Moreover, no sanctions have been provided for SOEs violating this requirement. It could, therefore, be argued that Article 7(2) AML states only a moral requirement without legal liability.

In conclusion, the above legislative reasoning of the Chinese legislature seems to repeat the old reasons for State owned and administrated enterprises in a socialist planning economy rather than analyse competition policy in a market economy. It has been argued that Article 7 AML grants exception to legal monopolies by which SOEs maintain an absolute monopoly or a dominant position in the so-called key industries from the application of the AML.²⁹² However, both Article 7 AML and the opinion of the Chinese legislature are equivocal on the applicability of AML to state economic monopolies. Therefore, it would be correct to argue that Article 7 AML provides for a special treatment and practically results in excluding application of the AML to such SOEs.

²⁸⁹ NPC, Legislative Consideration of AML (2007), p. 44.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, p. 44–45.

²⁹² Masseli, Das Antimonopolgesetz der VR China (2007), p. 260.

cc. Liner Conferences

The application of the AML to liner conferences is problematic. The “key industries” in the sense of Article 7 AML are not defined in the AML. It is, however, officially accepted that the maritime transport services belong to the “key industries”.²⁹³ If the AML would not apply to the “key industries” which should be controlled by state economic monopolies, the application of the AML to liner conferences could not come into consideration. Apart from the fact that state-owned liner shipping companies like COSCO and China Shipping occupy a dominant position among the domestic carriers, and the extraterritorial application of the AML in relation to liner conferences is a different issue.²⁹⁴

The relation between the AML and the regulation of specific sectors is also problematic. It is still unclear whether and how the AML applies to regulation in specific sectors. This, furthermore, refers to the determination and division of competence for antimonopoly enforcement among the related authorities. Upon this point, an influential opinion was that the AML shall not contain concrete provisions on this issue but let the State Council decide on the Anti-Monopoly Enforcement Authorities by taking all sides of the situation into consideration.²⁹⁵

According to the opinion of the Chinese legislature, the AML shall comply with the present situation of separate Antimonopoly enforcement by various authorities.²⁹⁶ This means that the authorities that previously have had the related competence of anti-monopoly enforcement in specific sectors or areas will keep such competence. The MOC is the authority responsible for the administration and regulation of international maritime transport services (Article 4 RIMT). As regards the competition investigation and handling, the MOC shall cooperate with the SAIC and the NCDR (Article 36 RIMT). Since the separate competence for Antimonopoly enforcement of the SAIC and the NCDR has been confirmed by the Chinese legislature in the form of demonstration by examples,²⁹⁷ it could be concluded that the similar competence of the MOC (of course still in combination with the SAIC and the NCDR) would subsist.

b. Extraterritorial Application

aa. General Rules

Article 2 AML states that “[t]his Law shall apply to monopolistic conduct outside the territory of the People’s Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People’s Republic of China”.

Chinese legislature here follows the international legislative fashion and prescribes extraterritorial application on the basis of the effects principle.²⁹⁸ This is based mainly on the example of antitrust legislation and enforcement especially in

²⁹³ See “The Opinions of the State-owned Assets Supervision and Administration Commission on the Adjustment of State Capitals and the Fusion of State-owned Enterprises”, approved and announced by the State Council on 5. December 2006.

²⁹⁴ See below B. II. 2. b. of this Chapter.

²⁹⁵ Guo, Three Amendments to Draft of Antimonopoly Law (2007).

²⁹⁶ NPC, Legislative Consideration of AML (2007), p. 56 ff.

²⁹⁷ *Ibid.*

²⁹⁸ Jung/Hao, The New Economic Constitution in China (2003), p. 132.

the U.S. and the EU,²⁹⁹ less on China's own experience. As regards the effect of monopolistic conduct outside the territory of the PRC, a strict textual reading of Article 2 AML does not require the anti-competitive effect in China to be substantial or foreseeable in order to allow the application of the AML. Therefore, a concern will arise about the potential application of the AML to extraterritorial conduct with indirect, insubstantial or unforeseeable effects within the territory of China.³⁰⁰ In this respect, the Chinese legislature is of the opinion that extraterritorial monopolistic conduct that has no effect or no substantial effect on domestic market shall not be accused of infringement.³⁰¹

bb. Liner Conferences

In most cases, liner conferences are of international character. The extraterritorial applicability laid down in Article 2 AML provides the legal basis for Chinese Anti-Monopoly Enforcement Authorities to carry out investigation and impose sanctions on international liner conferences which have restrictive effects on competition in the Chinese domestic market. However, the extraterritorial application of the AML unavoidably gives rise to legal conflicts between China and other countries. In this respect, the AML does not give any further provision. According to the opinion of the Chinese legislature, the legal conflicts or conflicts of interests as such shall be resolved only through bilateral or multinational cooperation.³⁰²

3. Substantive Rules of "Anti-Monopoly"

a. General Overview

Under the AML, two categories of anti-competitive actions are prohibited: the monopolistic conducts of undertakings and the abuse of administrative powers.³⁰³ The AML further provides for exceptions for the exercise of intellectual property rights in accordance with the law (Article 55 AML) and for the agricultural industry (Article 56 AML). In this way, a system of substantive competition rules with exceptions is constructed by the AML.³⁰⁴

aa. Monopolistic Conduct of Undertakings

The first general category is "monopolistic conducts" of undertakings. "Monopolistic conducts" of undertakings comprise three kinds of actions: 1) monopoly agreements between undertakings; 2) abuse of a dominant market position by undertakings; and 3) concentration of undertakings that have or may have the effect of eliminating or restricting competition. Monopoly agreements are prohibited with several exemptions (Articles 13 to 16 AML). Abuse of a dominant market position is deemed detrimental to market competition and prohibited (Articles

²⁹⁹ Wang, Antimonopoly Law is Milestone of China's Economic Reform (2007); Masseli, Das Antimonopolgesetz der VR China (2007), p. 262.

³⁰⁰ Freshfields, China Finally Enacts Anti-monopoly Law (2007), p. 1.

³⁰¹ NPC, Legislative Consideration of AML (2007), p. 15.

³⁰² *Ibid.*

³⁰³ *Ibid.*, p. 14.

³⁰⁴ Masseli, Das Antimonopolgesetz der VR China (2007), p. 260.

17 to 19 AML). Merger control which requires notification and administrative approval is provided for to prevent possible anti-competitive effects of the concentration of undertakings (Articles 20 to 31 AML).

As to “monopolistic conducts” of undertakings, two fundamental terms are defined in Article 12 AML. One is the term “undertakings”, the other is “relevant market”. “Undertaking” is legally defined in Article 12(1) AML as “a natural person, legal person, or other organization that engages in the production of and/or dealing in goods or the provision of services”. This definition is almost identical with the definitions of “undertakings” in the LAUC³⁰⁵ and the Pricing Law.³⁰⁶ An important point in relation with the term “undertakings” refers to “industry associations”. It is required that industry associations strengthen industry self-regulation, guide undertakings in their industries to compete in accordance with the law and protect the order of market competition (Article 11 AML), and shall not organize undertakings in its industry to engage in monopoly agreements prohibited in Chapter II of the AML (Article 16 AML).

Another term that is essential to competition investigation and assessment is the “relevant market”.³⁰⁷ The term “relevant market” had already been used but not legally defined in the PRCPM.³⁰⁸ “Relevant market” is defined in Article 12(2) AML as “the ensemble of goods and geographical area within which the undertakings compete against each other during a certain period of time with respect to specific goods or services” (hereinafter collectively referred to as “goods”). The definition of “relevant market” in the AML refers to these aspects for the purpose of competition assessment.³⁰⁹ The AML does not contain any individual provisions on market definition and market analysis.³¹⁰ Previous competition legislation such as the LAUC, the Pricing Law as well as the PRCPM, and their enforcement can rarely provide any experience or reference to the determination of the “relevant market” in practice. However, during the preparation of the AML, the Chinese legislature has referred to *interchangeability* (or *substitutability*) and the methods of market definition, especially the SSNIP-test (small but significant and non-transitory increase in price) applied in the USA and the EU competition jurisdiction.³¹¹ It should therefore be expected that such issues shall be touched upon in

³⁰⁵ Article 2(3) LAUC defines “undertakings” as legal persons, other economic organisations and individuals who engage in commercial operations or provision of profit-making services.

³⁰⁶ Article 3(3) Pricing Law defines “undertakings” as an entity with legal person status, other organisation or individual which engages in commodity production or operations or the provision of reimbursable services.

³⁰⁷ NPC, Legislative Consideration of AML (2007), p. 52. See also *Masseli*, Das Antimonopolgesetz der VR China (2007), p. 261.

³⁰⁸ Article 3 PRCPM states that the determination of dominant market position shall be mainly based on the market shares of undertakings in the relevant market, the substitutability of goods and the difficulty of the market entry for the new competitors.

³⁰⁹ The legal thinking of the Chinese legislature on the definition of “relevant market” is demonstrated and detailed in NPC, Legislative Consideration of AML (2007), p. 53.

³¹⁰ *Jones*, China’s New Anti-Monopoly Law (2007), p. 3.

³¹¹ NPC, Legislative Consideration of AML (2007), p. 54 ff.

the regulations, measures or guidelines which will be adopted in the months to come.³¹²

bb. Anti-Competitive Practices by Abuse of Administrative Power

The second general category of anti-competitive conduct is administrative actions by which administrative authorities and organizations authorized by laws and regulations to manage public affairs (administrative organisations) abuse their administrative power to eliminate or restrict competition,³¹³ such as the acts or measures of local governments or administrative organisations to restrain the entry of goods from other regions into a local market, or to illegally refuse to give administrative permission for the operation or the establishment of branches by enterprises from outside.³¹⁴ Such administrative actions are deemed severe and detrimental to market competition and the establishment of a united, open, competitive and well-ordered national market.³¹⁵ The AML defines the “anti-competitive practices by abuse of administrative power” and sets out the general prohibition of such abusive administrative behaviour (Article 8 AML),³¹⁶ and

³¹² Jones, China’s New Anti-Monopoly Law (2007), p. 3.

³¹³ Article 8 AML.

³¹⁴ NPC, Legislative Consideration of AML (2007), p. 46.

³¹⁵ *Ibid.*

³¹⁶ About the legislation debates on this issue, see *Nie*, On the Necessity of Adoption Administrative Monopoly into Chinese Anti-Monopoly (2007), p. 83; *Guo*, Say “No” to “Administrative Monopoly” (2007). In Chinese literature there are disputes on differentiation of “anti-competitive practices by abuse of administrative power” from “administrative monopoly” and the legality of the “state economic monopolies”. Until now there is no uniform understanding or definition of “administrative monopoly”. The prevailing opinions hold that the “anti-competitive practices by abuse of administrative power” and the “state economic monopolies” are two separated issues. More see *Chen*, Current State and Problems of Anti-Monopoly Legislation in China (2003), p. 46 ff.; *Shi*, Principle for Prohibition of Administrative Monopoly (2001). For a more detailed overview of “administrative monopoly”, see *Williams*, Competition Policy and Law in China, Hong Kong and Taiwan (2005), p. 158 ff, also *Wang*, The Study of Competition Law (1999), p. 1 ff. and p. 143 ff.; *Wang*, Challenging the Draft Chinese Antimonopoly Law (2007), p. 16 ff; *Zhou*, Antimonopoly Law Protects Fair Competition for Undertakings (2007). About the official opinions see *Yang*, China Has No Problem of “Administrative Monopoly” (2007). Following is a citation of the legislature opinion from NPC, Legislative Consideration of AML (2007), p. 47–48: “The legislature has carefully analyzed and researched the above two opinions and comes to the following conclusion. The circumstance that administrative authorities, and organisations that are given administrative powers to manage public affairs by laws and regulations, abuse administrative powers to eliminate or restrict competition, does exist in our country; (negative) effects on market competition are also a fact; the whole society pays attention to this issue. But administrative anti-competitive actions do not belong to the matter regulated by Anti-Monopoly Law; and Anti-Monopoly Law will hardly reach any effective achievement on this issue. Starting from the situation in our country, the Anti-Monopoly Law is a basic law specifically intended to protect competition. The inclusion of prohibition of administrative anti-competitive actions only demonstrates the atti-

provides for more concrete provisions in Chapter V (Articles 32 to 37) of the law.³¹⁷

Article 32 AML prohibits administrative organisations to abuse administrative power to limit, directly or in a disguised manner, the activities of organizations or individuals by requiring them to deal, purchase, or use goods supplied by designated undertakings.³¹⁸ The provisions in Articles 33 to 35 AML mainly concern the so-called “local protectionism”.³¹⁹ Article 36 AML prohibits compelling undertakings to engage in monopolistic conduct as specified in the AML. According to the explanation by the Chinese legislature, “compelling” includes issuing administrative rules or directives, or administrative decisions or official orders.³²⁰

Perhaps the most important provision is Article 37 AML which directly addresses administrative authorities and prohibits “abusing their administrative powers by making rules that contain stipulations which eliminate or restrict competition”. Literally interpreted, Article 37 AML is erroneous. Administrative authorities must have the power to make administrative rules or directives; they could never “abuse” their administrative power to make administrative rules if that power had been bestowed on them. Rather, Article 37 AML prohibits the making of rules without legal competence as well as administrative rules or directives infringing a statute with higher status in the hierarchy of legal documents. In both cases, administrative power is exceeded, not abused.

b. Monopoly Agreements

The AML provides for horizontal agreements (Article 13 AML), vertical agreements (Article 14 AML) and exemptions (Article 15 AML). “Monopoly agreements” are defined as agreements, decisions or other concerted practices that eliminate or restrict competition, in any form, written or oral, explicit or implicit.³²¹ This definition is given in Article 13(2) AML but is not restricted to horizontal agreements in Article 13 AML; it applies to the whole AML.

Article 13 AML enumerates the horizontal agreements that are prohibited: Price cartels (Article 13(1) No. 1 AML), capacity cartels (Article 13(1) No. 2 AML), market sharing cartels (Article 13(1) No. 3 AML), technology cartels (Article 13(1) No. 4 AML), joint boycotts (Article 13(1) No. 5 AML) and other types of monopoly agreements as determined by the State Council’s Anti-Monopoly En-

tude of the central government that the State takes seriously the issue of administrative anti-competitive conduct and firmly opposes such conduct.”

³¹⁷ Zhou, *Antimonopoly Law Protects Fair Competition for Undertakings* (2007).

³¹⁸ This originated from Article 7 LAUC and the Chinese legislature gave several examples to explain Article 32 AML. See NPC, *Legislative Consideration of AML* (2007), p. 154.

³¹⁹ Article 33 AML concerns restraints on the free flow of goods between regions; Article 34 AML prohibits excluding or restricting participation of undertakings from other regions in local bidding activities; and Article 35 AML prohibits excluding or restricting investments or the establishment of local branches by undertakings from other regions.

³²⁰ NPC, *Legislative Consideration of AML* (2007), p. 155.

³²¹ Masseli, *Das Antimonopolgesetz der VR China* (2007), p. 264. See also Wang, *Challenges for Antimonopoly Law at the Stage of Initial Enforcement* (2007).

forcement Authorities. As vertical agreements that are prohibited, Article 14 AML mentions “fixing the price for resale of goods to a third party” and “limiting the minimum price for resale of goods to a third party”. Similar to Article 13(1) No. 6 AML, Article 14 AML contains an open clause to empower the Anti-Monopoly Enforcement Authorities to apply the rule of reason.³²²

Article 15 AML exempts certain types of monopoly agreements and details the conditions of each exemption. Besides an open clause (Article 15(1) No. 7 AML), the exemptions refer to monopoly agreements which contribute to technological progress (Article 15(1) No. 1 AML), or improve production efficiency (Article 15(1) No. 2 AML), or improve the efficiency and competitiveness of small or medium-size undertakings (Article 15(1) No. 3 AML), or protect the public interest (Article 15(1) No. 4 AML), or resolve an economic crisis (Article 15(1) No. 5 AML), or protect legitimate interests in foreign trade and foreign economic cooperation (Article 15(1) No. 6 AML). For all conditions of an exemption, the relevant undertakings shall bear the burden of proof.³²³ Especially for the exemption in Article 15(1) No. 1 to No. 5 AML, the undertakings “must additionally prove that the agreement reached will not substantially restrict competition in the relevant market and can enable the consumers to share the benefits arising from the agreement”.

A last point refers to “industry associations”. Although the definition of “monopoly agreements” can already be interpreted to cover any collective anti-competitive conduct, the AML explicitly emphasizes the role of industry associations and states that “an industry association must not organize undertakings in its industry to engage in monopolistic conduct prohibited in this Law”.

c. Abuse of Dominant Position

AML does not restrain undertakings from gaining a dominant market position, but only prohibits the abuse of this dominant position.³²⁴ This conforms to the general principle stated in Article 6 AML. Chapter III of the AML enumerates the main types of abusive behaviour (Article 17 AML), provides for the criteria for the determination of a dominant market position (Article 18 AML) and of the presumption of a dominant market position (Article 19 AML).

The term “dominant market position” had been used in the PRCPPM and academic literature but without any definition. Article 17(2) AML defines the term “dominant market position” for the first time:

For the purpose of this Law, the term “Dominant Market Position” refers to a market position held by undertakings that have the ability to control the price or quantity of goods or other conditions of transaction in the relevant market or to hinder or affect the entry of other undertakings into the relevant market.

As regards the criteria for determination, Article 3 PRCPPM refers to the market share in the relevant market, the substitutability of goods and the chances for new

³²² *Masseli*, Das Antimonopolgesetz der VR China (2007), p. 264.

³²³ Article 15(1) and (2) AML.

³²⁴ *NPC*, Legislative Consideration of AML (2007), p. 41 ff.

competitors to enter the market. On this basis, Article 18 AML lists five factors to be considered and adds an open clause in Article 18(1) No. 6 AML which allows Anti-Monopoly Enforcement Authorities to consider additional factors. It is a matter of concern whether this might be used arbitrarily by the Anti-Monopoly Enforcement Authorities.

An additional instrument to determine a dominant market position is the presumption of a dominant market position. As criteria for presumption, Article 19(1) AML uses market shares. A group of several undertakings with a certain share of the market can also be presumed to occupy a collective dominant market position so as to regulate tacit collusion in such an oligopoly.³²⁵ Besides Article 19(2) AML provides for an exemption for small market shares. For the determination of a dominant market position, the burden of proof is lying with the Anti-Monopoly Enforcement Authorities. Where such a dominant position is presumed, according to Article 19(3) AML, the undertakings may prove that this presumption is wrong.

Article 17(1) AML enumerates specific types of abusive behaviour and adds an open clause allowing the State Council's Anti-Monopoly Enforcement Authorities to supplement other circumstances. It is worth mentioning the wording in the enumeration in Article 17(1) AML. A condition of the illegality of the behaviour under Article 17(1) No. 2 to 6 AML is that these acts are committed "without any justification". This condition is vague and difficult to interpret.³²⁶ It might refer to the legality of a conduct, or the interests of consumers as well as public interest, or even national economic policy and national security. Thus, it allows the Anti-Monopoly Enforcement Authorities great liberty in interpreting the law. This might endanger legal predictability by AML enforcement.

d. Liner Conferences

Leaving aside the question whether, considering Article 7 AML, the AML can apply to liner conferences at all, the applicability of the AML to liner conferences as "hard-core cartels" must be discussed.

aa. Conference Agreements as "Monopoly Agreements"

The agreements between conference members or among liner conferences fall under the definition of "monopoly agreements" in Article 13(2) AML. Article 13(1) AML refers to horizontal agreements and prohibits price cartels, capacity cartels, market sharing cartels, technology cartels and joint boycotts. These prohibitions cover the major conference agreements, especially those on freight rate-fixing, capacity management programs and even "tolerated outsider agreements" as well as "fighting ships". The prohibition of vertical agreements in Article 14 AML is limited only to the issue of resale. But an expansive interpretation of Article 14 AML in conjunction with the prohibition of market sharing cartels (Article 13(1) No. 3 AML) could cover the issue of inland price-fixing and multimodal transport services.

³²⁵ *Ibid.*, p. 96 ff.

³²⁶ *Masseli*, Das Antimonopolgesetz der VR China (2007), p. 265.

The application of the AML to liner conferences further depends on the relationship between the AML and the RIMT as well the IRRIMT on one side, and on the possibility of exemption according to Article 15 AML on the other side. As shown above, liner conferences gain legality in China only through fulfilling the filing requirements pursuant to the RIMT and the IRRIMT.³²⁷ Neither substantive examination nor competition assessment of a liner conference is necessary for the filing requirements. This results in a conflict between the acceptance in the RIMT as well the IRRIMT and the principal prohibition in the AML. One way to solve this conflict is to grant liner conferences a block exemption. Article 15 AML does not mention block or individual exemptions, but according to the wording of this Article, it refers to individual exemptions rather than block exemptions. Apart from lack of the legal basis for block exemptions, a choice of block exemptions by the Chinese legislature depends on its interpretation of Article 15 AML in case of liner conferences and requires a separate law or regulation. In respect of the above analysis on lack of economic advantages of liner conferences³²⁸ and following the European reform by repealing the exemption, it shall not be desirable for the Chinese legislature to grant such a block exemption for liner conferences. But anyway, an individual exemption under Article 15 AML is still possible. If there is no block exemption, the resolution of the conflict necessitates a review of the RIMT and the IRRIMT and a clarification of the relationship between the AML and the two Rules on this issue.

