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

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The Hamburg Lectures on Maritime Affairs 2009 & 2010

with the cooperation of Anatol Dutta

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Preface

The Hamburg Lectures on Maritime Affairs are a joint venture of the International Tribunal for the Law of the Sea and the International Max Planck Research School for Maritime Affairs, both established in Hamburg. The two institutions have started this lecture series to improve the general background formation in maritime affairs for their respective constituencies: the scholars and associates, i.e. PhD students, of the IMPRS and the trainees, mainly junior government officials, of the internship program offered by ITLOS and funded by the Nippon Foundation. The lectures series is meant to cover the full range of maritime subjects and to represent a broad international survey over scholarship on maritime affairs.

The present volume, which is the second in the series, collects eight papers delivered in 2009 and 2010. It represents a broad spectrum of topics reaching from maritime jurisdiction under international law across environmental issues, maritime labour law and competition to more general reflections on maritime law as a whole. Different national styles of legal scholarship likewise come to the fore. Since the lectures are of general interest, the authors were asked to prepare them for publication and we gratefully acknowledge their having made this additional effort. The collected papers are published in the book series Hamburg Studies on Maritime Affairs, edited by the directors of the IMPRS.

The editors of this book are indebted for their editorial cooperation and assistance to Dr. Anatol Dutta and Ingeborg Stahl, who prepared this volume, and to Michael Friedman for the language editing of the several articles.

Hamburg, November 2011

Jürgen Basedow
Ulrich Magnus
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Part I:

The Hamburg Lectures 2009

Competition in Liner Shipping

Francesco Munari

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I. Some definitions: liner *vs.* tramp shipping

Prior to addressing the matter concerning competition in liner shipping, we have preliminarily to understand what is meant by liner shipping, which is one of the two modalities for the carriage of goods by sea, the other being non-liner shipping, better known as "tramp" seaborne transportation of goods.

Liner differs from tramp shipping in several instances: in the first place, in liner services vessels are scheduled according to a given frequency of calls at predeter-

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mined specified ports along a given route, while in tramp shipping the service is not scheduled and the entire vessel is normally chartered for a given voyage or for a period of time. Secondly, vessels used for liner shipping also have quite different characteristics from other kinds of vessels: in particular, since containerization has taken place, and has virtually replaced all other forms of transportation of goods in cargo units, ships used in liner services are cellular container vessels, having different sizes and tonnages, and are capable of carrying from a few hundred boxes up to several thousands. Hence, liner vessels are capable of carrying a large variety of goods in small parcels whereas tramp vessels usually transport one and the same good in large quantities, be it solid or liquid, as it happens with, respectively, bulkers and tankers.

The capacity of liner vessels to transport a large and variable number of goods in parcels or cargo units displays a third peculiarity of liner services compared to tramp ones: as we have just pointed out, tramp vessels carry dry or bulk liquid cargo (oil, ore); in contrast, goods moved in liner services are high-value ones, *i.e.* either manufactured or semi-manufactured goods.

Finally, substantially different are also the contractual terms accompanying liner transport vis-à-vis tramp shipping: in the former mode of transportation, the relationship between shippers and carriers is regulated by standard printed forms of contracts (*e.g.* bills of lading or similar documents) whose terms and conditions are directly prepared by carriers without any negotiation with their contractual counterparts, except as regards tariffs. In tramp shipping, the trader normally charters and pays a negotiated rate for the whole ship, either for a voyage or for a period of time.

II. The origins of cartels in liner shipping: economic reasons or simple excess capacity?

Cooperation among liner shipowners has always been structural: as we shall see, it dates back many years ago. The quest for cooperation among competing shipping lines has for a long time been explained using sophisticated economic theories; that approach lasted for decades and still continues to fascinate some scholars. Probably, however, strong and successful lobbying has reinforced the (now gone) ideology calling for a "necessary" cooperation among liner shipping carriers, coupled with the characteristics of the demand for transport services, whose inelasticity has permitted the international economic system to live well with supra-competitive prices in liner shipping for a remarkably long period of time.

Additionally, and tracing back the whole history of international liner shipping services, I believe that a further element has contributed to the success of cartelization in shipping, *i.e.* the first and largest… "beggar thy neighbour" policy in international trade, allowing the maritime nations to extract wealth from exporting countries as well as from non-maritime economic systems served by foreign shipping lines: as we shall see below, when this phenomenon was discovered at an inter-state level, a revolution in international liner shipping took place, with a view

to allowing – at least for a couple of decades – a more equitable allocation of the benefits of shipping cartels among industrialised and developing countries.