Finally, the “industry association” rule in Article 16 AML could be considered in connection with liner conferences. A liner conference is an association of liner shipping companies, and can not be considered an “undertaking” within the meaning of Article 12(1) AML, since a liner conference is neither a natural or legal person, nor an “other organization that engages in the production of and/or dealing in goods or the provision of services”.³²⁹ The question is whether liner conferences must be included under the term “industry association” within the meaning of Articles 11 and 16 AML.³³⁰

³²⁷ See above Chapter IV B. II.

³²⁸ See especially above A. I. 2. to 6 of this Chapter.

³²⁹ Article 12(1) AML.

³³⁰ It was debated during the preparation of the AML whether or not it is necessary to provide for separate provisions on “industry association” in the AML. One opinion referred to the “other organisation” in the definition of “undertakings” by Article 12 AML and argued that the term “industry association” could be covered by the term “other organisation” and thus the application of the AML to “industry association” could be implied through the interpretation of the definition “undertakings”. Another opinion held separate provisions to be unnecessary since anti-competitive practices of an industry association fall under the scope of horizontal collective activities of the associated undertakings. Also an opinion noticed that such industry associations are exerting increasing influence over business activities in China, notably in arranging concerted actions among enterprises. The Chinese legislature admits the last argument and reasoned that the anti-competitive practice collectively conducted by industry associations is very common in China and therefore a direct and unequivocal prohibition is

In China, an “industry association” is a type of social organisation that is legitimized through registration by the Ministry of Civil Affairs³³¹ in accordance with the Regulation on Administration of the Registration of Social Organisations.³³² According to Article 4(2) of the Regulation on Administration of the Registration of Social Organisations, registered social organisations shall not carry out any commercial practices. Therefore, an industry association cannot be engaged in the production of and/or dealing in goods in its own name and does not fall under the term “other organisation” within the meaning of the definition of “undertakings” in the AML. This conclusion is also supported by the Chinese legislature.³³³

Liner conferences gain legality in China only through filing in accordance with the RIMT and the IRRIMT,³³⁴ but do not need to be registered in accordance with the Regulation on Administration of the Registration of Social Organisations. Therefore, liner conferences do not fall under the term “industry association” in the AML. But this should not affect the application of the AML to liner conferences, as conference agreements can be seen as “monopoly agreements” in the sense of Article 13(2) AML. Further, the extraterritorial application of the AML (Article 2 AML) does not require any recognition or inland registration of a foreign association of undertakings.

bb. Abuse of Collective Dominant Position

It is accepted that liner conferences constitute a form of collective dominant position.³³⁵ In this respect, the AML recognizes the collective dominant position possessed by more than one undertaking and provides the necessary legal basis for application to liner conferences.

Article 17(1) AML enumerates six specific types of abusive behaviour besides an open clause: 1) selling products at unfairly high prices or buying products at unfairly low prices; 2) selling products at prices below cost without any justifiable causes; 3) refusing to deal with a trading party without any justifiable causes; 4) restricting the trading party to certain undertakings without any justifiable causes; 5) implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable cause; 6) applying discriminatory treatment or trading conditions like prices to different trading parties with equal standing without any justifiable causes. These rules can especially cover the issues like loyalty arrangements and the discrimination on freight-rates, conditions and services. Under the prohibition of abusive behaviour no exemption is possible. If the

necessary. More see *NPC*, Legislative Consideration of AML (2007), p. 29 and 52, also *Jung/Hao*, The New Economic Constitution in China (2003), p. 142.

³³¹ 中华人民共和国民政部.

³³² Regulation on Administration of the Registration of Social Organisations [社会团体登记管理条例], promulgated by the State Council on 25 October 1998 and effective on the same date.

³³³ *NPC*, Legislative Consideration of AML (2007), p. 52.

³³⁴ See above Chapter IV B. II.

³³⁵ See above Chapter VI. A. I. 6. b. bb. Also see *Basedow*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1562, Rn. 60.

collective dominant position of a liner conference in a relevant market is proven or presumed, the liner conference has to suffer administrative sanctions (Article 47 AML) and would probably be liable for civil damages (Article 50 AML). The determination of a (collective) dominant position necessitates market definition and market analysis. Article 18 AML provides for a framework, but no practical experiences of anti-monopoly enforcement, especially regarding liner conferences, is until now available.

4. Anti-Monopoly Investigation

Chapter VI of the AML, now entitled “Investigation of Suspected Monopolistic Actions”, was previously named “Anti-Monopoly Authority”. Therefore, the provisions on “Anti-Monopoly Commission” and “Anti-Monopoly Enforcement Authorities” in Chapter I “General Provisions” (Articles 9 and 10 AML), will be discussed here in connection with the anti-monopoly investigation procedures.

a. Anti-Monopoly Authorities

The debate on how to establish an anti-monopoly authority continued all the time the law was drafted. Finally, the AML provides for a double-level model: an anti-monopoly commission and anti-monopoly enforcement authorities. This seems similar to the German model with the Monopoly Commission (Monopolkommission) and the Federal Cartel Office (Bundeskartellamt). But the relation between the two anti-monopoly authorities in China can be understood only from legislative history.

The history of the discussions on the AML is the history of the struggle between various central government organs for the control of the future anti-monopoly authority.³³⁶ The main actors involved are the MOFCOM, empowered to regulate mergers and acquisitions of foreign investors and to handle anti-dumping cases; the SAIC which enforces the LAUC and acts against administra-

³³⁶ The adoption of an Anti-Monopoly Law has been postponed several times. One essential reason was disagreement over which governmental agency will enforce the Anti-Monopoly Law. As early as in May 1994, an official draft-working group was established under the former State Economic and Trade Commission (SETC). According to the Restructuring Plan of the State Council approved in the 10th Session of the 10th NPC on 10 March 2003, a new MOFCOM was established that took over the SETC’s functions relating to the drafting of the Anti-Monopoly Law. Although the drafting work shall finally be carried out by the MOFCOM and the SAIC together, the MOFCOM made a greater effort to hold the leading position in this issue and established an Investigation Office of Anti-Monopoly whose main functions are: (1) to carry out the international exchanges of anti-monopoly legislations; (2) to draft the Anti-Monopoly Law; (3) to investigate monopolistic practices. See *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003), pp. 19–20; *Wang*, The Prospect of Antimonopoly Legislation in China (2002), p. 223.

tive anti-competitive practice; and the NCDR, formerly “National Planning Commission”, which engages in price regulation.³³⁷

The Chinese legislature accepted this situation and tried to reach a compromise, as stated in the legislative comment:³³⁸

... the establishment of anti-monopoly authorities should be based on the reality and feasibility (in China); since the relevant authorities under the State Council have retained parts of the competence for the enforcement of the statutes against monopolies, it is the best that the present situation of separated enforcement will remain in order to maintain the present activities against monopolies after the AML.

Thus, while the Chinese language does not differentiate singular and plural, the term “anti-monopoly enforcement authorities” in Article 10 AML must at present be translated as plural. However, the legislative comment pointed out that the AML must take into consideration the necessity of future administrative reform and adjustment of competences.³³⁹ Therefore, the AML has no specific provisions on the structure and organisation of the anti-monopoly authorities but empowers the State Council to determine this in separate rules.

As anti-monopoly enforcement shall be divided among several authorities to coordinate them, a special authority is to be established³⁴⁰ on the same administrative level as the authorities it has to coordinate.³⁴¹ This is the Anti-Monopoly Commission under the State Council, responsible for organizing, coordinating and guiding anti-monopoly work – probably mainly or only for “coordinating”. Among the duties assigned to this Commission, namely researching and drafting competition policies,³⁴² issuing market evaluation reports and anti-monopoly guidelines,³⁴³ and “coordinating anti-monopoly administrative enforcement”, only this last one concerns actual enforcement.

b. Investigation Procedures

Chapter VI of the AML sets out the principles of anti-monopoly investigations, the competences and obligations of Anti-Monopoly Enforcement Authorities, the rights and obligations of the investigated undertakings, and the rules for suspension and resumption of investigations.

In the case of suspicion of monopolistic conduct, the Anti-Monopoly Enforcement Authorities must carry out an investigation “in accordance with the laws”.³⁴⁴ “The laws” include not only the AML, but also other laws such as the LAUC or

³³⁷ It primarily refers to the enforcement of Pricing Law and Provisional Regulations on Curbing of Pricing Monopolies (PRCPM). For a detailed survey, see above Chapter II B. II. 3.

³³⁸ NPC, Legislative Consideration of AML (2007), p. 56.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*, p. 56 ff.

³⁴¹ Masseli, Das Antimonopolgesetz der VR China (2007), p. 262.

³⁴² Article 9(1) No. 1 AML.

³⁴³ Article 9(1) No. 2 AML.

³⁴⁴ Article 38(1) AML.

the Pricing Law. Article 38(2) and (3) AML grant everybody the right to report suspected monopolistic conduct to the Anti-Monopoly Enforcement Authorities, and the Anti-Monopoly Enforcement Authorities must investigate every report.

The duties of the Anti-Monopoly Enforcement Authorities include the presentation of the enforcement credentials,³⁴⁵ written investigation reports which should be signed by the investigated persons,³⁴⁶ the protection of business secrets obtained during an investigation,³⁴⁷ and the publication of the decision concluding the investigation.³⁴⁸ Entities or individuals under investigation must cooperate with the authorities' investigation.³⁴⁹

Suspension and resumption of investigation: if the undertakings under investigation promise to eliminate the effects of their conduct by concrete actions within a period of time approved by the Anti-Monopoly Enforcement Authorities, the Authorities may suspend the investigation.³⁵⁰ However, the Anti-Monopoly Enforcement Authorities shall monitor the performance of the promise by the undertakings. If the undertakings implement the promise, the Anti-Monopoly Enforcement Authorities may decide to terminate the investigation.³⁵¹ The investigation must be resumed if:

- 1) the undertakings fail to implement the promise; or
- 2) facts change on which the decision to suspend the investigation was based; or
- 3) the decision to suspend the investigation was based on incomplete or false information submitted by the undertakings.

c. Liner Conferences

If, as demonstrated above,³⁵² the MOC still keeps its decision-making role in the regulation of the international maritime transport market, the non-consonance in anti-monopoly investigation procedures between the AML and the RIMT as well the IRRIMT should not be overseen.

As regards the initiation of an investigation, Article 35 RIMT provides for two ways: the MOC can initiate an investigation on its own account or upon a request. However, AML does not clearly provide for the possibility of an investigation initiated upon request. Article 38(2) AML states only that any organisations or individuals shall have the right to report suspected monopolistic conduct to the Anti-Monopoly Enforcement Authorities. The Anti-Monopoly Enforcement Authorities shall maintain the confidentiality of the reporter.

Furthermore, a request of investigation shall not directly lead to an investigation. According to Article 52 IRRIMT, the request of investigation shall be examined by the MOC; an investigation will be initiated only on the basis of an ap-

³⁴⁵ Article 40(1) AML.

³⁴⁶ Article 40(2) AML.

³⁴⁷ Article 41 AML.

³⁴⁸ Article 43 AML.

³⁴⁹ Article 41 AML.

³⁵⁰ Article 45(1) AML.

³⁵¹ Article 45(2) AML.

³⁵² See above B. II. 2. a. cc. of this Chapter.

proval of the investigation request. In contrast to the provisions in the RIMT and the IRRIMT, the provisions in the AML are somewhat equivocal. Article 38 (3) AML states that, if the reports on monopolistic actions are in written form and contain relevant facts and evidence, the Antimonopoly enforcement authority shall carry out a *necessary* investigation. However, the term “necessary investigation” hereby used is ambiguous in the Chinese language. It could be interpreted as “an examination of the reports on monopolistic actions”, or that an antimonopoly investigation shall be carried out immediately. Therefore, a further legislative clarification is necessary for Article 38(3) AML.

The non-consonance further refers to other points, such as the period of time for investigation. Article 37 RIMT provides for a period of one year with a possible extension of six months. On the contrary, the AML does not contain any provision on the period of time for anti-monopoly investigation. Article 41 RIMT grants the right of hearing to the parties under investigation, while Article 43 RIMT only states that the undertakings and interested parties under investigation shall have the right to submit statements; the Anti-Monopoly Enforcement Authorities shall conduct the verification of the facts, reasons and evidence presented by the undertakings and interested parties. As regards the suspension and resumption of the investigation procedure, the AML gives rules (Article 45 AML) while the RIMT and the IRRIMT do not touch upon such issues.

5. Legal Liability

a. Administrative Sanctions and Liability for Civil Damages

The AML determines legal liability and sanctions for monopolistic conduct, administrative anti-competitive conduct, resistance to investigation and illegal conduct of working personnel of the Anti-Monopoly Enforcement Authorities respectively.

As regards monopolistic conduct, both administrative and civil sanctions³⁵³ are provided for. Administrative sanctions for “monopoly agreements”³⁵⁴ and “abuse of dominant market position”³⁵⁵ mainly take the form of fines calculated on the basis of “the total sales volume for the preceding year”. Administrative sanctions for “illegal concentration” mainly are orders to return to the *status quo* before the concentration. Rules on administrative sanctions for “monopolistic conduct” include the mitigation or exemption of penalties for undertakings which report anti-competitive conduct on their own accord³⁵⁶ and specific penalties for “industry association”.³⁵⁷ For the calculation of penalties for “monopolistic conduct”, factors

³⁵³ The criminal liability was contained in drafts of AML but deleted finally. See also Wang, Zur Kodifizierung des chinesischen Antimonopolrechts (2004), p. 96; Wang, Entwurf des chinesischen Antimonopolgesetzes (2007), p. 171; Hippe, Zum Entwurf eines chinesischen Antimonopolgesetzes (2006), p. 362.

³⁵⁴ Article 46(1) AML.

³⁵⁵ Article 47 AML.

³⁵⁶ Article 46(2) AML.

³⁵⁷ Article 46(3) AML.

such as the nature, degree and duration of the violation must be taken into account.³⁵⁸

Civil liability: undertakings that violate provisions of the AML and cause damage to other undertakings or natural persons bear civil liability (Article 50 AML). As clarified by the legislative comment, “civil liability” here refers to Article 134 of the General Principles of Civil Law which provides for ten forms of civil liability, namely 1) cessation of infringement; 2) removal of obstacles; 3) elimination of dangers; 4) return of property; 5) restoration of original conditions; 6) repair, rebuilding or replacement; 7) compensation for losses; 8) payment of breach of contract damages; 9) elimination of ill effects and rehabilitation of reputation; and 10) apologies. This means that “in accordance with the laws” in Article 50 AML primarily refers to the General Principles of Civil Law. Civil liability must be pursued mainly through civil proceedings.

As regards the legal liability for anti-competitive abuse of administrative powers, the Anti-Monopoly Enforcement Authorities do not have the competence to impose penalties, but can only recommend measures to a competent superior authority.³⁵⁹ The related superior authority must order corrections and discipline the supervisor directly in charge of the enterprise and other directly responsible persons. If laws or administrative regulations provide otherwise with respect to the handling of anti-competitive abuse of administrative powers, such provisions shall apply.³⁶⁰ Critics say that this provision means that the AML will be a tiger without teeth and fails to fight against administrative anti-competitive behaviour.³⁶¹

For resistance to investigations and illegal conduct of personnel of the Anti-Monopoly Enforcement Authorities, the AML provides for criminal liability and administrative penalties for resistance³⁶² and for disciplinary penalties for the personnel of the Anti-Monopoly Enforcement Authorities.³⁶³

b. Liner Conferences

According to Article 58 IRRIMT, after the investigation has been completed, conclusion shall be made which can be divided into three situations:

- 1) if there is no infringement, the investigation authorities shall decide to terminate the investigation;
- 2) if the infringement can be assessed but has not caused substantial detriment to fair competition, the investigation authorities can decide not to take prohibitive or restrictive measures against the parties under investigation; and
- 3) if the infringement is clear and has caused substantial detriment to fair competition, the investigation authorities shall take prohibitive and restrictive measures against the parties under investigation pursuant to the RIMT.

³⁵⁸ Article 49 AML.

³⁵⁹ Article 51(1) AML.

³⁶⁰ Article 51(2) AML.

³⁶¹ Wang, Challenges for Antimonopoly Law at the Stage of Initial Enforcement (2007).

³⁶² Article 52 AML.

³⁶³ Article 54 AML.

The last point further refers to Article 40(2) RIMT which provides for the following prohibitive and restrictive measures: 1) ordering the undertakings to correct the agreements concerned; 2) limiting the number of liner voyages; 3) suspending freight tariff books, or temporarily suspending the acceptance of filing of freight tariffs; or 4) ordering the undertakings concerned to submit relevant information at regular intervals. The RIMT in conjunction with the IRRIMT provide for only administrative penalties of restriction on business operation, but no administrative sanctions like fines, nor do they provide for civil damages, as stated in the AML. In conclusion, the sanction rules in the RIMT and the IRRIMT will hardly impress liner conferences and should be toughened, at least, up to the level as in the AML.

6. Legal Remedy

The AML generally allows administrative review or direct court action against administrative decisions of Anti-Monopoly Enforcement Authorities.³⁶⁴ However, a court action against decisions of the Anti-Monopoly Enforcement Authorities on “concentration of undertakings”³⁶⁵ can be brought only after administrative review of the decisions.³⁶⁶

Concerning liner conferences, as shown above, the RIMT and the IRRIMT do not contain any provisions on administrative review or court action.³⁶⁷ This deficiency cannot be repaired by the rules of the Administrative Review Law or the Administrative Litigation Law, and should be reviewed and corrected in accordance with the AML.

C. Conclusion

A perspective into the future regulation of liner conferences should be based on the review of the hitherto existing regulation regime and the enforcement experience. In view of the development in market dynamics, decision practice and theoretical research, the compatibility of the block exemption under Regulation 4056/86 with Articles 81 and 82 EC from the substantive point of view could not be justified any more. The review in China could, however, only be focused on the antitrust investigation on THC. This official investigation shows not only the significant weakness in the substantive and procedural provisions of Chinese competition rules, but also the vacuum of regulation experience and the non-qualification of administrative practice of the authorities.

Essential changes of the regulation regime have occurred at both ends of the Europe-Asia trade in respect of liner shipping. In the EU the change directly deals with liner conferences. After more than three years of comprehensive review of Regulation 4056/86, Regulation 1419/2006 was adopted, according to which the

³⁶⁴ See Article 53(2) AML in conjunction with Article 16 of the Administration Review Law.

³⁶⁵ Articles 28 and 29 AML.

³⁶⁶ Article 53(1) AML.

³⁶⁷ See above Chapter V B. III. 6. b.

original block exemption for liner conferences shall be repealed completely after a transitional period. In China the change refers to the development of general competition rules. After almost twenty years of legislative preparation and debates, the AML was finally adopted on 30 August 2007 and it is the first time in the history of this People's Republic to have a unified antitrust code with general applicability.

In the EU, the expected expiration of the block exemption for liner conferences highlights the issue of the block exemption for consortia which is a developed form of liner conferences, on one side. On the other side, the simple repeal of the block exemption for liner conferences cannot resolve the complexity of the competition issue caused by liner conferences overnight. Following a public consultation of a draft, the Guidelines on the application of Article 81 EC to maritime transport services were adopted on 1 July 2008 by the European Commission to touch upon the relevant competition issues like information exchanges and horizontal agreements.

In China, the AML provides for a unified framework of general competition rules both in the sense of substantive and procedural provisions. However, the new AML leaves lots of legal vacuums. Many individual implementation rules or regulations are to be expected in order to reach an effective enforcement of the AML. As regards the possible application of the AML to liner conferences, the AML gives a legal basis for relevant issues like the prohibition of monopoly agreements, the conditions for exemption of monopoly agreements and the prohibition of abusive practices, but leaves many other relevant issues open or in question.