For a long time, scholars explained the need for shipowners to avoid competition among themselves using economic theories: in particular, it was maintained that liner shipping demonstrates peculiarities that cannot cope with a competitive market model since, inter alia, (a) fixed costs are proportionately much higher than variable costs, (b) entering and exiting a given market (*i.e.* a liner service) is not so easy and entails substantial shifting costs, (c) the unit of supply in the liner shipping market (*i.e.* the vessel) does not correspond to, and is much bigger than, the unit of demand (*i.e.* the parcel or cargo unit), this making it quite awkward for the carrier to constantly adapt its offer in order to match the fluctuations of demand.

The above reasons stood as an obstacle to conceptualising the application of the perfect competition model in our sector: hence, it was a matter of common sense to state that, if liner carriers were to compete among themselves for pricing, this would produce "rate wars" and a "destructive competition" whose consequences would undermine the stability of trade.

Given the importance of having reliable and constant shipping services carrying goods traded in world markets, not only was cartelization accepted, but it was even welcomed in many instances as the most effective organizational model for our sector. In this regard, also the stability of tariffs deriving from this model was acknowledged as being of value, since this would reduce fluctuations of prices in the goods traded worldwide, this being depicted again as an overall advantage for the economic system.

The economic reasoning summarised above – which stands now as largely criticised – may not have been entirely biased. Yet, a more persuasive reading of the whole history exists: as a matter of fact, rather than theory, cartelization of liner shipping has clear factual and economic causations that can be best summarised with chronic excess capacity.

This overcapacity has different origins and different timing: the first factor is technological and is represented by the introduction of steam vessels *in lieu* of sailing ones; steamships could travel at a higher speed than clippers and were much more reliable than the latter because of their potential to navigate independently from winds and related seasonal sailing routes. Hence, replacement of sailing with steamships introduced in the markets considerably more productive vessels for the carriage of an overall volume of trade which did not increase at the same pace of the enhanced productivity of seaborne transportation.

The second cause of overcapacity is geographical and is due to the opening of the Suez Canal: when this infrastructure was finished in 1869, it practically halved the duration of voyages across probably the most important trade route of that time (Asia-Europe); this, in turn, doubled the productivity of the vessels therein deployed. No wonder that a few years later the response to the excessive capacity created by the Suez Canal was the first structured shipping cartel on that route: although conferences had existed since 1868 in the North Atlantic trade, the Calcutta Conference, formed in 1875, is known as the "mother" of the conference system which would dominate liner shipping for the subsequent 120 years.

More recently, a third critical factor of oversupply has emerged and has to do with the evolution of cargo handling: again, the shift from break-bulk to cellular vessels has had an enormous impact on ships' productivity; suffice it to note that the time spent in port by a sailing vessel was previously twice as long as that spent for navigating, with ships berthed in ports for weeks during loading and unloading operations; now this proportion is more than reversed, and a port call of a huge container vessel hardly lasts more than a couple of days.

This having been said, one has to admit that an analogous overcapacity (with some caveat in respect of cargo handling) has also characterised non-liner shipping: yet, in the tramp sector there has been no track record of collusion among shipowners until recently, when shipping pools emerged in some trade. The above means that cartelization in liner shipping has been possible and has been carried out because of the existence of further reasons that may be connected to the peculiarities of the markets for liner services vis-à-vis tramp ones: whereas the latter are clearly worldwide, the former are much smaller and are represented by each liner trade, route or, at best, range thereof; in these smaller markets, players are much fewer in number, are more interdependent from one another and therefore operate within an environment where collusion is much easier. Compared to tramp shipping, liner shipping is the perfect place where Adam Smith's tenet about collusion among entrepreneurs holds true: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public, or in some diversion to raise prices".

III. Main features of cooperative agreements in liner shipping

Shipping practice has developed a limited number of cartel-type agreements among shipowners operating in seaborne transportation, the oldest and most important kind being that of the liner shipping conference.

The liner conference (or conference) is a cartel agreement among shipping lines serving the same route; its scope can encompass one or both directions of trade, and normally the latter is the preferred option. Conference members fix and agree on schedules, in order to rationalise the capacity and the frequency of services offered to their customers, as well as the tariffs that are publicly available. By the same token, at least initially, also contractual relationships with shippers are identical for all conference shipowners, so that shippers enjoy the same terms and conditions of carriage independently from the liner they use on the trade served by the conference. These contractual conditions may be such as to restrict competition further, as it happens when shippers are granted rebates on tariffs, provided they grant exclusivity to the conference members: this kind of arrangement has been called a loyalty agreement and was very frequent in the past.

Further restrictions on competition among conference members take place when they pool revenues and/or volumes according to a fixed quota, with a view to eliminating any remaining "internal" competition among them *e.g.* in the quality of the services they render. Pooling agreements were also quite abundant in the past, and their ultimate effect was that of freezing market shares among

conference members, irrespective of their different levels of efficiency and quality in providing transportation services.