Chapter VII: Conclusion

1. The development of maritime policy shall be understood against the political and economic background. The EC was established as a supranational organisation of Member States. In respect of the traditional “self-regulation” in maritime industry and the strong political tendency of Member States to reserve regulation, the development of the common policy in maritime transport has seen a transformation from separation to concentration since the competence of the Community in this field was confirmed. Nevertheless, the common industry policy shall comply with the fundamental economic order of the Community, namely the market economy on the basis of private ownership, which is held as the economic constitution of the EC. In contrast, the maritime policy of China originated in her socialist plan economy and was characterized by high concentration. The development of maritime policy after the introduction of the reform policy and during the transformation towards the “socialist market economy” shows the orientation of liberalisation policy which has led to a gradual expansion of deregulation and more freedom of competition both for the domestic and international markets. However, the “national maritime fleets” still enjoy privileges, because the socialist market economy shall maintain the same principle of the economic order as under the previous plan economy, namely state ownership and market dominance of SOEs.
2. The competition regulation on liner conferences further refers to the relation between industry policy and competition policy as well as the choice of the regulation regime. The common policy of maritime transport constitutes part of the Community industry policy and shall serve to contribute to the realization of the fundamental aims of the EC, especially to build up a system ensuring that competition in the common market is not distorted. Under this requirement, the European law-makers prefer pro-competition policy instead of protectionism. This could be shown especially in the review of Regulation 4056/86 and the pioneering advance in the regulation of liner conferences by repealing the antitrust exemption. The competition policy of China could find its origin after the economic reform at the end of the 1970s. Under the socialist economic order in China, the competition policy applies as an instrument for the implementation of a certain national industry policy, but not on the contrary. In spite of the measures of gradual liberalisation in the domestic and international maritime transport markets, the Chinese authorities lack the experience of competition regulation in the sense of free market competition and prefer the function of the administrative control through SOEs. Particularly in

respect of the international liner shipping market, the “national champion” is the focus of Chinese maritime policy, but not an effective competition regime.

3. Sector-specific regulation of liner conferences generally finds its origin in general competition rules, since the latter apply as the primary legal basis and are fundamental for the interpretation and application of individual competition provisions. That is the situation in the EU. Apart from the politicization of Community competition rules in the maritime sector during the initial phases, the general competition rules of the EC and their procedural rules for implementation became applicable in the field of maritime transport through Community case law. On the contrary, the general competition rules in China, at least before the Anti-Monopoly Law (AML) was adopted on 30 August 2007, are unsystematic and scattered over many individual laws, acts and regulations. The general applicability of such legal documents is quite restricted and their applicability to the specific issue of liner conferences could barely be established.
4. Although the compatibility of Regulation 4056/86 within the system of the EC Treaty appears doubtful, Regulation 4056/86 provides for a complete competition regulation regime on liner conferences both in the sense of substantive provisions and procedural provisions. This competition regime for sector-specific regulation of liner conferences stood, at least from the original point of view favouring the generally argued economic advantages of liner conferences, in compliance with the general Community competition rules and was meant to implement the general competition rules in the sector of liner conferences by authorizing antitrust exemption under certain conditions and obligations. In view of the weakness of the general competition rules in China, it is a typical phenomenon that the sector-specific regulations in various industrial fields are normally based on their own sector-specific competition rules and rarely resort to the general competition rules. This is true also for the Chinese regulation of maritime transport, whose competition provisions are found primarily in the RIMT and the IRRIMT. However, these provisions are not functionally appropriate and efficient, and do not focus on liner conferences.
5. The scope of application of specific regulations includes two aspects: the objective and the territorial scope.
6. Objective: the application of Regulation 4056/86 is actually restricted to international cargo liner shipping transport. Passenger transport service in liner shipping transport is excluded. The scope of application of the RIMT and the IRRIMT covers, however, a wide range of subjects besides international liner shipping services. International liner shipping services within the meaning of the RIMT and the IRRIMT include not only cargo transport, but also passenger transport services.
7. Territorial: Regulation 4056/86, the RIMT and the IRRIMT seem to take the domestic ports as basis for the application of the regulations. Extraterritorial application of general competition rules is partly accepted by Community case law, but was not accepted in China jurisdiction until the AML explicitly adopted it.

8. In respect of the anti-competitive nature of liner conferences, it is an essential question whether an antitrust exemption or a legal exception has been authorized for liner conferences in order to grant legality to their operations to a certain extent. Under the EC general competition rules, liner conferences principally constitute an infringement of Article 81(1) EC. Notwithstanding the question of compatibility between the adoption of Regulation 4056/86 and Article 81(3) EC, liner conferences enjoyed the antitrust exemption authorized under Regulation 4056/86. In contrast, the legal status of liner conferences in the Chinese jurisdiction is not very clear. The legality of liner conferences is established by the formal filing requirements without any substantive examination as to competition. This could be considered a general legitimization; however, its legal nature is unclear.
9. Furthermore, an antitrust exemption of liner conferences cannot exist without any conditions or restrictions in respect of their fundamental anti-competitive characteristic. Under the EC regime, this primarily refers to the conditions under Article 4 and the obligations under Article 5 of Regulation 4056/86. Under the lack of such conditions in the Chinese regime, the legal nature of the general legitimization of liner conferences cannot be clarified and constitutes the obstacle of application of competition rules both in the general sense and in maritime regulation to liner conferences.
10. The effective implementation of competition rules depends on the effectiveness of procedural rules. The EC has adopted the general procedural rules for implementation of general competition rules at the very beginning (Regulation 17) and advanced a full-scaled modernization (Regulation 1/2003). Similar to the general competition rules of the Community, the general procedural rules are directly applicable to almost all fields of economic regulation, namely also to the regulation of liner conferences. The situation in China is different. Before the AML was adopted in 2007, no procedural rules in the general sense were available. The sector-specific regulation could only be carried out on its own procedural provisions.
11. Regulation 4056/86 contains also procedural provisions. However, these sector-specific procedural provisions deviate much from the previous notification system in Regulation 17 and come closer to the new system of legal exception in Regulation 1/2003. After the adoption of Regulation 1419/2006, the regulatory procedure on liner conferences shall, except for the monitoring provisions in Regulation 4056/86, directly follow the general procedural rules in Regulation 1/2003. China's regulatory procedures on liner conferences are primarily based on the procedural provisions in the RIMT and the IRRIMT. Although such procedural provisions cover the main aspects of regulation procedures, such as the investigation authorities, initiation of investigation as well as investigation measures and hearings etc., most of them are not detailed, conflicts between individual provisions can be found and an effective implementation is difficult to expect.
12. A perspective into the future regulation of liner conferences should be based on the review of the hitherto existing regulation regime and the enforcement experience. In view of the development in market dynamics, decision practice and theoretical research, the compatibility of the block exemption under

Regulation 4056/86 with Articles 81 and 82 EC from the substantive point of view could not be justified any more. The review in China could, however, only be focused on the antitrust investigation on Terminal Handling Charges (THC). This official investigation shows not only the significant weakness in the substantive and procedural provisions of Chinese competition rules, but also the vacuum of regulation experience and the non-qualification of administrative practice of the authorities.

13. Essential changes of the regulation regime have occurred at both ends of the Europe-Asia trade in respect of liner shipping. In the EU the change directly concerns liner conferences. After more than three years of comprehensive review of Regulation 4056/86, Regulation 1419/2006 was adopted, according to which the original block exemption for liner conferences shall be repealed completely after a transitional period. In China the change refers to the development of general competition rules. After almost twenty years of legislative preparation and debates, the AML was finally adopted on 30 August 2007 and it is the first time in the history of this People's Republic to have a unified antitrust code with general applicability.
14. In the EU, the expected expiration of the block exemption for liner conferences highlights the issue of the block exemption for consortia which is a developed form of liner conferences, on one side. On the other side, the simple repeal of the block exemption for liner conferences can not resolve the complexity of the competition issue caused by liner conferences overnight. Following a consultation of a draft, the Guidelines on the application of Article 81 EC to maritime transport services were adopted on 1. July 2008 by the European Commission to touch upon the relevant competition issues like information exchanges and horizontal agreements.
15. In China, the AML provides for a unified framework of general competition rules both in the sense of substantive and procedural provisions. However, the new AML leaves lots of legal vacuums. Many individual implementation rules or regulations are to be expected in order to reach an effective enforcement of the AML. As regards the possible application of the AML to liner conferences, the AML gives a legal basis for relevant issues like the prohibition of monopoly agreements, the conditions for exemption of monopoly agreements and the prohibition of abusive practices, but leaves many other relevant issues open or in question.

Bibliography

Documents

EC: Notice concerning Agreements, Decisions, and Concerted Practices in the Field of Co-operation between Enterprises, O.J. 1968 C 75/3 corrected by O.J. 1968 C 93/3 (now withdrawn)

EC: Commission Proposal concerning the ratification of Member States, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 1978 C 35/3

EC: Commission Doc. No. COM (81) 423 final: Proposal of 13 October 1981 for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, O.J. 1981 C 282/4

EC: Commission Doc. No. COM (85) 90 final: Commission Communication and Proposals to the Council transmitted on 19 March 1985: Progress towards a Common Transport Policy – Maritime Transport, Draft of the Council laying down the requirements in the application of Articles 85 and 86 of the Treaty, O.J. 1985 C 212, published also in Bulletin of the European Communities, Supplement 5/85

EC: Commission Doc. No. COM (89) 266 final: A future for the Community shipping industry: measures to improve the operating conditions of Community shipping (3 August 1989)

EC: Doc. No. SEC (89) 921 final: Guidelines on State aid to shipping companies (3 August 1989)

EC: Commission Doc. No. COM (90) 260 final: Report on the possibility of a group exemption for consortia agreements in liner shipping (18 June 1990)

EC: Commission Doc. No. COM (90) 260 final: Proposal for a Council Regulation (EEC) of on the Application of Article 85 (3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between shipping companies, O.J. 1990 C 167/9

EC: Press Release IP/93/739 of 9 September 1993: Commission Terminates Procedure Initiated against the East African Conference (EAC)

EC: Working Paper of DGIV: Report on Commission Regulation No. 870/95 (28 January 1999), available online at <http://ec.europa.eu/comm/competition/antitrust/report_comm_reg_870_95_en.pdf>

EC: White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 of 28 April 1999, O.J. 1999 C 132/1

EC: The Lisbon Agenda, European Council, March 2000, SN/100/1/100

EC: Charter of fundamental rights of the European Union, O.J. 2000 C 364/1

EC: Commission Doc. No. COM (2000) 582 final: Proposal of 27 September 2000 for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, O.J. 2000 C 365 E/284

EC: Commission Doc. No. C(2000) 3614: Rules of Procedure of the Commission, O.J. 2000 L 308/26

EC: Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, O.J. 2001 C 3/2

EC: Commission Doc. No. SEC (2001) 1828: Commission Staff Working Paper: The proposal for a new regulation implementing Articles 81 and 82 EC

EC: Press Release IP/02/976 of 2 July 2002: Commission fines Degussa and Nippon Soda in animal feed (methionine) cartel

EC: Council Doc. No. 8388/1/02 REV 1: Legislative acts and other instruments: Agreement on Maritime Transport between the European Community and its Member States, of the one part, and the People's Republic of China, of the other part (30 September 2002)

EC: Consultation Paper on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the EC Treaty to maritime transport, 27 March 2003, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/en.pdf>>

EC: Press Release IP/03/445 of 27 March 2003: Commission starts consultation on application of competition rules to maritime transport

EC: Commission Doc. No. COM (2003) 595 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interpretation of Council Regulation (EEC) No. 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (22 December 2003)

EC: Commission Discussion Paper of 16 June 2004 on Review of Regulation 4056/86, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/review_4056.pdf>

EC: White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport, Commission Programme 2003/COMP/18 of 13 October 2004

EC: Commission Doc. No. 2004/C 101/03: Commission Notice on cooperation within the Network of Competition Authorities, O.J. 2004 C 101/43

EC: Commission Doc. No. 2004/C 101/04: Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2004 C 101/54

EC: Commission Doc. No. 2004/C 101/05: Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004 C 101/65

EC: Commission Doc. No. 2004/C 101/06: Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), O.J. 2004 C 101/78

EC: Commission Doc. No. 2004/C 101/07: Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. 2004 C 101/81

EC: Commission Doc. No. 2004/C 101/08: Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004 C 101/97

EC: Press Release IP/04/1213 of 13 October 2004: Commission adopts White Paper on liner shipping conferences

EC: Commission Doc. No. COM (2005) 651 final: Proposal for a Council Regulation repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services (14 December 2005)

EC: Commission Doc. No. MEMO/05/480: Proposal to repeal block exemption for liner shipping conferences – Frequently Asked Questions (14 December 2005)

EC: Commission Doc. No. IP/05/1586: Press Release: Competition: Commission proposes repeal of exemption for liner shipping conferences (14 December 2005)

EC: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, O.J. 2006 C 210/2

EC: Commission Doc. No. COM (2006) 196 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interpretation of Council Regulation (EEC) No. 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (11 May 2006)

EC: Commission: Issues raised in discussions with the carrier industry in relation to the forthcoming Commission Guidelines on the Application of Competition Rules to Maritime Transport Services, available online at <http://ec.europa.eu/competition/antitrust/legislation/maritime/issues_paper_shipping.pdf> (September 2006)

EC: Commission Doc. No. MEMO/06/344: Competition: repeal of block exemption for liner shipping conferences – frequently asked questions (25 September 2006)

EC: Commission Doc. No. COM (2006) 869 final – 2006/0308 (COD): Proposal for a European Parliament and Council Regulation repealing Council Regulation (EEC) No. 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences (30 January 2007)

EC: Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007 C 215/3

EC: Opinion of the European Economic and Social Committee on the “Liner Conferences – United Nations Convention” COM (2006) 869 final – 2006/0308 (COD), O.J. 2007 C 256/62

EC: Press Release IP/07/1463 of 10 October 2007: An ocean of opportunity: Commission proposes Integrated Maritime Policy for the EU

EC: MEMO/07/403 of 10 October 2007: Questions and Answers on an Integrated Maritime Policy for the European Union

EC: Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2008 C 245/2

EC: Table of Legislations, Cases and Decisions of 1 July 2008: Antitrust: Commission adopts Guidelines on application of competition rules to maritime transport services

EC: Commission Doc. No. MEMO/08/460: Antitrust: Guidelines on the application of competition rules in the maritime sector – frequently asked questions (1 July 2008)

EC: Preliminary Draft Regulation on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2008 C 266/1.

Global Insight/Berlin University of Technology (WIP)/Institute of Shipping Economics and Logistics (ISL), The Application of Competition Rules to Liner Shipping, Final Report of 26 October 2005, available online at: <http://ec.europa.eu/comm/competition/antitrust/others/maritime/shipping_report_26102005.pdf> [Cit.: *Global Insight/WIP/ISL*, The Application of Competition Rules to Liner Shipping (2005)]

MOC (Ministry of Communications of the PRC): Report of China’s Shipping (1999) [Cit.: *MOC*, Report of China’s Shipping (1999)]

MOC: Report of China’s Shipping (2001) [Cit.: *MOC*, Report of China’s Shipping (2001)]

MOC: Report of China’s Shipping (2002) [Cit.: *MOC*, Report of China’s Shipping (2002)]

OECD: Doc. No. DSTI/DOT (2001)3, Report on Regulatory Issues in International Maritime Transport (8 March 2002) [Cit.: *OECD*, Report on Regulatory Issues in International Maritime Transport (2002)]

OECD: Doc. No. DSTI/DOT(2002)2, Final Report on Competition Policy in Liner Shipping (16 April 2002) [Cit.: *OECD*, Final Report on Competition Policy in Liner Shipping (2002)]

Royal Commission on Shipping Rings: Report of the Royal Commission on Shipping Rings (London: HMSO, 1909), five volumes, Cd. 4668–70, 4685–86

- State Council of the PRC*: White Papers on the Development of China's Marine Programs, available online at <<http://www.china.org.cn/e-white/6/index.htm>>
- UNCTAD*: The Liner Conference System (Doc. TD/B/C.4/62/Rev.1, New York: United Nations, 1970)
- UNCTAD*: Convention on a Code of Conduct for Liner Conferences, concluded at Geneva on 6 April 1974, United Nations, Treaty Series, Vol. 1334, p. 15, and annex A in volumes 1365, 1398, 1401 and 1408
- WTO*: Doc. No. WTO/ACC/CHN/49: Report of the Working Party on the Accession of China, (1 October 2001)
- WTO*: Doc. No. WT/L/432: Decision of 10 November 2001 on Accession of the People's Republic of China (23 November 2001)
- WTO*: Doc. No. WT/L/432: Protocol of on the Accession of the People's Republic of China (23 November 2001)
- WTO*: Doc. No. GATS/SC/135: Trade in services – the People's Republic of China – schedule of specific commitments (14 February 2002)
- WTO*: Doc. No. GATS/EL/135: Trade in services – the People's Republic of China – final list of Article II (MFN) exemptions (14 February 2002)

Books, Reports, Papers and Articles

- Abrahamsson, Bernhard J.*, International Ocean Shipping: Current Concepts and Principles (Boulder, Colorado: Westview Press, 1980) [Cit.: *Abrahamsson*, International Ocean Shipping: Current Concepts and Principles (1980)]
- Ademuni-Odeke*, Shipping in International Trade Relations (Aldershot: Avebury, Gower Publishing Company Ltd., 1988) [Cit.: *Ademuni-Odeke*, Shipping in International Trade Relations (1988)]
- Anonymous*, The Comment of the United Nations on the RIMT, Water Transportation Digest, 4/2002, p. 12 [无名, 我国海运条例在美反响强烈, 水路运输文摘, 4/2002, p. 12] [Cit.: *Anonymous*, The Comment of the United Nations on the RIMT (2002)]
- Au, Hans*, Das Wettbewerbsrecht der VR China: wirtschaftspolitische Ziele und Gesetzesvollzug (Hamburg: Institut für Asienkunde, 2004) [Cit.: *Au*, Das Wettbewerbsrecht der VR China (2004)]
- AUTF (Association des utilisateurs de Transport de Frêt)*, Public Hearing: Review of Council Regulation 4056/86: AUTF Presentation, 2 December 2003, available online at <http://ec.europa.eu/comm/competition/antitrust/review/submissions/autf_slides.pdf> [Cit.: *AUTF*, Public Hearing on Review of Regulation 4056/86 (2003)]
- Bai, Xuejie/Wang, Haiping*, China's Shipping and Port Companies Facing the Challenges of the WTO, Port Economy, 2/2001, pp. 22–25 [白雪洁/王海平, 面对WTO挑战的中国港航企业, 港口经济, 2/2001, pp. 22–25] [Cit.: *Bai/Wang*, China's Shipping and Port Companies Facing the Challenges of the WTO (2001)]
- Bao, Ximei*, The Economic Analysis of Antimonopoly Law (Beijing: Chinese Social Science Press, 2003) [包锡妹, 反垄断法的经济分析 (北京: 中国社会科学出版社, 2003)] [Cit.: *Bao*, The Economic Analysis of Antimonopoly Law (2003)]
- Basedow, Jürgen*, Verkehrsrecht und Verkehrspolitik als Europäische Aufgabe, in: *Basedow, Jürgen* (ed.), Europäische Verkehrspolitik (Tübingen: Mohr, 1987), pp. 1–28 [Cit.: *Basedow*, Verkehrsrecht und Verkehrspolitik als Europäische Aufgabe (1987)]
- Basedow, Jürgen* (ed.), Europäische Verkehrspolitik (Tübingen: Mohr, 1987) [Cit.: *Basedow*, Europäische Verkehrspolitik (1987)]

- Basedow, Jürgen*, Mehr Freiheit wagen: über Deregulierung und Wettbewerb (Tübingen: Mohr Siebeck, 2002) [Cit.: *Basedow*, Mehr Freiheit wagen: über Deregulierung und Wettbewerb (2002)]
- Basedow, Jürgen*, The Modernization of European Competition Law: A Story of Unfinished Concepts, *Texas International Law Journal*, 3/2007, pp. 429–439 [Cit.: *Basedow*, The Modernization of European Competition Law (2007)]
- Benini, Fabrizia/Bermig, Carsten*, The European Commission Proposes to Repeal the Liner Conference Block Exemption, *EC Competition Policy Newsletter*, 1/2006, pp. 43–48 [Cit.: *Benini/Bermig*, The Commission Proposes to Repeal the Liner Conference Block Exemption (2006)]
- Bredima-Savopoulou, Anna/Tzoannos, John*, The Common Shipping Policy of the EC (North-Holland: T.M.C Asser Institut, 1990) [Cit.: *Bredima-Savopoulou/Tzoannos*, The Common Shipping Policy of the EC (1990)]
- Brinkmann, Thomas*, Der UNCTAD-Verhaltenskodex für Linienkonferenzen: zugleich ein Beitrag zur Dienstleistungs- und Wettbewerbsordnung in der internationalen Linienschifffahrt (Kehl am Rhein: Engel, 1993) [Cit.: *Brinkmann*, Der UNCTAD-Verhaltenskodex für Linienkonferenzen (1993)]
- Brodie, Peter*, *Commercial Shipping Handbook* (2nd ed., London: Informa, 2006) [Cit.: *Brodie*, *Commercial Shipping Handbook* (2006)]
- Brooks, Mary R.*, *Sea Change in Liner Shipping: Regulation and Managerial Decision-Making in a Global Industry* (Amsterdam: Pergamon, 2000) [Cit.: *Brooks*, *Sea Change in Liner Shipping: Regulation and Managerial Decision-Making in a Global Industry* (2000)]
- Cai, Ximei*, China's State-Owned Enterprises and Reform of the Central COSCO Appointed New Leadership, *Lianhe Zaobao*, 28 June 2000 [Cit.: *Cai*, China's State-Owned Enterprises and Reform of the Central COSCO Appointed New Leadership (2000)]
- Camasasca, Peter D./Schmidt, Anna K.*, EC Commission's Post-Conference Maritime Transport Guidelines – True Guidance to Navigate Through Antitrust Compliance, 30 *European Competition Law Review* (2009), pp. 143–145 [Cit.: *Camasasca/Schmidt*, EC Commission's Post-Conference Maritime Transport Guidelines (2009)]
- Cao, Shouye/Wang, Fei*, The Applicability of WTO Agreements in Chinese Jurisdiction, *Newspaper of the People's Court*, 15 October 2001 [曹守晔/王飞, 中国法院适用WTO规则, 人民法院报, 2001年10月15日] [Cit.: *Cao/Wang*, The Applicability of WTO Agreements in Chinese Jurisdiction (2001)]
- Cass, Deborah Z./Williams, Brett G./Barker, George*, China and the Reshaping of the World Trade Organization, in: *Cass, Deborah Z./Williams, Brett G./Barker, George* (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge Univ. Press, 2003), pp. 1–15 [Cit.: *Cass/Williams/Barker*, *China and the Reshaping of the World Trade Organization* (2003)]
- Chen, Lijie*, The Current State and Problems of Anti-Monopoly Legislation in the People's Republic of China, *Global Law Review*, 1/2003, pp. 44–48 [陈丽洁, 中国反垄断立法的现状与问题, 环球法律评论, 1/2003, pp. 44–48] [Cit.: *Chen*, Current State and Problems of Anti-Monopoly Legislation in China (2003)]
- Cheng, Lixue*, The Impact of the THC Collection on Carriers and Shippers, *Social Scientist*, 5/2005 (Supplement), pp. 180–181 [程立雪, THC的收取对船货双方的影响, 社会科学家, 5/2005 (增刊), pp. 180–181] [Cit.: *Cheng*, The Impact of the THC Collection on Carriers and Shippers (2005)]
- Chuah, Jason*, Liner conferences in the EU and the proposed review of EC Regulation 4056/86, *Lloyd's Maritime and Commercial Law Quarterly*, 2/2005, pp. 207–233 [Cit.: *Chuah*, Liner conferences in the EU and the proposed review of EC Regulation 4056/86 (2005)]

- Close, G.*, Article 84(2) EEC: the Development of Transport Policy in the Sea and Air Transport Sector, *European Law Review*, 3/1980, pp. 188–207 [Cit.: *Close*, Article 84(2) EEC: the Development of Transport Policy in the Sea and Air Transport Sector (1980)]
- Clough, Mark/Randolph, Fergus*, *Shipping and EC Competition Law* (London: Butterworths, 1991) [Cit.: *Clough/Randolph*, *Shipping and EC Competition Law* (1991)]
- COSCO*, COSCO History, available online at <<http://www.cosco.com/en/about/history.jsp?leftnav=1/2>> [Cit.: *COSCO*, COSCO History]
- CSA (China Shippers' Association)*, Answer to the Investigatory Questionnaires of the THC Issue, August 2003, available online at <<http://china-commerce.com.cn/news.asp?classid=42&id=312>> [中国对外贸易经济合作企业协会, THC调查会议题问答, 2003年8月] [Cit.: *CSA*, Answer to the Investigatory Questionnaires of the THC Issue (2003)]
- CSA (China Shippers' Association)*, The General Statement of the CSA on the THC, 21 August 2003, available online at <<http://china-commerce.com.cn/news.asp?classid=42&id=311>> [中国外贸企业协会, 调查会上对THC立场观点的总陈述 (副会长蔡家祥), 2003年8月21日] [Cit.: *CSA*, The General Statement of the CSA on the THC (2003)]
- Davies, Peter N.*, British Shipping and World Trade: Rise and Decline: 1820–1939, in: *Yui, Tsunehiko/Nakagawa, Keiichiro* (eds.), *Business History of Shipping: Strategy and Structure* (Tokyo: University of Tokyo Press, 1985), pp. 39–85 [Cit.: *Davies*, British Shipping and World Trade: Rise and Decline: 1820–1939 (1985)]
- Dinger, Felix*, The Future of Liner Conferences in Europe: A Critical Analysis of Agreements in Liner Shipping under Current European Competition Law (Frankfurt am Main: Lang, 2004) [Cit.: *Dinger*, The Future of Liner Conferences in Europe (2004)]
- Donnithorne, Audrey*, *China's Economic System* (London: Allen and Unwin, 1967) [Cit.: *Donnithorne*, *China's Economic System* (1967)]
- Dong, Yiliang*, Chinas Beitritt zur WTO: Beitrittsverfahren und Anforderung an die chinesische Rechtsordnung, *Newsletter der Deutsch-Chinesischen Juristenvereinigung e.V.*, 2/2003, pp. 82–90 [Cit.: *Dong*, Chinas Beitritt zur WTO (2003)]
- Dreyer, Jan Joachim*, Informationsaustausch zwischen Wettbewerbern und Kartellrecht im See verkehr, 31 *Transportrecht* (2008), pp. 225–230 [Cit.: *Dreyer*, Informationsaustausch zwischen Wettbewerbern und Kartellrecht im See verkehr (2008)]
- ELAA (European Liner Affairs Association)*, The European Commission Consultation Paper on the Review of Council Regulation (EEC) 4056/86 of 22 December 1986: Response by the European Liner Affairs Association, 18 June 2003, available online at <<http://ec.europa.eu/comm/competition/antitrust/review/submissions/elaa.pdf>> [Cit.: *ELAA*, Reponse to Consultation Paper on the Review of Regulation 4056/86 (2003)]
- ELAA*, The European Commission Consultation Paper on the Review of Council Regulation (EEC) 4056/86 of 22 December 1986: Comments on responses submitted by third parties, 15 October 2003, available online at <<http://ec.europa.eu/comm/competition/antitrust/review/submissions/elaaresponsesubmissions.pdf>> [Cit.: *ELAA*, Comments on responses submitted by third parties (2003)]
- ELAA*, European Commission Review of Council Regulation (EEC) 4056/86 of 22 December 1986: Issues Paper, 3 December 2003, available online at <http://ec.europa.eu/comm/competition/antitrust/review/submissions/elaa_issuespaper.pdf> [Cit.: *ELAA*, Issues Paper on the Review of Regulation 4056/86 (2003)]
- ELAA*, European Commission Review of Council Regulation (EEC) 4056/86 of 22 December 1986: Post Hearing Submission, 20 February 2004, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/post_hearing_submission.pdf> [Cit.: *ELAA*, Post Hearing Submission on the Review of Regulation 4056/86 (2004)]
- ELAA*, Review of Regulation 4056/86: Proposal for a New Regulatory Structure, Letter from *Ken Bloch Soerensen*, Executive Director of ELAA to *Lowri Evans*, Director in charge of the services sector in the European Commission DGCOMP, 6 August 2004, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>

elaa_proposal_06082004.pdf> [Cit.: *ELAA*, Review of Regulation 4056/86: Proposal for a New Regulatory Structure (2004)]

ELAA, The ELAA Proposal for a New Regulatory Framework for the Liner Shipping Industry: Article 81 EC Assessment, 10 March 2005, available online at <<http://ec.europa.eu/comm/competition/antitrust/review/elaa/>> [Cit.: *ELAA*, Proposal for a New Regulatory Framework for the Liner Shipping Industry (2005)]

ELAA, Comment on EC Commission Draft Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport, November 2007, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/elaa.pdf>> [Cit.: *ELAA*, Comment on the Draft Guidelines (2007)]

Elsner, Wolfgang, Unfair Pricing in Maritime Transport, 23 *European Transport Law* (1988), pp. 590–599 [Cit.: *Elsner, Wolfgang*, Unfair Pricing in Maritime Transport (1988)]

Erdmenger, Jürgen, Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt: zur Auslegung von Article 84 Abs. 2 des Vertrages (Hamburg: De Gruyter & Co., 1962) [Cit.: *Erdmenger*, Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt (1962)]

Erdmenger, Jürgen, Die Gemeinsame Binnenverkehrspolitik der EG nach dem Gerichtshofurteil vom 22. Mai 1985, in: *Basedow, Jürgen* (ed.), Europäische Verkehrspolitik (Tübingen: Mohr, 1987), pp. 83–108 [Cit.: *Erdmenger*, Die Gemeinsame Binnenverkehrspolitik der EG nach dem Gerichtshofurteil vom 22. Mai 1985 (1987)]

Erdmenger, Jürgen, Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt, in: *Schmidt, Karsten/Schwark, Eberhard* (eds.), Unternehmen, Recht und Wirtschaftsordnung – Festschrift für Peter Raisch zum 70. Geburtstag (Köln: Heymanns, 1995), pp. 387–415 [Cit.: *Erdmenger*, Zur Anwendung des EG-Kartellrechts auf die Seeschifffahrt (1995)]

Ersboll, Niels Christian, The European Commission's Enforcement Powers: An Analysis of the Exclusion of Tramp Vessel Services from Regulation 4056/86 and Regulation 1/2003, 24 *European Competition Law Review* (2003), pp. 375–383 [Cit.: *Ersboll*, The European Commission's Enforcement Powers (2003)]

ESC (European Shippers' Council), ESC Response to the ELAA Proposal for a New Regulatory Framework for the Liner Shipping Industry: Article 81 EC Assessment, 30 June 2005, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/elaa_proposal/liner_shipping_v3.pdf> [Cit.: *ESC*, ESC Response to the ELAA Proposal for a New Regulatory Framework for the Liner Shipping Industry (2005)]

ESC, The Submission of ESC in Relation to the Draft Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services, 9 November 2007, available online at <<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/esc.pdf>> [Cit.: *ESC*, The Submission of ESC in Relation to the Draft Guidelines (2007)]

Evans, Lowri, Competition Developments Affecting the Maritime Sector, Speech at London European Maritime Law Organisation, 14 October 2005, available online at <http://ec.europa.eu/competition/speeches/text/sp2005_018_en.pdf> [Cit.: *Evans*, Competition Developments Affecting the Maritime Sector (2005)]

Evans, Lowri, The Future Regulatory Framework for Liner Shipping, Speech at the 8th Global Liner Shipping Conference, London, 27 April 2006, available online at <http://ec.europa.eu/competition/speeches/text/sp2006_006_en.pdf> [Cit.: *Evans*, The Future Regulatory Framework for Liner Shipping (2006)]

Farantouris, Nikolaos E., European Integration and Maritime Transport (Athens: Sakkoulas, 2003) [Cit.: *Farantouris*, European Integration and Maritime Transport (2003)]

Faull, Jonathan, Recent Developments in European Community – Competition Policy in the Maritime Field, 30 *European Transport Law* (1995), pp. 3–11 [Cit.: *Faull*, Competition Policy in the Maritime Field (1995)]

Fitzgerald, Eric, Stability v Competitiveness, speech in the Transasia 99 Conference, Hong Kong, 25–27 August 1999, available online at <http://ec.europa.eu/comm/competition/speeches/text/sp1999457_en.pdf> [Cit.: *Fitzgerald*, Stability v Competitiveness (1999)]

- Freshfields Bruckhaus Deringer Newsletter*, China Finally Enacts Anti-monopoly Law, Newsletter of the Law Firm Freshfields Bruckhaus Deringer (September 2007), available online at <<http://www.freshfields.com/publications/pdfs/2007/sept05/19887.pdf>>, pp. 1–4 [Cit.: *Freshfields*, China Finally Enacts Anti-monopoly Law (2007)]
- Gertler, Jeffrey L.*, China's WTO Accession – the Final Countdown, in: *Cass, Deborah Z./Williams, Brett G./Barker, George* (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge Univ. Press, 2003), pp. 55–67 [Cit.: *Gertler*, China's WTO Accession – the Final Countdown (2003)]
- Grabitz, Eberhard/Hilf, Meinhard* (eds.), *Das Recht der Europäischen Union* (München: Beck) [Cite example: *Karpenstein/Langner*, in: *Grabitz/Hilf*, *Das Recht der EU*, Band III, Art. 225 EGV, Rn. 4 (23. EL Jan. 2004)]
- Greaves, Rosa*, EC Maritime Transport Policy and Regulation, 3 *Duke Journal of Comparative and International Law* (1992–1993), pp. 119–145 [Cit.: *Greaves*, EC Maritime Transport Policy and Regulation (1992)]
- Greaves, Rosa*, EC transport law (Harlow: Longman, 2000) [Cit.: *Greaves*, EC transport law (2000)]
- von der Groeben, Hans/Thiesing, Jochen/Ehlermann, Claus-Dieter* (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Band I: Art. 1–53 EUV, Art. 1–80 EGV (6th ed., Baden-Baden: Nomos, 2003) Cite example: *Erdmenger*, in: *von der Groeben/Thiesing/Ehlermann*, *Kommentar zum EU-/EG-Vertrag*, Article 80 EG, p. 1975, Rn. 21 ff.
- Gu, Yimo*, *Practice of the Foreign Trade Transport* (Peking: Knowledge Press, 1986) [顾奕镛, *对外贸易运输实务* (北京: 知识出版社, 1986)] [Cit.: *Gu*, *Practice of the Foreign Trade Transport* (1986)]
- Guo, Xiaoyu*, Three Amendments to Draft of Antimonopoly Law, *Legal Daily*, 24 August 2007, available online at <http://www.legaldaily.com.cn/bm/2007-08/25/content_687410.htm> [郭晓宇, 反垄断法草案又有三方面修改: 对外资参与经营者集中的审查规定更明确, *法制日报*, 2007年8月24日] [Cit.: *Guo*, Three Amendments to Draft of Antimonopoly Law (2007)]
- Guo, Xiaoyu*, Say “No” to “Administrative Monopoly”, *Legal Daily*, 26 August 2007, available online at <http://www.legaldaily.com.cn/bm/2007-08/26/content_687500.htm> [郭晓宇, 对“行政性垄断”说“不”, *法制日报*, 2007年8月26日] [Cit.: *Guo*, Say “No” to “Administrative Monopoly” (2007)]
- Guo, Xiaoyu*, Anti-Monopoly Law Safeguards Fair Competition, *Legal Daily*, 1 September 2007, available online at <http://www.legaldaily.com.cn/bm/2007-08/31/content_691309.htm> [郭晓宇, 反垄断法保护公平的竞争制度, 反垄断执法机构将成立, *法制日报*, 2007年9月1日] [Cit.: *Guo*, Anti-Monopoly Law Safeguards Fair Competition (2007)]
- Guo, Zongjie*, Monopoly in Special Industries and Braches: Comments on Relevant Articles of Draft of Antimonopoly Law, *Research on Rule of Law*, 5/2007, pp. 26–29 [郭宗杰, 特殊行业与领域的垄断问题——兼论反垄断法草案相关条款的设置, *法治研究*, 5/2007, pp. 26–29] [Cit.: *Guo*, Monopoly in Special Industries and Braches: Comments on Relevant Articles of Draft of Antimonopoly Law (2007)]
- Haralambides, Hercules E./Yang, Jiaqi*, A Fuzzy Set Theory Approach To Flagging Out: Towards A New Chinese Shipping Policy, 27 *Marine Policy* (2003), pp. 13–22 [Cit.: *Haralambides/Yang*, *Flagging Out: A New Chinese Shipping Policy* (2003)]
- Heine, Irwin M.*, *China's Rise to Commercial Maritime Power* (New York: Greenwood Press, 1989) [Cit.: *Heine*, *China's Rise to Commercial Maritime Power* (1989)]
- Hering, Ingelore*, Verordnung (EWG) Nr. 3577/92 des Rates zur Anwendung des Grundsatzes des freien Dienstleistungsverkehrs auf den Seeverkehr in den Mitgliedstaaten (Seekabotage), in: *Mückenhausen, Peter/Boeing, Detlev* (eds.), *EG-Verkehrsrecht: Binnenmarkt, Sozialrecht, Verkehrssicherheit, Umweltrecht, transeuropäische Netze, EG-Außenbeziehungen im Verkehr*; *Kommentar* (München: Beck, 2004), Section 42 [Cit.:

- Hering*, Verordnung (EWG) Nr. 3577/92 des Rates zur Anwendung des Grundsatzes des freien Dienstleistungsverkehrs auf den Seeverkehr in den Mitgliedstaaten (Seekabotage) (2004)]
- Herman, Amos*, Shipping Conferences (Deventer: Kluwer, 1983) [Cit.: *Herman*, Shipping Conferences (1983)]
- Hippe, Markus*, Zum Entwurf eines chinesischen Antimonopolgesetzes, Zeitschrift für chinesisches Recht, 2/2006, pp. 347–364 [Cit.: *Hippe*, Zum Entwurf eines chinesischen Antimonopolgesetzes (2006)]
- Hirsch, Günter/Montag, Frank/Säcker, Franz Jürgen* (eds.), Competition Law: European Community Practice and Procedure – Article-by-Article Commentary (London: Sweet & Maxwell, 2008) [Englische Übersetzung von Münchener Kommentar zum europäischen und deutschen Wettbewerbsrecht (Kartellrecht): Kartellrecht, Missbrauchs- und Fusionskontrolle, Band I Europäische Wettbewerbsrecht (München: Beck, 2007)] [Cite example: *Wollmann*, in: *Hirsch/Montag/Säcker*, Competition Law (2008), Part 2 B., p. 521, Rn. 2-2-131]
- Hjalmarsson, Johanna/Listo, Andrea*, EU Competition Law and Maritime Transport, 5 Shipping & Trade Law (2005), pp. 1–3, also available online at <http://www.eulaw.soton.ac.uk/elpub/Article_%20Vol5%20No_3.pdf> [Cit.: *Hjalmarsson/Listo*, EU Competition Law and Maritime Transport (2005)]
- Huang, Jianshe*, The Impact of China's WTO Accession on Chinese Maritime Transport Services, Containerization, 9/2001, pp. 14–18 [黄建设, 加入WTO对我国航运业的影响及几点思考, 集装箱化, 9/2001, pp. 14–18] [Cit.: *Huang*, The Impact of China's WTO Accession on Chinese Maritime Transport Services (2001)]
- Immenga, Ulrich/Mestmäcker, Ernst-Joachim* (eds.), Wettbewerbsrecht, Kommentar zum Europäischen Kartellrecht, 4. Auflag (München: Beck, 2007) [Cite example: *Basedow*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht Kommentar (2007), Verkehr; C., p. 1559, Rn. 54]
- Jack, Robert B.*, Self-Policing of Ocean Shipping Conferences, 20 Stanford Law Review (1968), pp. 724–753 [Cit.: *Jack*, Self-Policing of Ocean Shipping Conferences (1968)]
- Jackson, John H./Feinerman, Jamees V.*, China's WTO Accession Survey of Materials, 4 Journal of International Economic Law (2001), pp. 329–335 [Cit.: *Jackson/Feinerman*, China's WTO Accession Survey of Materials (2001)]
- Jacobs, Andreas*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (Baden-Baden: Nomos, 1991) [Cit.: *Jacobs*, Zur Vereinbarkeit von Kartellabsprachen der internationalen Linienschifffahrt mit Artikel 85 EWG-Vertrag (1991)]
- Jaspers, Maria*, The TACA Judgment: Lessons Learnt and the Way Forward, EC Competition Policy Newsletter, 1/2004, pp. 34–39 [Cit.: *Jaspers*, The TACA Judgment: Lessons Learnt and the Way Forward (2004)]
- Jiang, Zemin*, Address at the Meeting of the 14th National Congress of the Communist Party of China (18 October 1992)
- Jin, Chaowu/Luo, Wei*, Competition Law in China (Buffalo, NY: Hein, 2002) [Cit.: *Jin/Luo*, Competition Law in China (2002)]
- Jones, Alison/Sufrin, Brenda*, EC Competition Law, 3rd Edition (Oxford: Oxford University Press, 2008) [Cit.: *Jones/Sufrin*, EC Competition Law (2008)]
- Jones, Paul*, China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?, 3(5) China Law Reporter (Newsletter of the China Law Committee of the International Section of the American Bar Association, Chicago) (2007), pp. 3–13, available online at <<http://www.jonesco-law.ca/89/files/pdfs/PCP%20-%20New%20AML%20-%20CLR.2007.09.pdf>> [Cit.: *Jones*, China's New Anti-Monopoly Law (2007)]
- Jung, Youngjin/Hao, Qian*, The New Economic Constitution in China: A Third Way for Competition Regime?, 24 Northwestern Journal of International Law & Business (2003), pp. 107–171 [Cit.: *Jung/Hao*, The New Economic Constitution in China (2003)]

- Kang, Jong-Soon/Findlay, Christopher*, Regulatory Reform in the Maritime Industry, in: Christopher Findlay/Tony Warren (eds.), *Impediments to Trade in Services: Measurement and Policy Implications* (London: Routledge, 2000), pp. 152–171 [Cit.: *Kang/Findlay*, *Regulatory Reform in the Maritime Industry* (2000)]
- Kjolbye, Lars*, The New Commission Guidelines on the Application of Article 81 (3): An Economic Approach to Article 81, 25 *European Competition Law Review* (2004), pp. 566–577 [Cit.: *Kjolbye*, *The New Commission Guidelines on the Application of Article 81 (3)* (2004)]
- Komninos, Assimakis P.*, Public and Private Antitrust Enforcement in Europe: Complement? Overlap?, 3 *The Competition Law Review* (2006), pp. 5–26 [Cit.: *Komninos*, *Public and Private Antitrust Enforcement in Europe* (2006)]
- Komninos, Assimakis P.*, Modernisation and Decentralisation: Retrospective and Prospective, in: *Amato, Giuliano/Ehlermann, Claus-Dieter* (eds.), *EC Competition Law – A Critical Assessment* (Oxford: Hart, 2007), pp. 629–674 [Cit.: *Komninos*, *Modernisation and Decentralisation* (2007)]
- Kong, Qingjiang*, China's WTO Accession: Commitments and Implications, 3 *Journal of International Economic Law* (2000), pp. 655–690 [Cit.: *Kong*, *China's WTO Accession: Commitments and Implications* (2000)]
- Kong, Qingjiang*, Enforcement of WTO Agreements in China: Illusion or Reality?, in: *Cass, Deborah Z./Williams, Brett G./Barker, George* (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge Univ. Press, 2003), pp. 132–155 [Cit.: *Kong*, *Enforcement of WTO Agreements in China: Illusion or Reality?* (2003)]
- Kong, Xiangjun*, *Anti-Unfair Competition Law: Application and Perfection* (Beijing: Law Press, 1998) [孔祥俊, 反不正当竞争法的适用与完善 (北京: 法律出版社, 1998)] [Cit.: *Kong*, *Anti-Unfair Competition Law* (1998)]
- Kong, Xiangjun*, The Consequent Implementation and the Applicability of the WTO Legislations, *Legal Daily*, 14 October 2001, available online at <http://www.fatianxia.com/paper_list.asp?id=14137> [孔祥俊, 同一解释原则与WTO法律的司法适用, 法制日报, 2001年10月14日] [Cit.: *Kong*, *The Consequent Implementation and the Applicability of the WTO Legislations* (2001)]
- Korah, Valentine*, *An Introductory Guide to EC Competition Law and Practice* (9th ed., Oxford: Hart, 2007) [Cit.: *Korah*, *An Introductory Guide to EC Competition Law and Practice* (2007)]
- Kreis, Helmut W.R.*, European Community Competition Policy and International Shipping, 13 *Fordham International Law Journal* (1989–1990), pp. 411–445 [Cit.: *Kreis*, *European Community Competition Policy and International Shipping* (1990)]
- Kreis, Helmut W.R.*, Liner Services: The Block Exemptions and Inter-modal Transport, in: *Bull, Hans Jacob/Stemshaug, Helge* (eds.), *EC Shipping Policy* (Oslo: Juridisk Forlag, 1997), pp. 129–161 [Cit.: *Kreis*, *Liner Services: The Block Exemptions and Inter-modal Transport* (1997)]
- Kröger, Bernd*, Current Issues in EC Maritime Competition Law, 28 *European Transport Law* (1993), pp. 423–431 [Cit.: *Kröger*, *Current Issues in EC Maritime Competition Law* (1993)]
- Lan, Lu-An*, The Antitrust Exemptions of Liner Conference, 17 *Annual of China Maritime Law* (2006), pp. 46–58 [蓝鹭安, 论班轮公会反垄断豁免法, 中国海商法年刊, 第17卷, 2006年, pp. 46–58] [Cit.: *Lan*, *The Antitrust Exemptions of Liner Conference* (2006)]
- Lang, John Temple*, Current Issues in EC Maritime Competition Law, 28 *European Transport Law* (1993), pp. 405–422 [Cit.: *Lang*, *Current Issues in EC Maritime Competition Law* (1993)]
- Larenz, Karl*, *Methodenlehre der Rechtswissenschaft* (6th ed., Berlin, Heidelberg: Springer, 1991) [Cit.: *Larenz*, *Methodenlehre der Rechtswissenschaft* (1991)]

- Lauriat, George*, China Shipping: the Great Leap Forward (Colchester: Lloyd's of London Press, 1983) [Cit.: *Lauriat*, China Shipping (1983)]
- Lenaerts, Koen*, Modernisation of the Application and Enforcement of European Competition Law – An Introductory Overview, in: *Stuyck, Jules/Gilliams, Hans* (eds.), Modernisation of European Competition Law, The Commission's Proposal for A New Regulation Implementing Articles 81 and 82 EC (Antwerp: Intersentia, 2002), pp. 11–40 [Cit.: *Lenaerts*, Modernisation of the Application and Enforcement of European Competition Law (2002)]
- Li, Kevin X./Ingram, CWM*, Maritime Law and Policy in China (London: Cavendish, 2002) [Cit.: *Li/Ingram*, Maritime Law and Policy in China (2002)]
- Li, Kevin X./Cullinane, Kevin/Yan, Hong/Cheng, Jin*, Maritime Policy in China after WTO: Impacts and Implications for Foreign Investment, 36 Journal of Maritime Law and Commerce (2005), pp. 77–135 [Cit.: *Li/Cullinane/Yan/Cheng*, Maritime Policy in China after WTO (2005)]
- Li, Shishi*, Chinese Legislation, International Conventions and International Law, Chinese Yearbook of International Law (1993), pp. 263–268 [李适时, 中国的立法、条约与国际法, 中国国际法年刊, 1993年, pp. 263–268] [Cit.: *Li*, Chinese Legislation, International Conventions and International Law (1993)]
- Li, Yao*, The WTO, Shipping Industry and Foreign Exchange, Foreign Exchange, 2/2002, pp. 20–22 [李瑶, WTO, 海运业, 外汇管理, 中国外汇管理, 2/2002, pp. 20–22] [Cit.: *Li*, The WTO, Shipping Industry and Foreign Exchange (2002)]
- Li, Yongsheng*, Impact of WTO Accession on China's Shipping Companies, Shipping Management, 10/2000, pp. 5–7 and 19 [李永生, 加入WTO对我国航运企业的影响, 水运管理, 10/2000, pp. 5–7 and 19] [Cit.: *Li*, Impact of WTO Accession on China's Shipping Companies (2000)]
- Li, Zhaojie*, The Legislative Effects of International Conventions on Chinese Domestic Jurisdiction, Chinese Yearbook of International Law (1993), pp. 269–279 [李兆杰, 条约在我国国内法效力若干问题之探讨, 中国国际法年刊, 1993年, pp. 269–279] [Cit.: *Li*, The Legislative Effects of International Conventions on Chinese Domestic Jurisdiction (1993)]
- Lin, Yanping*, On Some Articles of the Draft Chinese Anti-Monopoly Law, Journal of Shanghai Jiaotong University (Philosophy and Social Sciences) 1/2007, pp. 19–23 [林燕平, 对《中华人民共和国反垄断法(草案)》相关条款之评析——对“有关法律、行政法规另有规定的, 依照其规定”的质疑, 上海交通大学学报(哲学社会科学版), 1/2007, pp. 19–23] [Cit.: *Lin*, On Some Articles of the Draft Chinese Anti-Monopoly Law (2007)]
- Liu, Hongyan*, China's International Maritime Legislation after its Accession to the WTO, 28 Transportrecht (2005), pp. 429–437 [Cit.: *Liu*, China's International Maritime Legislation after its Accession to the WTO (2005)]
- Loewenheim, Ulrich/Meessen, Karl M./Riesenkampff, Alexander*, Kartellrecht, Band 1: Europäisches Recht (München: Beck, 2005) [Cite example: *Kreis*, Verkehr, in: *Loewenheim/Meessen/Riesenkampff*, Kartellrecht (2005), Band 1, § 7 Rn. 8]
- Lorenz, Moritz*, Änderungen der Rechtspraxis durch das neue chinesische Kartellgesetz, 53 Recht der internationalen Wirtschaft (2007), pp. 927–933 [Cit.: *Lorenz*, Änderungen der Rechtspraxis durch das neue chinesische Kartellgesetz (2007)]
- Lorenz, Moritz*, Das neue chinesische Kartellgesetz, 58 Wirtschaft und Wettbewerb (2008), pp. 814–824 [Cit.: *Lorenz*, Das neue chinesische Kartellgesetz (2008)]
- Lü, Ming/Zhang, Bo*, The Antitrust Exemption under the Chinese Shipping Competition Law, Shipping Management, 3/2005, pp. 23–25 [吕鸣/章博, 我国航运竞争法的反垄断豁免制度, 水运管理, 3/2005, pp. 23–25] [Cit.: *Lü/Zhang*, The Antitrust Exemption under the Chinese Shipping Competition Law (2005)]
- Lu, Po*, Research on the International Freight Forwarders, LL.M. thesis (2004), available online at <<http://www.smuiml.net/school/essay/2004/lupo/index.htm>> (2004) [陆坡, 国际

- 货运代理人若干法律问题研究, 载于: 海商法论坛 (2004)] [Cit.: *Lu*, Research on the International Freight Forwarders (2004)]
- Luo, Wei*, Chinese Law and Legal Research (Buffalo, New York: Hein, 2005) [Cit.: *Luo*, Chinese Law and Legal Research (2005)]
- Ma, Lingping*, China's International Maritime Policy and Shipping Legislation, LL.M Thesis (2003), available online at <<http://www.smuiml.net/school/essay/2003/malinping/index.htm>> [马玲萍, 浅析我国的国际航运政策和航运立法, 载于: 海商法论坛 (2003)] [Cit.: *Ma*, China's International Maritime Policy and Shipping Legislation (2003)]
- Mao, Xiaofei/Glass, Tobias*, Das chinesische Antimonopolgesetz im Lichte des deutschen Kartellrechts, 6 Zeitschrift für Wettbewerbsrecht (2008), pp. 88–108 [Cit.: *Mao/Glass*, Das chinesische Antimonopolgesetz im Lichte des deutschen Kartellrechts (2008)]
- Marx, Daniel*, International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences (Princeton: Princeton University Press, 1953) [Cit.: *Marx*, International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences (1953)]
- Masseli, Markus*, Das Antimonopolgesetz der VR China, Zeitschrift für chinesisches Recht, 3/2007, pp.259–277 [Cit.: *Masseli*, Das Antimonopolgesetz der VR China (2007)]
- Masseli, Markus*, Die chinesische Fusionskontrolle im Lichte der ersten Nebenbestimmungen zum Antimonopolgesetz, Zeitschrift für chinesisches Recht, 1/2009, pp. 18–36 [Cit.: *Masseli*, Die chinesische Fusionskontrolle im Lichte der ersten Nebenbestimmungen zum Antimonopolgesetz (2009)]
- Mattoo, Aaditya*, China's Accession to the WTO: the Services Dimension, 6 Journal of International Economic Law (2003), pp. 299–334 [Cit.: *Mattoo*, China's Accession to the WTO: the Services Dimension (2003)]
- Mestmäcker, Ernst-Joachim/Schweitzer, Heike*, Europäisches Wettbewerbsrecht (2nd ed., München: Beck, 2004) [Cit.: *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht (2004)]
- Meyer, Peter/Chen, Zhaoxia*, Fusionskontrolle in der VR China: Schaffen Richtlinien endlich mehr Rechtssicherheit?, 55 Recht der Internationalen Wirtschaft (2009), pp. 265–272 [Cit.: *Meyer/Chen*, Fusionskontrolle in der VR China (2009)]
- Mo, John Shijian*, Shipping Law in China (Hong Kong: Sweet & Maxwell Asia, 1999) [Cit.: *Mo*, Shipping Law in China (1999)]
- Montag, Frank/Rosenfeld, Andreas*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure, Zeitschrift für Wettbewerbsrecht, 2/2003, pp. 107–135 [Cit.: *Montag/Rosenfeld*, A Solution to the Problem? Regulation 1/2003 and the Modernization of Competition Procedure (2003)]
- Muller, David G.*, China as a Maritime Power (Boulder/Colo.: Westview, 1983) [Cit.: *Muller*, China as a Maritime Power (1983)]
- Müller, Felix*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition, 5 German Law Journal (2004), pp. 721–740 [Cit.: *Müller*, The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition (2004)]
- Munari, Francesco*, Das Europäische Wettbewerbsrecht des Seeverkehrs, 54 Rabels Zeitschrift für ausländisches und internationales Privatrecht (1990), pp. 627–676 [Cit.: *Munari*, Das Europäische Wettbewerbsrecht des Seeverkehrs (1990)]
- Munari, Francesco*, Liner Shipping and Antitrust after the Repeal of Regulation 4056/86, Lloyd's Maritime and Commercial Law Quarterly, 1/2009, pp. 42–56 [Cit.: *Munari*, Liner Shipping and Antitrust after the Repeal of Regulation 4056/86 (2009)]
- Münzel, Frank*, Neues chinesisches Vertrags- und Wettbewerbsrecht, 27 Recht der internationalen Wirtschaft (1981), pp. 218–224 [Cit.: *Münzel*, Neues chinesisches Vertrags- und Wettbewerbsrecht (1981)]

- Münzel, Frank*, Kartellrecht in China, in: Dietz, Adolf (ed.), Die Neuregelung des gewerblichen Rechtsschutzes in China: Texte und Einführungen zum Patent-, Warenzeichen-, Wettbewerbs- und Kartellrecht (Weinheim: VCH, 1988), pp. 147–185 [Cit.: *Münzel*, Kartellrecht in China (1988)]
- Nesterowicz, Malgorzata Anna*, The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping, 17 University of San Francisco Maritime Law Journal (2004–2005), pp. 45–88 [Cit.: *Nesterowicz*, The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping (2005)]
- Neumann, Peter/Guo, Jackson*, The Slow Boat to Antitrust Law in China: An Examination of New Regulations on Monopoly Pricing, China Law & Practice, 7/2003, pp. 19–23 [Cit.: *Neumann/Guo*, The Slow Boat to Antitrust Law in China (2003)]
- Nie, Xiaohong*, On the Necessity of Adoption Administrative Monopoly into Chinese Anti-Monopoly, Hebei Law Science, 2/2007, pp. 83–89 [聂孝红, 行政垄断纳入我国反垄断法的必要性, 河北法学, 2/2007, pp. 83–89] [Cit.: *Nie*, On the Necessity of Adoption Administrative Monopoly into Chinese Anti-Monopoly (2007)]
- NPC: Legislative Affairs Commission of the Standing Committee of NPC* (ed.), Legislative Consideration of the PRC Legislation Law (Beijing: The People's Court Press, 2000) [中华人民共和国全国人大常委会法制工作委员会编写, 立法法条文释义 (北京: 人民法院出版社, 2000)] [Cit.: *NPC*, Legislative Consideration of the PRC Legislation Law (2000)]
- NPC: Legislative Affairs Commission of the Standing Committee of NPC* (ed.), Question and Answer to the Anti-Monopoly Law of the PRC (Beijing: China's Democracy and Legal System Press, 2007) [中华人民共和国全国人大常委会法制工作委员会编写, 中华人民共和国反垄断法学习问答 (北京: 中国民主法制出版社, 2007)] [Cit.: *NPC*, Legislative Consideration of AML (2007)]
- Oelke, Christina*, Das europäische Wettbewerbsnetz: die Zusammenarbeit von Kommission und nationalen Wettbewerbsbehörden nach der Reform des europäischen Kartellverfahrensrechts (Baden-Baden: Nomos; München: Beck, 2006) [Cit.: *Oelke*, Das europäische Wettbewerbsnetz (2006)]
- Ortiz Blanco, Luis/Van Houtte, Ben*, EC Competition Law in the Transport Sector (Oxford: Clarendon Press, 1996) [Cit.: *Ortiz Blanco/Van Houtte*, EC Competition Law in the Transport Sector (1996)]
- Ortiz Blanco, Luis*, Shipping Conferences under EC Antitrust Law: Criticism of a Legal Paradox (Oxford: Hart, 2007) [Cit.: *Ortiz Blanco*, Shipping Conferences under EC Antitrust Law (2007)]
- Otto, Jan Michiel/Polak, Maurice V./Chen, Jiafu/Li, Yuwen* (eds.), Law-Making in the People's Republic of China (The Hague: Kluwer Law Internat, 2000) [Cit.: *Otto/Polak/Chen/Li* (eds.), Law-Making in the People's Republic of China (2000)]
- Pace, Lorenzo Federico*, European Antitrust Law: Prohibition, Merger Control and Procedures (Cheltenham: Edward Elgar Publishing, 2007) [Cit.: *Pace*, European Antitrust Law (2007)]
- Paixão, A.C./Marlow, P.B.*, A Review of the European Union Shipping Policy, 28 Maritime Policy & Management (2001), pp. 187–198 [Cit.: *Paixão/Marlow*, A Review of the European Union Shipping Policy (2001)]
- Parameswaran, Benjamin*, The Liberalization of Maritime Transport Services (Berlin: Springer, 2004) [Cit.: *Parameswaran*, The Liberalization of Maritime Transport Services (2004)]
- Pernice, Ingolf*, Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt, in: *Everling, Ulrich/Narjes, Karl-Heinz/Sedemund, Jochim* (eds.), Europarecht, Kartellrecht, Wirtschaftsrecht: Festschrift für Arved Deringer (Baden-Baden: Nomos 1993), pp. 135–159 [Cit.: *Pernice*, Offene Märkte und Wettbewerbsordnung der EG im Bereich der Seeschifffahrt (1993)]

- Power, Vincent J.*, EC Shipping Law (1st Edition, London: Lloyd's of London Press, 1992) [Cit.: *Power*, EC Shipping Law (1992)]
- Power, Vincent J.*, EC Shipping Law (2nd Edition, London: Lloyd's of London, 1998) [Cit.: *Power*, EC Shipping Law (1998)]
- Rabe, Dieter/Schütte, Michael*, Die erste Verordnung des Rates zur Anwendung des EWG-Kartellrechts (Art. 85 und 86 EWGV) auf den Seeverkehr, 34 Recht der internationalen Wirtschaft (1988), pp. 701–705 [Cit.: *Rabe/Schütte*, Die erste Verordnung des Rates zur Anwendung des EWG-Kartellrechts (Art. 85 und 86 EWGV) auf den Seeverkehr (1988)]
- Rabe, Hans-Jürgen*, Wettbewerbs- und Seeschiffahrtspolitik der EG: Ein ungelöster Widerspruch?, 17 Transportrecht (1994), pp. 1–6 [Cit.: *Rabe*, Wettbewerbs- und Seeschiffahrtspolitik der EG (1994)]
- Ritter, Lennart/Braun, W. David*, European Competition Law: A Practitioner's Guide, 3rd Edition (The Hague: Kluwer, 2004) [Cit.: *Ritter/Braun*, European Competition Law (2004)]
- Roe, Michael*, Chinese-Polish Co-operation in Liner Shipping, in: *Lee, Tae-Woo* (ed.), Shipping in China (Aldershot: Ashgate, 2002), pp. 100–115 [Cit.: *Roe*, Chinese-Polish Co-operation in Liner Shipping (2002)]
- Roth, Peter/Rose, Vivien* (eds.), Bellamy & Child – European Community Law of Competition (6th ed., Oxford: Oxford Univ. Press, 2008) [Cite example: *Lindsay/Scola*, in: Bellamy & Child – European Community Law of Competition (2008), Chapter 4, p. 260, Rn. 4.035]
- Ruttley, Philip*, International Shipping and EEC Competition Law, 12 European Competition Law Review (1991), pp. 5–18 [Cite: *Ruttley*, International Shipping and EEC Competition Law (1991)]
- Rycken, Willem*, European Antitrust Aspects of Maritime and Air Transport, 22 European Transport Law (1987), pp. 483–504 [Cit.: *Rycken*, European Antitrust Aspects of Maritime and Air Transport (1987)]
- Schaub, Alexander/Dohms, Rüdiger*, Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag, 49 Wirtschaft und Wettbewerb (1999), pp. 1055–1070 [Schaub/Dohms, Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag (1999)]
- Schmidt, Lienhard*, Formalisierte Ineffizienz: Globaler Seeverkehr in der Brüsseler Zwangsjacke?, 26 Transportrecht (2003), pp. 336–340 [Cit.: *Schmidt*, Formalisierte Ineffizienz: Globaler Seeverkehr in der Brüsseler Zwangsjacke? (2003)]
- Schmidt, Lienhard*, Europäisches Kartellrecht im globalen Kontext: Grenzen exterritorialer Anwendung am Beispiel der international Linienschiffahrt, 27 Transportrecht (2004), pp. 247–251 [Cit.: *Schmidt*, Europäisches Kartellrecht im globalen Kontext: Grenzen exterritorialer Anwendung am Beispiel der international Linienschiffahrt (2004)]
- Schmidt, Lienhard*, Wunderdroge oder Büchse der Pandora: EG-Kartellrecht pur im globalen Linienschiffahrtsverkehr, 28 Transportrecht (2005), pp. 65–69 [Cit.: *Schmidt*, Wunderdroge oder Büchse der Pandora: EG-Kartellrecht pur im globalen Linienschiffahrtsverkehr (2005)]
- Schmidt, Lienhard*, Behauptungen ohne Beweis: Harte Kritik am Weißbuch der Europäischen Kommission zur VO 4056/86, 28 Transportrecht (2005), pp. 155–156 [Cit.: *Schmidt*, Behauptungen ohne Beweis: Harte Kritik am Weißbuch der Europäischen Kommission zur VO 4056/86 (2005)]
- Schmidt, Lienhard*, Totale „Deregulierung“ des internationalen Seeverkehrs mit der EU?, 29 Transportrecht (2006), pp. 111–114 [Cit.: *Schmidt*, Totale „Deregulierung“ des internationalen Seeverkehrs mit der EU? (2006)]
- Schmidt, Lienhard*, EU-Kartellrecht nunmehr pur im internationalen Seeverkehr, 30 Transportrecht (2007), pp. 18–22 [Cit.: *Schmidt*, EU-Kartellrecht nunmehr pur im internationalen Seeverkehr (2007)]
- Schmidt, Lienhard*, Im Netzwerk der Unwägbarkeiten, 31 Transportrecht (2008), pp. 25–29 [Cit.: *Schmidt*, Im Netzwerk der Unwägbarkeiten (2008)]

Schröter, Helmuth/Jakob, Thinam/Mederer, Wolfgang (eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden: Nomos, 2003) [Cite example: *Negenman*, in: *Schröter/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht* (2003), p. 1150 Rn. 22]

Shi, Jichun, Principle for Prohibition of Administrative Monopoly, *Legal Daily*, 16 September 2001, available online at <<http://www.civillaw.com.cn/weizhang/default.asp?id=15302>> [史际春, 反行政垄断要确立平等观, 法制日报, 2001年9月16日] [Cit.: *Shi*, Principle for Prohibition of Administrative Monopoly (2001)]

Shao, Jiandong, Unternehmensgruppen und Zusammenschlußkontrolle in China: empfiehlt sich eine Regelung nach deutschem Modell? (Frankfurt am Main: Lang, 1996) [Cit.: *Shao*, Unternehmensgruppen und Zusammenschlußkontrolle in China (1996)]

Stragier, Joos, Recent Developments in EU Competition Policy in the Maritime Sector, A Speech at the Shipping Forecast Conference, London, 25–26 April 2002, available online at <http://ec.europa.eu/competition/speeches/text/sp2002_015_en.pdf> [Cit.: *Stragier*, Recent Developments in EU Competition Policy in the Maritime Sector (2002)]

Sullivan, Eric, *The Marine Encyclopaedic Dictionary* (5th ed., London: LLP, 1996) [Cit.: *Sullivan*, *The Marine Encyclopaedic Dictionary* (1996)]

Sun, Guangqi/Zhang, Shiping, General Review of the Chinese Shipping Policy for the Contemporary Era, 26 *Maritime Policy & Management* (1999), pp. 93–99 [Cit.: *Sun/Zhang*, *The Chinese Shipping Policy* (1999)]

Sun, Guangqi/Zhang, Shiping, Chinese Shipping Policy and the Impact of its Development, in: *Lee, Tae-Woo* (ed.), *Shipping in China* (Aldershot: Ashgate, 2002), pp. 4–17 [Cit.: *Sun/Zhang*, Chinese Shipping Policy and the Impact of its Development (2002)]

Tai, Sik Kwan/Tang, Owen/Wong, Peter, Note and Comments on the First Decision Based on the Chinese Regulations on International Maritime Transportation Concerning Terminal Handling Charges, 38 *Journal of Maritime Law and Commerce* (2007), pp. 111–123 [Cit.: *Tai/Tang/Wong*, Note and Comments on the First Decision Based on the RIMT Concerning THC (2007)]

Tang, Jun, Anti-Monopoly Law says no to Competition Restriction by Administrative Powers, *Legal Daily*, 2 September 2007, available online at <http://www.legaldaily.com.cn/bm/2007-09/02/content_692248.htm> [唐俊, 反垄断法对行政权力限制竞争说“不”, 法制日报, 2007年9月2日] [Cit.: *Tang*, Anti-Monopoly Law says no to Competition Restriction by Administrative Powers (2007)]

Tanner, Murray Scot, *The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects* (Oxford: Clarendon, 1999) [Cit.: *Tanner*, *The Politics of Lawmaking in Post-Mao China* (1999)]

Townley, Chris, The Liner Shipping Block Exemptions in European Law: Has the Tide Turned?, 27 *World Competition* (2004), pp. 107–153 [Cit.: *Townley*, *The Liner Shipping Block Exemptions in European Law* (2004)]

Vastine, J. Robert, Comments of the Coalition of Service Industries (CSI) on the RIMT, 12 March 2002, available online at <www.uscsi.org/publications/papers/Letter_to_USTR_03122002.doc> [Cit.: *Vastine*, The CSI's Comments on the RIMT (2002)]

Vermote, Lieven, The Application of the United Nations Liner Code within the European Communities, 23 *European Transport Law* (1988), pp. 571–589 [Cit.: *Vermote*, *The Application of the United Nations Liner Code within the European Communities* (1988)]

Viethen, Philipp, Auswirkungen des EU-Konferenzverbots: Die Effekte des Konferenzverbots der EU unter besonderer Berücksichtigung der Preisbildung in der Containerlinienschifffahrt, *HANSA International Maritime Journal*, 1/2008, pp. 52–53 [Cit.: *Viethen*, *Auswirkungen des EU-Konferenzverbots* (2008)]

Voionmaa, Tapani, Short Sea Shipping, in: *Bull, Hans Jacob/Stemshaug, Helge* (eds.), *EC shipping policy* (Oslo: Juridisk, 1997), pp. 169–181 [Cit.: *Voionmaa*, *Short Sea Shipping* (1997)]

- von Hinten-Reed, Nils / Chipty, Tasneem / Morton, Fiona Scott*, Shipping Conferences: A Study of the Impact of FEFC Activity on Prices in the North Europe-Asia Trade, Charles River Associates, 4 June 2004, available online at <http://ec.europa.eu/comm/competition/antitrust/others/maritime/elaa_proposal/feec_study_redacted_en.pdf> [Cit.: *von Hinten-Reed/Chipty/Morton*, A Study of the Impact of FEFC (2004)]
- Wang, Cheng*, The Negotiations on Maritime Transport Services under the GATT/WTO, International Business Research, 2/2000, pp. 34–37 [汪成, 论GATT/WTO的海运服务谈判, 国际商务研究, 2/2000, pp. 34–37] [Cit.: *Wang*, The Negotiations on Maritime Transport Services under the GATT/WTO (2000)]
- Wang, George Y. B.*, China's Rules on Shipping: Sailing on an International Voyage, China Law and Practice, 3/2002, pp. 31–34 [Cit.: *Wang*, China's Rules on Shipping (2002)]
- Wang, Liyu*, The Applicability of International Conventions in China's Domestic Jurisdiction, Chinese Yearbook of International Law (1993), pp. 280–301 [王丽玉, 国际条约在中国国内法中的适用, 中国国际法年刊, 1993年, pp. 280–301] [Cit.: *Wang*, The Applicability of International Conventions in Chinese Domestic Jurisdiction (1993)]
- Wang, Tieya*, The Legal Status of International Conventions in Chinese Jurisdiction, Chinese Yearbook of International Law (1994), pp. 3–18 [王铁崖, 条约在中国法律制度中的地位, 中国国际法年刊, 1994年, pp. 3–18] [Cit.: *Wang*, The Legal Status of International Conventions in Chinese Jurisdiction (1994)]
- Wang, Xiaoye*, The Study of Competition Law (Beijing: China Legal Publishing House, 1999) [王晓晔, 竞争法研究 (北京: 中国法制出版社, 1999)] [Cit.: *Wang*, The Study of Competition Law (1999)]
- Wang, Xiaoye*, The Prospect of Antimonopoly Legislation in China, 1 Washington University Global Studies Law Review (2002), pp. 201–231 [Cit.: *Wang*, The Prospect of Antimonopoly Legislation in China (2002)]
- Wang, Xiaoye*, Zur Kodifizierung des chinesischen Antimonopolrechts, Zeitschrift für chinesisches Recht, 2/2004, pp. 91–101 [Cit.: *Wang*, Zur Kodifizierung des chinesischen Antimonopolrechts (2004)]
- Wang, Xiaoye*, Einige Fragen und Probleme des neuesten Entwurfs des chinesischen Antimonopolgesetzes, Zeitschrift für chinesisches Recht, 2/2007, pp. 164–171 [Cit.: *Wang*, Entwurf des chinesischen Antimonopolgesetzes (2007)]
- Wang, Xiaoye*, Challenging the Draft Chinese Antimonopoly Law, Journal of Shanghai Jiaotong University (Philosophy and Social Sciences), 1/2007, pp. 13–18 [王晓晔, 我国最新反垄断法草案中的若干问题, 上海交通大学学报(哲学社会科学版), 1/2007, pp. 13–18] [Cit.: *Wang*, Challenging the Draft Chinese Antimonopoly Law (2007)]
- Wang, Xiaoye*, Challenges for Antimonopoly Law at the Stage of Initial Enforcement, Legal Daily, 2 September 2007, available online at <http://www.legaldaily.com.cn/2007jdwt/2007-09/03/content_692942.htm> [王晓晔, 重视反垄断法初期执法将遇到的严峻挑战, 法制日报, 2007年9月2日] [Cit.: *Wang*, Challenges for Antimonopoly Law at the Stage of Initial Enforcement (2007)]
- Wang, Xiaoye*, Antimonopoly Law: Milestone of China's Economic Reform, Legal Daily, 2 September 2007, available online at <http://www.legaldaily.com.cn/0705/2007-09/02/content_692281.htm> [王晓晔, 反垄断法——中国经济体制改革的里程碑, 法制日报, 2007年9月2日] [Cit.: *Wang*, Antimonopoly Law is Milestone of China's Economic Reform (2007)]
- Wei, Jiafu/Yu, Jianxing/Liu, Gang/Hu, Yunchang*, The Research on Impact to Domestic Shipping Market After China Acceding to the WTO, World Shipping, 3/2001, pp. 1–3 [魏家福/余建星/刘刚/胡云昌, 加入WTO对我国航运市场影响的研究, 世界海运, 3/2001, pp. 1–3] [Cit.: *Wei/Yu/Liu/Hu*, The Research on Impact to Domestic Shipping Market After China Acceding to the WTO (2001)]

- Weitbrecht, Andreas*, Das neue EG-Kartellverfahrensrecht, Europäische Zeitschrift für Wirtschaftsrecht, 3/2003, pp. 69–73 [Cit.: *Weitbrecht*, Das neue EG-Kartellverfahrensrecht (2003)]
- Werner, Walter*, Eine Wettbewerbsverordnung für den Seeverkehr, 37 Wirtschaft und Wettbewerb (1987), pp. 796–806 [Cit.: *Werner*, Eine Wettbewerbsverordnung für den Seeverkehr (1987)]
- Whish, Richard*, Competition Law (4th ed., London: Butterworths, 2001) [Cit.: *Whish*, Competition Law (2001)]
- White, Lawrence J.*, International Trade in Ocean Shipping Services: the United States and the World (Cambridge: Ballinger, 1988) [Cit.: *White*, International Trade in Ocean Shipping Services: the United States and the World (1988)]
- Williams, Mark*, Competition Policy and Law in China, Hong Kong and Taiwan (Cambridge: Cambridge University Press, 2005) [Cit.: *Williams*, Competition Policy and Law in China, Hong Kong and Taiwan (2005)]
- Wood, David*, High Tides, Low Tides: The Scope of The Conference Group Exemption, Speech at The Royal Society of Arts, London, 29 January 1999, available online at <http://ec.europa.eu/competition/speeches/text/sp1999_002_en.html> [Cit.: *Wood*, The Scope of The Conference Group Exemption (1999)]
- Wood, David*, Recent Commission Decisions Concerning the Scope of the Group Exemption for Liner Conferences, 1 EC Competition Policy Newsletter (1999), pp. 17–21 [Cit.: *Wood*, Recent Commission Decisions Concerning the Scope of the Group Exemption for Liner Conferences (1999)]
- Wu, Weida*, Price-monopoly and Legislation Regulation, Tribune of Political Science and Law (Journal of China University of Political Science and Law), 4/2006, pp. 173–180 [吴伟达, 价格垄断及立法规制, 政法论坛 (中国政法大学学报), 2006年第4期, pp. 173–180] [Cit.: *Wu*, Price-monopoly and Legislation Regulation (2006)]
- Wu, Xiaofeng*, Antimonopoly Law Legitimizes the Control of State Economic Section in Key Industries, Legal Daily, 2 September 2007, available online at <http://www.legaldaily.com.cn/bm/2007-09/02/content_692249.htm> [吴晓峰, 反垄断法确认了国有经济控制一些重要行业的合法性, 法制日报, 2007年9月2日] [Cit.: *Wu*, Antimonopoly Law Legitimizes the Control of State Economic Section in Key Industries (2007)]
- Xu, Buzeng/Yan, Hao/Zhen, Hong*, Impact of the WTO Accession on the Development of China's Shipping Industry and Countermeasures, Shipping Management, 11/2002, pp. 14–16 [徐步增/严浩/真虹, 加入WTO对中国航运业发展的影响及对策, 水运管理, 11/2002, pp. 14–16] [Cit.: *Xu/Yan/Zhen*, Impact of the WTO Accession on the Development of China's Shipping Industry and Countermeasures (2002)]
- Xu, Minhui*, The WTO and Chinese Maritime Legal System, Journal of Longyan Teachers College, 4/2004, pp. 28–30 [许民慧, WTO与中国海运服务贸易法, 龙岩师专学报, 4/2004, pp. 28–30] [Cit.: *Xu*, The WTO and Chinese Maritime Legal System (2004)]
- Xue, Kepeng*, The Non-monopoly of Administrative Monopoly and the Regulation, Journal of Tianjin Normal University (Social Science), 3/2007, pp. 9–14 [薛克鹏, 行政垄断的非垄断性及其规制, 天津师范大学学报(社会科学版), 3/2007, pp. 9–14] [Cit.: *Xue*, The Non-monopoly of Administrative Monopoly and the Regulation (2007)]
- Yang, Guohua/Cheng, Jin*, The Process of China's Accession to the WTO, 4 Journal of International Economic Law (2001), pp. 297–328 [Cit.: *Yang/Cheng*, The Process of China's Accession to the WTO (2001)]
- Yang, Jingyu*, China Has No Problem of “Administrative Monopoly”, China Security Journal, 8 October 2007, available online at <http://news.xinhuanet.com/lianzheng/2007-10/08/content_6845091.htm> [杨景宇, 我国不存在“行政垄断”问题, 中国证券报, 2007年10月8日] [Cit.: *Yang*, China Has No Problem of “Administrative Monopoly” (2007)]

Yang, Yongzheng, China's WTO Accession: The Economics and Politics, 34(4) *Journal of World Trade* (2000), pp. 77–94 [Cit.: *Yang*, China's WTO Accession: The Economics and Politics (2000)]

Yang, Yujing, A Comparative Analysis of the Liner Conference Regulation in Several Countries, LL.M. thesis (2004), available online at <<http://www.smuiml.net/school/essay/2004/yangyujing/index.htm>> [杨宇晶, 各国班轮运输业务立法管制的比较研究, 载于: 海商法论坛 (2004)] [Cit.: *Yang*, A Comparative Analysis of the Liner Conference Regulation in Several Countries (2004)]

Ye, Weiping, On the Relationship between Competition Law Legislation and Competition Order Construction, *Shenzhen University Journal (Humanities & Social Sciences)*, 1/2007, pp. 107–111 [叶卫平, 竞争立法与竞争秩序建构-以行政垄断规制必要性为中心, 深圳大学学报(人文社会科学版), 1/2007, pp. 107–111] [Cit.: *Ye*, On the Relationship between Competition Law Legislation and Competition Order Construction (2007)]

Yi, Seong Deog/Choi, Chong Ju, The Community's Unfair Pricing Practices in the Maritime Transport Sector, 16 *European Law Review* (1991), pp. 279–294 [Cit.: *Yi/Choi*, The Community's Unfair Pricing Practices in the Maritime Transport Sector (1991)]

Yu, Shicheng/Wang, Yu, Integration of Deregulation and Regulatory Administration: Some Comments on the Regulations of the People's Republic of China on International Maritime Transportation, 9 *Journal of International Maritime Law* (2003), pp. 569–574 [Cit.: *Yu/Wang*, Integration of Deregulation and Regulatory Administration: Some Comments on the RIMT (2003)]

Yu, Shicheng/Zhou, Yingying, The Application of Abuse of Market Dominant Position in the International Shipping Competition Law", *Law Review*, 5/2006, pp. 44–50 [於世成/邹盈颖, 论禁止滥用市场优势地位制度在国际航运竞争法中的运用, 法学评论 (双月刊), 5/2006, pp. 44–50] [Cit.: *Yu/Zhou*, Abuse of Market Dominant Position (2006)]

Zerby, John, Regulating Ocean Shipping in the U.S.A.: Historical Perspectives and Current Trends, *The Great Circle (Journal of the Australian Maritime History Association)*, 1/1984, pp. 47–60 [Cit.: *Zerby*, Regulating Ocean Shipping in the U.S.A. (1984)]

Zhang, Hui, The Regulation of Competition Law in International Shipping Transport, *Law Review*, 4/2005, pp. 155–160 [张辉, 试论对国际海运竞争的法律调整, 法学评论 (双月刊), 4/2005, pp. 155–160] [Cit.: *Zhang*, The Regulation of Competition Law in International Shipping Transport (2005)]

Zhang, Lixing, Shipping Law in China, in: *Rui, Mu/Wang, Guiguo* (ed.), *Chinese Foreign Economic Law: Analysis and Commentary* (Washington, D.C.: International Law Institute, 1990) [Cit.: *Zhang*, Shipping Law in China (1990)]

Zhang, Lixing, Recent Maritime Legislation and Practice in the People's Republic of China, 6 *University of San Francisco Maritime Law Journal* (1994), pp. 273–356 [Cit.: *Zhang*, Recent Maritime Legislation and Practice in the People's Republic of China (1994)]

Zhang, Peilin, The WTO and Adjustment of China's Shipping Policy, *Zhujiang Water Transport*, 12/1999, pp. 14–17 [张培林, WTO与中国航运政策的调整方向研究, 珠江水运, 12/1999, pp. 14–17] [Cit.: *Zhang*, The WTO and Adjustment of China's Shipping Policy (1999)]

Zhang, Xianglan/Zhang, Hui, WTO and Legal System of Chinese Maritime Transport Services, *Wuhan University Journal of Social Sciences*, 1/2003, pp. 10–14 [张湘兰/张辉, WTO与中国海运服务贸易法律制度, 武汉大学学报(社会科学版), 1/2003, pp. 10–14] [Cit.: *Zhang/Zhang*, WTO and Legal System of Chinese Maritime Transport Services (2003)]

Zhou, Haixia, Price Cartel in Liner Shipping, *Market Modernization*, 11(2)/2005, pp. 127–128 [周海霞, 浅谈班轮运输中的价格卡特尔, 商场现代化, 11(2)/2005, pp. 127–128] [Cit.: *Zhou*, Price Cartel in Liner Shipping (2005)]

Zhou, Wangsheng, Science of Legislation (Beijing: Law Press, 2004) [周旺生, 立法学 (北京: 法律出版社, 2004)] [Cit.: *Zhou*, Science of Legislation (2004)]

Zhou, Yun, Antimonopoly Law Protects Fair Competition for Undertakings, China Security Journal, 10 September 2007, available online at <http://news.xinhuanet.com/fortune/2007-09/10/content_6696678.htm> [周昀, 《反垄断法》为企业公平竞争保驾护航, 中国证券报, 2007年9月10日] [Cit.: *Zhou*, Antimonopoly Law Protects Fair Competition for Undertakings (2007)]

Zhu, Chengzhi, Comments on the Dispute of THC, 7 China Water Transport (2002), pp. 15–16 [朱承志, THC风波面面观, 中国水运, 7/2002, pp. 15–16] [Cit.: *Zhu*, Comments on the Dispute of THC (2002)]

Zhu, Lijiang, The Applicability of International Maritime Conventions in Chinese Jurisdiction From the View of Case Law, Law Review of University Anhui, 2/2002, pp. 123–135 [朱利江, 从判例看中国法院对国际海商海事公约的适用, 安徽大学法律评论, 2/2002, pp. 123–135] [Cit.: *Zhu*, The Applicability of International Maritime Conventions in Chinese Jurisdiction From the View of Case Law (2002)]

Zhu, Xiugen, The Dispute of THC Between Chinese Shippers and Liner Companies, Containerization, 8/2003, pp. 24–27 [朱秀根, 解析我国货主与班轮公司的THC之争, 集装箱化, 8/2003, pp. 24–27] [Cit.: *Zhu*, The Dispute of THC Between Chinese Shippers and Liner Companies (2003)]

Zhu, Zengjie, The Maritime Code of the People's Republic of China, 95 Il Diritto Marittimo (1993), pp. 176–189 [Cit.: *Zhu*, The Maritime Code of the People's Republic of China (1993)]

Table of Legislations, Cases and Decisions

The European Community

Regulations

(in chronological order)

Regulation 17: Council Regulation (EEC) No. 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty, O.J. 1962 13/204, modified by Council Regulation (EEC) No. 59/62, O.J. 1962 58/1655; Council Regulation (EEC) No. 118/63, O.J. 1963 162/2696; Council Regulation (EEC) No. 2822/71, O.J. 1972 L 135/14; Council Regulation (EC) No. 1216/1999, O.J. 1999 L 148/5

Regulation 141: Council Regulation (EEC) No. 141 of 26 November 1962 exempting transport from the application of Council Regulation No. 17, O.J. 1962 124/2751, modified by Council Regulation (EEC) No. 165/65, O.J. 1965 210/3141; Council Regulation (EEC) No. 1002/67, O.J. 1967 306/1

Regulation 19/65: Council Regulation (EEC) No. 19/65 of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, O.J. 1965 36/533

Regulation 1017/68: Council Regulation (EEC) No. 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, O.J. 1968 L 175/1

Regulation 1612/68: Council Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, O.J. 1968 L 257/2

Regulation 2821/71: Council Regulation (EEC) No. 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, O.J. 1971 L 285/46

Regulation 2988/74: Council Regulation (EEC) No. 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, O.J. 1974 L 319/1

Regulation 954/79: Council Regulation (EEC) No. 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 1979 L 121/1

Regulation 4055/86: Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, O.J. 1986 L 378/1

Regulation 4056/86: Council Regulation (EEC) No. 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 [now 81 and 82] of the Treaty to maritime transport (liner shipping conferences), O.J. 1986 L 378/4

Regulation 4057/86: Council Regulation (EEC) No. 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, O.J. 1986 L 378/14

Regulation 4058/86: Council Regulation (EEC) No. 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades, O.J. 1986 L 378/21

Regulation 3975/87: Council Regulation (EEC) No. 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, O.J. 1987 L 374/1

Regulation 3976/87: Council Regulation (EEC) No. 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, O.J. 1987 L 374/9

Regulation 4064/89: Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. 1989 L 395/1, modified by Council Regulation (EC) No. 1310/97, O.J. 1997 L 180/1

Regulation 1534/91: Council Regulation (EEC) No. 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, O.J. 1991 L 143/1

Regulation 479/92: Council Regulation (EEC) No. 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 1992 L 55/3

Regulation 2410/92: Council Regulation (EEC) No. 2410/92 of 23 July 1992 amending Regulation (EEC) No. 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, O.J. 1992 L 240/18

Regulation 3577/92: Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), O.J. 1992 L 364/7

Regulation 870/95: Commission Regulation (EC) No. 870/95 of 20 April 1995 on the application of Article 85(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No. 479/92, O.J. 1995 L 89/7

Regulation 1216/1999: Council Regulation (EC) No. 1216/1999 of 10 June 1999 amending Regulation No. 17: first Regulation implementing Articles 81 and 82 of the Treaty, O.J. 1999 L 148/5

Regulation 823/2000: Commission Regulation (EC) No. 823/2000 of 19 April 2000 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2000 L 100/24, modified by Commission Regulation (EC) No. 611/2005, O.J. L 2005 101/10

Regulation 1/2003: Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003 L 1/1, modified by Council Regulation (EC) No. 1419/2006, O.J. 2006 L 269/1

Regulation 358/2003: Commission Regulation (EC) No. 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, O.J. 2003 L 53/8

Regulation 139/2004: Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), O.J. 2004 L 24/1

Regulation 411/2004: Council Regulation (EC) No. 411/2004 of 26 February 2004 repealing Regulation (EEC) No. 3975/87 and amending Regulations (EEC) No. 3976/87 and (EC) No. 1/2003, in connection with air transport between the Community and third countries, O.J. 2004 L 68/1

Regulation 773/2004: Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L 123/18

Regulation 611/2005: Commission Regulation (EC) No. 611/2005 of 20 April 2005 amending Regulation (EC) No. 823/2000 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O.J. 2005 L 101/10

Regulation 1419/2006: Council Regulation (EC) No. 1419/2006 of 25 September 2006 repealing Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, O.J. 2006 L 269/1

Regulation 1490/2007: Regulation (EC) No. 1490/2007 of the European Parliament and of the Council of 11 December 2007 repealing Council Regulation (EEC) No. 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, O.J. 2007 L 332/1

Table of Cases

(in chronological order)

Judgments of the Court of Justice (ECJ)

ECJ 13 July 1966, joined cases 56 and 58/64 (*Consten and Grundig v. Commission*), [1966] E.C.R. 299

ECJ 15 July 1970, case 41/69 (*ACF Chemiefarma NV v. Commission*), [1970] E.C.R. 661

ECJ 14 July 1972, case 48/69 (*Imperial Chemical Industries Ltd. v. Commission*), [1972] E.C.R. 619

ECJ 27 March 1974, case 127/73 (*Belgische Radio en Televisie v. SV SABAM and NV Fonior*), [1974] E.C.R. 313

ECJ 4 April 1974, case 167/73 (*Commission v. French Republic, "French Merchant Seamen"*), [1974] E.C.R. 359

ECJ 15 May 1975, case 71/74 (*Nederlandse Vereniging voor de fruit- en groentenimport-handel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit "Frubo" v. Commission and Vereniging de Fruitunie*), [1975] E.C.R. 563

ECJ 16 December 1975, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Coöperatieve Vereniging "Suiker Unie" UA and Others v. Commission*), [1975] E.C.J. 1663

ECJ 25 October 1977, case 26/76 (*Metro SB-Großmärkte GmbH & Co. KG v. Commission*), [1977] E.C.R. 1875

ECJ 14 February 1978, case 27/76 (*United Brands Company and United Brands Continental BV v. Commission*), [1978] E.C.R. 207

ECJ 13 February 1979, case 85/76 (*Hoffmann-La Roche & Co. AG v. Commission*), [1979] E.C.R. 461

ECJ 20 February 1979, case 120/78 (*Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*), [1979] E.C.R. 649

ECJ 12 July 1979, joined case 32/78, 36/78 to 82/78 (*BMW Belgium SA and Others v. Commission*), [1979] E.C.J. 2435

ECJ 18 October 1979, case 125/78 (*GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v. Commission*), [1979] E.C.R. 3173

ECJ 2 March 1983, case 7/82 (*Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission*), [1983] E.C.R. 483

ECJ 17 January 1984, joined cases 43/82 and 63/82 (*Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB), and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v. Commission*), [1984] E.C.R. 19

ECJ 28 March 1984, joined case 29/83 and 30/83 (*Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*), [1984] E.C.R. 1679

- ECJ 22 May 1985, case 13/83 (*European Parliament v. Council of the European Communities*), [1985] E.C.R. 1513
- ECJ 11 July 1985, case 42/84 (*Remia BV and Others v. Commission*), [1985] E.C.R. 2545
- ECJ 7 November 1985, case 145/83 (*Stanley George Adams v. Commission*), [1985] E.C.R. 3539
- ECJ 10 December 1985, case 240/82 (*Stichting Sigarettenindustrie (SSI) and Others v. Commission*), [1985] E.C.R. 3831
- ECJ 30 April 1986, joined cases 209 to 213/84 (*Ministère Publique v. Lucas Asjes and Others, "Nouvelles Frontières"*), [1986] E.C.R. 1425
- ECJ 18 December 1986, case 10/86 (*VAG France SA v. Établissements Magne SA*), [1986] E.C.R. 4071
- ECJ 20 May 1987, case 272/85 (*Association nationale des travailleurs indépendants de la batellerie (ANTIB) v. Commission*), [1987] E.C.R. 2201
- ECJ 9 July 1987, case 43/85 (*Associazione nazionale commercianti internazionali dentali e sanitari (Ancides) v. Commission*), [1987] E.C.R. 3131
- ECJ 3 December 1987, case 136/86 (*Bureau national interprofessionnel du cognac (BNIC) v. Yves Aubert*), [1987] E.C.R. 4789
- ECJ 4 May 1988, case 30/87 (*Corinne Bodson v. SA Pompes funèbres des régions libérées*), [1988] E.C.R. 2479
- ECJ 11 April 1989, case 66/86 (*Ahmed Saeed Flugreisen and Others v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*), [1989] E.C.R. 803
- ECJ 21 September 1989, joined cases 46/87 and 227/88 (*Hoechst AG v. Commission*), [1989] E.C.R. 2859
- ECJ 18 October 1989, case 374/87 (*Orkem v. Commission*), [1989] E.C.R. 3283
- ECJ 18 October 1989, case 27/88 (*Solvay & Cie v. Commission*), [1989] E.C.R. 3355
- ECJ 13 December 1990, case C-238/89 (*Pall Corp. v. P. J. Dahlhausen & Co.*), [1990] E.C.R. I-4827
- ECJ 23 April 1991, case C-41/90 (*Höfner and Elser v. Macroton*), [1991] E.C.R. I-1979
- ECJ 31 March 1993, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 (*A. Ahlström Osakeyhtiö and Others v. Commission*), [1993] E.C.R. I-1307
- ECJ 18 May 1993, case C-126/91 (*Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*), [1993] E.C.R. I-2361
- ECJ 16 June 1994, case C-322/93 P (*Automobiles Peugeot SA and Peugeot SA v. Commission*), [1994] E.C.R. I-2727
- ECJ 15 December 1994, case C-250/92 (*Gøttrup-Klim and Others v. Grovvareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*), [1994] E.C.R. I-5641
- ECJ 6 April 1995, joined cases C-241/91 P and C-242/91 P (*Radio Telefís Éireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*), [1995] E.C.R. I-743
- ECJ 6 July 1995, case C-470/93 (*Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*), [1995] E.C.R. I-1923
- ECJ 5 October 1995, case C-96/94 (*Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl*), [1995] E.C.R. I-2883
- ECJ 24 October 1995, case C-70/93 (*Bayerische Motorenwerke AG (BMW) v. ALD Auto-Leasing D GmbH*), [1995] E.C.R. I-3439
- ECJ 24 October 1995, case C-266/93 (*Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*), [1995] E.C.R. I-3477
- ECJ 26 November 1996, case C-313/94 (*F.lli Graffione SNC v. Ditta Fransa*), [1996] E.C.R. I-6039
- ECJ 11 March 1997, case C-264/95 P (*Commission v. Union Internationale des Chemins de Fer (UIC)*), [1997] E.C.R. I-1287
- ECJ 31 March 1998, joined cases C-68/94 and C-30/95 (*French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*), [1998] E.C.R. I-1375

ECJ 28 May 1998, case C-7/95 P (*John Deere Ltd v. Commission*), [1998] E.C.R. I-3111
 ECJ 28 May 1998, case C-8/95 P (*New Holland Ford Ltd v. Commission*), [1998] E.C.R. I-3175
 ECJ 26 November 1998, case C-7/97 (*Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*), [1998] E.C.R. I-7791
 ECJ 8 July 1999, case C-199/92 P (*Hüls AG v. Commission*), [1999] E.C.R. 4287
 ECJ 16 March 2000, joined cases C-395/96 P and C-396/96 P (*Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines A/S v. Commission*), [2000] E.C.R. I-1365
 ECJ 2 October 2003, joined cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P (*International Power and Others v. Commission*), [2003] E.C.R. I-11421
 ECJ 7 January 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (*Aalborg Portland and Others v. Commission*), [2004] E.C.R. I-123

Judgments of the Court of First Instance (CFI)

CFI 10 July 1990, case T-51/89 (*Tetra Pak Rausing SA v. Commission*), [1990] E.C.R. II-309
 CFI 10 March 1992, case T-11/89 (*Shell International Chemical Company Ltd v. Commission*), [1992] E.C.R. II-757
 CFI 9 July 1992, case T-66/89 (*Publishers' Association v. Commission*), [1992] E.C.R. II-1995
 CFI 18 September 1992, case T-24/90 (*Automec Srl v. Commission*), [1992] E.C.R. II-2223
 CFI 18 November 1992, case T-16/91 (*Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v. Commission*), [1992] E.C.R. II-2417
 CFI 22 April 1993, case T-9/92 (*Automobiles Peugeot SA and Peugeot SA v. Commission*), [1993] E.C.R. II-493
 CFI 29 June 1993, case T-7/92 (*Asia Motor France SA and Others v. Commission*), [1993] E.C.R. II-669
 CFI 23 February 1994, joined cases T-39/92 and T-40/92 (*Groupement des Cartes Bancaires "CB" and Europay International SA v. Commission*), [1994] E.C.R. II-49
 CFI 14 July 1994, case T-77/92 (*Parker Pen Ltd v. Commission*), [1994] E.C.R. II-549
 CFI 15 July 1994, case T-17/93 (*Matra Hachette SA v. Commission*), [1994] E.C.R. II-595
 CFI 27 October 1994, case T-34/92 (*Fiatagri UK Ltd and New Holland Ford Ltd v. Commission*), [1994] E.C.R. 905
 CFI 27 October 1994, case T-32/93 (*Ladbroke Racing Ltd v. Commission*), [1994] E.C.R. II-1015
 CFI 27 October 1994, case T-35/92 (*John Deere Ltd v. Commission*), [1994] E.C.R. II-957
 CFI 24 January 1995, case T-114/92 (*Bureau Européen des Médias de l'Industrie Musicale (BEMIM) v. Commission*), [1995] E.C.R. II-147
 CFI 21 February 1995, case T-29/92 (*Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) and Others v. Commission*), [1995] E.C.R. II-289
 CFI 8 June 1995, case T-9/93 (*Schöller Lebensmittel GmbH & Co. KG v. Commission*), [1995] E.C.R. II-1611
 CFI 27 June 1995, case T-186/94 (*Guérin Automobiles v. Commission*), [1995] E.C.R. II-1753
 CFI 18 September 1995, case T-548/93 (*Ladbroke Racing Ltd v. Commission*), [1995] E.C.R. II-2565
 CFI 9 January 1996, case T-575/93 (*Casper Koelman v. Commission*), [1996] E.C.R. II-1
 CFI 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93 (*Compagnie Maritime Belge Transports SA and Others v. Commission*), [1996] E.C.R. II-1201

- CFI 15 January 1997, case T-77/95 (*Syndicat Français de l'Express International (SFEI) and Others v. Commission*), [1997] E.C.R. II-1
- CFI 15 September 1998, joined cases T-374/94, T-375/94, T-384/94 and T-388/94 (*European Night Services Ltd (ENS) and Others v. Commission*), [1998] E.C.R. II-3141
- CFI 16 September 1998, case T-110/95 (*International Express Carriers Conference (IECC) v. Commission*), [1998] E.C.R. II-3605
- CFI 21 January 1999, joined cases T-185/96, T-189/96 and T-190/96 (*Riviera Auto Service Etablissements Dalmasso SA and Others v. Commission*), [1999] E.C.R. II-93
- CFI 11 March 1999, case T-136/94 (*Eurofer ASBL v. Commission*), [1999] E.C.R. II-263
- CFI 25 March 1999, case T-102/96 (*Gencor Ltd v. Commission*), [1999] E.C.R. II-753
- CFI 7 October 1999, case T-228/97 (*Irish Sugar plc v. Commission*), [1999] E.C.R. II-2969
- CFI 15 March 2000, joined cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 (*Cimenteries CBR and Others v. Commission*, "Cement"), [2000] E.C.R. II-491
- CFI 20 February 2001, case T-112/98 (*Mannesmannröhren-Werke AG v. Commission*), [2001] E.C.R. II-729
- CFI 5 April 2001, case T-16/98 (*Wirtschaftsvereinigung Stahl and Others v. Commission*), [2001] E.C.R. II-1217 (2001)
- CFI 30 January 2002, case T-54/99 (*max.mobil Telekommunikation Service GmbH v. Commission*), [2002] E.C.R. II-313
- CFI 28 February 2002, case T-86/95 (*Compagnie générale maritime and Others v. Commission*, "FEFC"), [2002] E.C.R. II-1011
- CFI 28 February 2002, case T-395/94 (*Atlantic Container Line and Others v. Commission*, "TAA"), [2002] E.C.R. II-875
- CFI 6 June 2002, case T-342/99 (*Airtours plc v. Commission*), [2002] E.C.R. II-2585
- CFI 19 March 2003, case T-213/00 (*CMA CGM and Others v. Commission*), [2003] E.C.R. II-913
- CFI 21 March 2002, case T-131/99 (*Shaw and Others v. Commission*), [2002] E.C.R. II-2023
- CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98 (*Atlantic Container Line AB and Others v. Commission*, "TACA"), [2003] E.C.R. II-3275
- CFI 16 December 2003, joined Cases T-5/00 and T-6/00 (*Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied, Technische Unie BV v. Commission*), [2003] E.C.R. II-5761
- CFI 17 December 2003, case T-219/99 (*British Airways plc. v. Commission*), [2003] E.C.R. II-5917, para. 171

Other EC Court Decisions

- Order of ECJ 11 December 1973, joined case 41/73, 43 to 48/73, 50/73, 111/73, 113/73, 114/73 (*Société anonyme Générale Sucrière and Others v. Commission*), [1973] E.C.R. 1465
- Order of CFI 21 November 1990, case T-39/90 R (*Samenwerkende Elektriciteits-produktiebedrijven (SEP) NV v. Commission*), [1990] E.C.R. II-649
- Order of ECJ 12 June 1992, case C-29/92 (*Asia Motor France SA and Others v. Commission*), [1992] E.C.R. I-3935
- Case C-339/95 (*Compagnia di Navigazione Marittima and Others v. Compagnie Maritime Belge and Others*, "SUNAG"), O.J. 1995 C 351/4, removed from the register on 11 March 1998
- Order of CFI 26 October 2001, case T-184/01 R (*IMS Health Inc. v. Commission*), [2001] E.C.R. II-3193

Decisions of the European Commission

(in chronological order)

Commission Decision 76/593/EEC of 25 June 1976 (*CSI*), O.J. 1976 L 192/27

Commission Decision 77/592/EEC of 8 September 1977 (*COBELPA/VNP*), O.J. 1977 L 242/10

Commission Decision 78/252/EEC of 23 December 1977 (*Vegetable parchment*), O.J. 1978 L 70/54

Commission Decision 80/1334/EEC of 17 December 1980 (*Italian Cast Glass*), O.J. 1980 L 383/19

Commission Decision 84/405/EEC of 6 August 1984 (*Zinc Producer Group*), O.J. 1984 L 220/27

Commission Decision 85/74/EEC of 23 November 1984 (*Peroxygen products*), O.J. 1985 L 35/1

Commission Decision 86/399/EEC of 10 July 1986 (*Roofing Felt*), O.J. 1986 L 232/15

Commission Decision 90/22/EEC of 20 December 1989 (*TEKO*), O.J. 1990 L 13/34

Commission Decision 91/213/EEC of 15 March 1991 (*Baccarat*), O.J. 1991 L 97/16

Commission Decision 92/157/EEC of 17 February 1992 (*UK Agricultural Tractor Registration Exchange*), O.J. 1992 L 68/19

Commission Decision 92/262/EEC of 1 April 1992 (*French-West African shipowners' committees*), O.J. 1992 L 134/1

Commission Decision 92/427/EEC of 27 July 1992 (*Quantel International- Continuum/Quantel SA*), O.J. 1992 L 235/9

Commission Decision 93/82/EEC of 23 December 1992 (*Cewal, Cowac and Ukwai*), O.J. 1993 L 34/20

Commission Decision (*Compagnie Maritime Beige v. East African Conference (CMB v. EAC)*), Press Release IP/93/739 of 9 September 1993

Commission Decision 94/980/EC of 19 October 1994 (*Trans Atlantic Agreement, "TAA"*), O.J. 1994 L 376/1

Commission Decision 94/815/EC of 30 November 1994 (*Cement*), O.J. 1994 L 343/1

Commission Decision 94/985/EC of 21 December 1994 (*DS/K v. FEFC*), O.J. 1994 L 378/17

Commission Notice (Case No. IV/34.936/E1 – *CEPI-Cartonboard*), O.J. 1996 C 310/3

Commission Decision of 19 December 1996 (Case No. IV/M.831 – *P&O Royal Nedlloyd*), O.J. 1997 C 110/7

Commission Decision 98/4/ECSC of 26 November 1997 (*Wirtschaftsvereinigung Stahl*), O.J. 1998 L 1/10

Commission Decision 99/243/EC of 16 September 1998 (*Trans Atlantic Conference Agreement, "TACA"*), O.J. 1999 L 95/1

Commission Decision 99/421/EC of 26 January 1999 (*P&O Stena Line*), O.J. 1999 L 163/61

Commission Decision 99/485/EC of 30 April 1999 (*Europe Asia Trades Agreement, "EATA"*), O.J. 1999 L 193/23

Commission Decision of 7 May 1999 (Case No. IV/M.1474 – *Maersk/Safmarine*), O.J. 1999 C 176/9

Commission Decision of 6 October 1999 (Case No. IV/M.1651 – *Maersk/Sea-Land*), O.J. 1999 C 313/6

Commission Decision 2000/627/EC of 16 May 2000 (*Far East Trade Tariff Charges and Surcharges Agreement, "FETTCSA"*), O.J. 2000 L 268/1

Commission Decision 2002/914/EC of 24 July 2002 (*VISA International-Multilateral Interchange Fee*), O.J. 2002 L318/17

Commission Decision 2003/300/EC of 8 October 2002 (*IFPI Simulcasting*), O.J. 2003 L 107/58

Commission Decision 2003/68/EC of 14 November 2002 (*Revised TACA*), O.J. 2003 L 26/53

Commission Decision of 29 November 2002 (*Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine*) (COMP/M.2879), O.J. 2003 C 30/31

Commission Decision 2003/741/EC of 13 August 2003 (*NDC Health/IMS Health: Interim measures*), O.J. 2003 L 268/69

Commission Decision 2005/480/EC of 30 April 2004 (*Compagnie Maritime Beige SA*), O.J. 2005 L 171/28

Commission Decision of 22 December 2004 (*ECT/PONL/EUROMAX*) (COMP/M.3576), not yet published

Commission Decision of 29 July 2005 (*Maersk/PONL*) (COMP/M.3829), not yet published

Commission Decision of 12 October 2005 (*TUI/CP SHIPS*) (COMP/M.3863), not yet published

The People's Republic of China

Legislations, Notices and Decisions

(in chronological order)

Directive on the Unity of Shipping and Port Management [关于统一航务港务管理的指示], issued by the Financial and Economic Committee of the Government Affairs Department on 26 July 1950.

Criminal Code [刑法], adopted at the 2nd Session of the 5th NPC on 1 July 1979 and effective as of 1 January 1980. In 1997, 1999, 2001, 2002, 2005 and 2006, Criminal Code was revised and amended six times.

Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy [关于开展和保护社会主义的竞争的暂行规定], promulgated by the State Council on 17 October 1980 and abolished on 6 October 2001.

Trademark Law [商标法], adopted at the 24th Session of the Standing Committee of the 5th NPC on 23 August 1982 and effective as of 1 March 1983. In 1982, 1993 and 2001, Trademark Law was revised and amended three times.

Constitution of the PRC [中华人民共和国宪法], adopted at the 5th Session of the 5th NPC and promulgated for implementation by the Proclamation of the NPC on 4 December 1982, and effective as of 4 December 1982. In 1988, 1993, 1999 and 2004, the Constitution was revised and amended four times.

Maritime Traffic Safety Law [海上交通安全法], adopted at the 2nd Session of the Standing Committee of the 6th NPC on 2 September 1983 and effective as of 1 January 1984.

Decision on Strictly Prohibiting Party and Government Organs and Party and Government Cadres from Engaging in Commerce and Running Enterprises [关于严禁党政机关和党政干部经商, 办企业的决定], issued by the Central Committee of the Communist Party and the State Council on 3 December 1984.

Provisional Measures on the Administration of International Shipping Companies [对从事国际海运船舶公司的暂行管理办法], issued and effective on 11 April 1985 by the MOC, abolished on 1 March 2003.

Interim Regulation on Preferential Treatment of Sino-Foreign Joint-Ventures in Port Construction [关于中外合资建设港口码头优惠待遇的暂行规定], promulgated by the State Council on 30 September 1985 and effective on the same date.

General Principles of Civil Law [民法通则], adopted at the 4th Session of the 6th NPC on 12 April 1986, and effective as of 1 January 1987.

Decision on Deepening Reform of Enterprises and Strengthening Enterprise's Dynamic [关于深化改革增强企业活力的若干规定], issued by the State Council of the PRC on 5 December 1986 and abolished on 16 Mai 1994.

Regulation on Waterway Transportation [水路运输管理条例], promulgated by the State Council on 12 May 1987 and effective as of 1 October 1987, amended on 3 December 1997.

Opinions on Establishment and Development of Enterprise Groups [关于组建和发展企业集团的几点意见], jointly issued by the State Commission for Economic Restructuring and the State Commission of Economic on 16 December 1987.

Implementation Rules of Regulation on Waterway Transportation [水路运输管理条例实施细则], issued by the MOC on 22 September 1987 and effective as of 1 October 1987, amended on 6 March 1998.

Complementary Notice of Reform on Chinese International Maritime Transport Regulation [关于改革我国国际海洋运输管理工作的补充通知], issued by the Leading Committee for Entry Regulation of the State Council on 26 July 1988.

Interim Measures for Merger of Enterprises [关于企业兼并的暂行办法], jointly issued by the State Commission for Economic Restructuring, the State Planning Commission, and the Ministry of Finance as well as the Bureau of Management of State-Owned Property on 19 February 1989.

Administration Litigation Law [行政诉讼法], adopted at the 2nd Session of the 7th NPC on 4 April 1989 and effective as of 1 October 1990.

Provisions on the Administration of the International Shipping Agency [国际船舶代理管理规定], issued by the MOC on 2 March 1990 and effective as of 1 April 1990, abolished on 1 March 2003.

Provisions on the Administration of International Liner Shipping [国际班轮运输管理规定], issued by the MOC on 20 June 1990 and effective as of 1 July 1990, abolished on 1 March 2003.

Notice on Breaking Regional Market Blockades and Further Promoting the Circulation of Commodities [关于打破地区间市场封锁, 进一步搞活商品流通的通知], issued by the State Council on 10 November 1990 and effective on the same date.

Provisions on the Administration of International Maritime Container Transport Services [海上国际集装箱运输管理规定], promulgated by the State Council on 5 December 1990 and effective on the same date, amended on 18 April 1998, abolished on 1 January 2002.

Law on Procedures for Treaty Conclusion [缔结条约程序法], adopted at the 17th Session of the Standing Committee of the 7th NPC on 28 December 1990 and effective on the same date.

Civil Procedure Law [民事诉讼法], adopted at the 4th Session of the 7th NPC on 9 April 1991, effective on the same date, amended at the 30th Session of the Standing Committee of the 10th NPC on 28 October 2007, effective on 1 April 2008.

Implementation Rules on Provisions on the Administration of International Container Transportation at Sea [海上国际集装箱运输管理规定实施细则], issued by the MOC on 9 June 1992 and effective as of 1 July 1992, abolished on 1 January 2002.

Maritime Code [海商法], adopted at the 28th Session of the Standing Committee of the 7th NPC on 7 November 1992 and effective as of 1 July 1993.

Product Quality Law [产品质量法], adopted at the 30th Session of the Standing Committee of the 7th NPC on 22 February 1993, effective as of 1 September 1993 and amended in 2000.

Law Against Unfair Competition [反不正当竞争法], adopted at the 3rd Session of the Standing Committee of the 8th NPC on 2 September 1993 and effective on the same date.

Law on Protection of Consumer Rights and Interests [消费者权益保护法], adopted at the 4th Session of the Standing Committee of the 8th NPC on 31 October 1993 and effective as of 1 January 1994.

Company Law [公司法], adopted at the 5th Session of the Standing Committee of the 8th NPC on 29 December 1993 and effective as of 1 July 1994. In 1999, 2004 and 2005, Company Law was revised and amended three times.

Regulation on Ship Registration [船舶登记条例], promulgated by the State Council on 2 June 1994, effective as of 1 January 1995.

Advertisement Law [广告法], adopted at the 10th Session of the Standing Committee of the 8th NPC on 27 October 1994 and effective as of 1 February 1995.

Measures on Approval of International Freight Transport Agencies with Foreign Investment [外商投资国际货运代理企业审批办法], issued by the MOFTEC on 22 February 1995 and effective on the same date, abolished on 9 September 1996.

Notice on the Establishment of Chinese Shipping Companies Wholly Foreign-Owned by Foreign Shipping Companies [关于外国船公司在华设立独资船务公司有关问题的通知], issued and effective on 12 December 1995 by the MOC and the MOFTEC jointly.

Administrative Measures on Shipping in the Taiwan Strait [台湾海峡两岸间航运管理办法], issued by the MOC on 19 August 1996 and effective as of 20 August 1996.

Rules on Approval of International Freight Transport Agencies with Foreign Investment [外商投资国际货物运输代理企业审批规定], issued by the MOFTEC on 9 September 1996 and effective on the same date.

Regulation of the Shanghai Shipping Exchange [上海航运交易所管理规定], issued by the MOC on 3 October 1996 and effective on the same date.

Notice on the Adoption of a Freight Rates Filing System and the Authorization of the Shanghai Shipping Exchange [关于实行运价报备制度和对上海航运交易所授权的通知], issued by the MOC on 13 October 1996 and effective as of 1 November 1996.

Implementation Rules on the Tariff Filing of International Container Liner Services [国际集装箱班轮运输运价报备制度实施办法], issued by the MOC on 17 October 1996 and effective on the same date.

Rules on Administration of International Multimodal Container Transportation [国际集装箱多式联运管理规则], issued by the MOC and the Ministry of Railway jointly on 14 March 1997 and effective on the same date, abolished on 2 December 2003.

Administrative Measures on Permanent Representative Offices of Foreign Waterway Transportation Enterprises [外国水路运输企业常驻代表机构管理办法], issued by the MOC on 22 November 1997 and effective as of 1 January 1998, abolished on 1 March 2003.

Pricing Law [价格法], adopted at the 29th Session of the Standing Committee of the 8th NPC on 29 December 1997 and effective as of 1 May 1998.

Implementation Provisions of Regulations on the Administration of International Freight Forwarding Agency Services [国际货物运输代理业管理规定实施细则], promulgated by the MOFTEC on 26 January 1998, effective as of 18 February 1998, and revised by the MOFCOM on 1 January 2004.

Reform Plan of the State Council 1998 [国务院机构改革方案(1998年)], adopted at the 1st Session of the 9th NPC on 10 March 1998.

Rules of Competence, Organization Construction and Personal Administration for the Ministry of Communications [交通部职能配置、内设机构和人员编制规定] was adopted by the State Council on 18 June 1998.

Regulation on Administration of the Registration of Social Organisations [社会团体登记管理条例], promulgated by the State Council on 25 October 1998 and effective on the same date.

Administration Review Law [行政复议法], adopted at the 9th Session of the Standing Committee of the 9th NPC on 29 April 1999 and effective as of 1 October 1999.

Bidding Law [招标投标法], adopted at the 11th Session of the Standing Committee of the 9th NPC on 30 August 1999 and effective as of 1 January 2000.

Law of Special Procedure for Maritime Proceedings [海事诉讼特别程序法], adopted at the 13th Session of the Standing Committee of the 9th NPC on 25 December 1999 and effective as of 1 July 2000.

Interim Measures for the Examination and Approval of Wholly Foreign-funded Shipping Companies [外商独资船务公司审批管理暂行办法], issued and effective on 28 January 2000 by the MOC and the MOFTEC jointly.

Legislation Law [立法法], adopted at the 3rd Session of the Standing Committee of the 9th NPC on 15 March 2000, and effective as of 1 July 2000.

Rules on the Prohibition of Regional Boycott in Market Economic Practices [国务院关于禁止在市场经济活动中实行地区封锁的规定], issued by the State Council on 21 April 2001 and effective on the same date.

Regulations on International Maritime Transportation [国际海运条例], promulgated by the State Council on 11 December 2001 and effective as of 1 January 2002.

Notice on Issues Relating to Strengthening the Supervision of Tramp Vessel Services in the Taiwan Strait [关于加强台湾海峡两岸不定期船舶运输管理的通知], issued by the MOC on 26 November 2002 and effective as of the same date.

Notice on Strengthening the Supervision and Administration of International Maritime Transport [关于加强对国际海运经营活动监督管理的公告], Doc. No. MOC 7/2002, issued by the MOC on 29 November 2002. (MOC-Notice 7/2002)

Notice on Launching the Investigation of THC [关于开展码头作业费问题调查的公告], Doc. No. MOC 9/2002, issued by the MOC on 30 December 2002. (MOC-Notice 9/2002)

Implementation Rules of Regulations on International Maritime Transportation [国际海运条例实施细则], issued by the MOC on 20 January 2003 and effective as of 1 March 2003.

Notice on the Submission of Opinions on THC [关于提供码头作业费调查材料的公告], issued by the MOC on 22 January 2003.

Interim Provisions for Foreign Investors to Merge Domestic Enterprises [外国投资者并购境内企业暂行规定], jointly issued by four ministries (including the Ministry of Foreign Trade and Economic Cooperation, the State Administration of Taxation, the State Administration for Industry and Commerce, the State Administration of Foreign Exchange) on 7 March 2003 and effective as of 12 April 2003, replaced by Rules on Merger and Acquisition of Domestic Enterprises by Foreign.

Notice on Implementation of the IRRIMT [关于实施国际海运条例实施细则的公告], issued by the MOC on 21 March 2003.

Notice on THC Hearing [关于召开码头作业费调查会的通知], issued by the MOC on 9 April 2003.

Notice Listing the Names of the Members of the Group of Experts in the THC Investigation [关于调整THC调查咨询专家组成员名单的公告], Doc. No. MOC 8/2003, issued by the MOC on 30 May 2003.

Provisional Regulation on Curbing of Pricing Monopolies [制止价格垄断行为暂行规定], issued by the National Development and Reform Commission on 18 June 2003 and effective on 1 November 2003.

Notice on Issues of the THC Investigation [关于THC调查有关事项的公告], Doc. No. MOC 10/2003, issued by the MOC on 24 June 2003.

Law on Ports [港口法], adopted at the 3rd Session of the Standing Committee of the 10th NPC and promulgated on 28 June 2003, effective as of 1 January 2004.

Notice on Implementation Provisions of Regulations on the Administration of International Freight Forwarding Agency Services (Revised) [关于国际货物运输代理业管理规定实施细则修订的公告], issued by the MOFCOM on 1 January 2004, and effective as of the same date.

Official Letter of the MOFCOM to the MOC regarding the Recommendation and the Draft Investigation Conclusion submitted by the MOC [商务部给交通部去函对THC咨询报告和调查结论提出意见和建议], issued on 23 February 2004 and available online at <http://news.cnshipper.com/read_10264.html> (the MOFCOM Opinion).

Provisions on the Administration of Foreign Investment in International Maritime Transportation [外商投资国际海运业管理规定], promulgated by the MOC and the MOFCOM on 25 February 2004, and effective as of 1 June 2004.

Provisions on the Administration of Port Operations [港口经营管理规定], promulgated by the MOC on 15 April 2004, effective as of 1 June 2004.

Notice on Implementation of Provisions on the Administration of Port Operations [关于实施港口经营管理规定有关问题的通知], released by the MOC on 18 May 2004 and effective as of the same date.

Notice on Issues Relating to Strengthening the Supervision of Container Liner Shipping Services in the Taiwan Strait [关于加强台湾海峡两岸集装箱班轮运输管理的公告], Doc. No. MOC 9/2004, issued by the MOC on 8 June 2004.

Notice on Publication of the Decision Relating to the Investigation on the Collection of THC in International Container Liner Services [关于公布国际班轮运输码头作业费(THC)调查结论的公告], Doc. No. MOC 9/2006, issued jointly by the MOC, the NDRC and the SAIC on 18 April 2006.

Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [关于外国投资者并购境内企业的规定], jointly issued by six ministries together (including Ministry of Commerce, State Asset Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange) on 8 August 2006 and effective as of 8 September 2006.

Guideline for Anti-Monopoly Declaration by Foreign Investors in the Merger or Acquisition of Domestic Enterprises [外国投资者并购境内企业反垄断申报指南], issued by the Ministry of Commerce on 8 March 2007 and effective as of the same date.

Notice on Strengthening Supervision on Liner Conferences and Freight Discussion Agreements [关于加强对班轮公会和运价协议组织监管的公告], Doc. No. MOC 10/2007, issued by the MOC on 12 March 2007.

Notice on Publication of the Decision Relating to the Investigation on the Collection of THC in International Container Liner Services [关于公布国际班轮运输码头作业费(THC)调查结论的公告], Doc. No. MOC 9/2006, issued jointly by the MOC, the NDRC and the SAIC on 18 April 2006.

Anti-Monopoly Law [反垄断法], adopted at the 29th Session of the Standing Committee of the 10th NPC on 30 August 2007 and will be effective as of 1 August 2008.

Other Judicial Cases

Judgment *The Mogul S.S. Co. v. McGregor, Gour and Co. and Others*, [1885] 15 Q.B.D. 476 (Judgment by the Queen's Bench Division). Appeal, House of Lords, [1892] App. Cas. 25

Judgment *Syndikats Rhederi, U.S. v. Hamburg-American S. S. Line et al.*, 216 F. 791 (S.D.N.Y. [1914])

Judgment *U.S. v. American-Asiatic Steamship Company et al. and U.S. v. Prince Line Ltd., et al.*, 242 U.S. 537 [1917] (Certiorari denied by the Supreme Court of the U.S., 22 January 1917)

About the International Max Planck Research School for Maritime Affairs at the University of Hamburg

The International Max Planck Research School for Maritime Affairs at the University of Hamburg was established by the Max Planck Society for the Advancement of Science, in co-operation with the Max Planck Institute for Foreign Private Law and Private International Law (Hamburg), the Max Planck Institute for Comparative Foreign Public Law and International Law (Heidelberg), the Max Planck Institute for Meteorology (Hamburg) and the University of Hamburg. The School's research is focused on the legal, economic, and geophysical aspects of the use, protection, and organization of the oceans. Its researchers work in the fields of law, economics, and natural sciences. The School provides extensive research capacities as well as its own teaching curriculum. Currently, the School has 15 Directors who determine the general work of the School, act as supervisors for dissertations, elect applicants for the School's PhD-grants, and are the editors of this book series:

Prof. Dr. Dr. h.c. Jürgen Basedow is Director of the Max Planck Institute for Foreign Private Law and Private International Law; *Prof. Dr. Peter Ehlers* is the Director of the German Federal Maritime and Hydrographic Agency; *Prof. Dr. Dr. h.c. Hartmut Graßl* is Director emeritus of the Max Planck Institute for Meteorology; *Prof. Dr. Lars Kaleschke* is Junior Professor at the Institute of Oceanography of the University of Hamburg; *Prof. Dr. Hans-Joachim Koch* is Managing Director of the Seminar of Environmental Law at the University of Hamburg; *Prof. Dr. Rainer Lagoni* is Director emeritus of the Institute of Maritime Law and the Law of the Sea at the University of Hamburg; *PD Dr. Gerhard Lammel* is Senior Scientist at the Max Planck Institute for Meteorology; *Prof. Dr. Ulrich Magnus* is Managing Director of the Seminar of Foreign Law and Private International Law at the University of Hamburg; *Prof. Dr. Peter Mankowski* is Director of the Seminar of Foreign and Private International Law at the University of Hamburg; *Prof. Dr. Marian Paschke* is Managing Director of the Institute of Maritime Law and the Law of the Sea at the University of Hamburg; *PD Dr. Thomas Pohlmann* is Senior Scientist at the Centre for Marine and Climate Research and Member of the Institute of Oceanography at the University of Hamburg; *Dr. Uwe Schneider* is Assistant Professor at the Research Unit Sustainability and Global Change of the University of Hamburg; *Prof. Dr. Jürgen Sündermann* is Director emeritus of the Centre for Marine and Climate Research at the University of Hamburg; *Prof. Dr. Rüdiger Wolfrum* is Director at the Max Planck Institute for Comparative Foreign

Public Law and International Law and a judge at the International Tribunal for the Law of the Sea; *Prof. Dr. Wilfried Zahel* is Professor emeritus at the Centre for Marine and Climate Research of the University of Hamburg.

At present, *Prof. Dr. Dr. h.c. Jürgen Basedow* and *Prof. Dr. Ulrich Magnus* serve as speakers of the International Max Planck Research School for Maritime Affairs at the University of Hamburg.