A conference may or may not form a new legal entity: de facto, each member continued to issue its own bills of lading and enter into commercial relationships with clients on a one-to-one basis; yet, especially larger conferences worked through a secretariat, which was responsible for preparing tariffs, keeping contacts with shippers in particular for the sake of providing them with general marketing and pricing information, canvassing and organising all relevant data regarding the service rendered by the members, in order to prepare statistics, disseminating information and checking compliance of the conference viz. pool agreements.

In the golden age of liner conferences, they also indulged in retaliatory measures against independent liners competing with them on a given route: for instance, the most popular behaviour utilised by conferences was that of deploying on the route so-called fighting ships, *i.e.* vessels having a schedule coincident with that of the independent liner, and practicing predatory prices; losses arising out of the use of these fighting ships were allocated among members, whereas the independent liner was often persuaded to leave the trade or join the cartel.

In essence, from the antitrust point of view liner conferences were price-fixing cartels, often coupled with market sharing; when they, furthermore, offered loyalty agreements to shippers and organised fighting ships against competitors, they were covering the whole catalogue of hard-core antitrust infringements proscribed by competition law. And yet, for a number of reasons, they prospered and survived over a very long period of time, actually marking the liner shipping sector with a model that, for many decades, was even praised as a highly sophisticated device for stabilising shipping world-wide.

More recently, when antitrust law had become more popular world-wide and the containerization of liner shipping trades had replaced the break-bulk modes of seaborne transportation, other forms of cooperation among liner shipowners developed: reference is made to the so-called consortium agreements, or consortia, *i.e.* agreements whose objective is that of rationalising capacity on container trade and offering joint liner services organised by two or more shipping lines on the same route. In a consortium, pooled vessels are normally identical, and cross-slot charters are executed with a view to reserving for each member of the consortium a fixed portion of the capacity of all vessels used in the service. Port terminals used by the members are clearly the same, and often also other equipment is pooled. Sometimes joint offices are also established, yet each member maintains its independency in respect of pricing and conditions of transport with clients.

A global alliance is a sort of consortium whose geographic scope is not a single trade, but is instead worldwide. Members of this alliance are hence capable of globally covering liner trade. Global alliances have emerged in the past years as a response which allows medium-sized shipping lines to compete globally with those few lines which are able to offer independent liner services on all trades: they are a product of globalization within a market that, in fact, has witnessed a profound merger and acquisition development over the past twenty years and nowadays shows impressive levels of concentration worldwide.

For many years, liner conferences coexisted with consortia, and sometimes with global alliances: when these two sets of agreements were contemporaneously in place, liner conferences concentrated more on tariffs, whereas consortia focused on technical matters: indeed, antitrust concern for consortia is certainly less than that for conferences; this is the reason why, as we shall see below, conferences have been finally banned, whereas consortia are still practiced in the liner shipping sector.

In the previous paragraph we have briefly hinted at the emergence of pool arrangements also in the tramp sector, whose formation is probably due to the need to respond to the more global demand characterising non-liner services which has also developed in the past years: these pools bring together a number of similar vessels under different ownership, and vessels are then operated under a single administration. A pool manager is normally responsible for commercial management and commercial operations. It often acts under the supervision of vessel owners. However, technical operation of vessels is usually the responsibility of each owner. Although these pools market their services jointly, the pool members often perform the services individually.

The history and track-record of these tramp shipping pools is still limited, and no case-law regarding them has developed so far: as we shall see below, the European Commission has started investigating these arrangements from a competition law point of view, and it has offered some important indications within a communication issued at the end of 2007,[1] which we shall further analyse below.

IV. Antitrust and liner conferences: a legal environment fostering collusion, but not worldwide

Shipping conferences were invented prior to the appearance of antitrust laws, and their operation in the international arena was practically seen as an extraterritorial phenomenon on which, especially in the nineteenth century, States had little to say: indeed, in a very early and famous case, the *Mogul* case, predatory practices carried out by a conference were examined under common law, but no infringement was established.[2]

On the other hand, with the unique exception of shipping, in those decades the international dimension of trade was not perceived; in such a situation, States' jurisdiction on international trade was not an issue and nobody furthered an extraterritorial application of law.

In the twentieth century, and some twenty-five years after the enactment of the Sherman Act, the United States did start to consider liner conferences as a potential antitrust problem, and, after extensive studies carried out by a Committee

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1 Commission Guidelines on the application of Art. 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2−14 (hereinafter, the "2008 Guidelines").

2 *Mogul Steamship Co v MacGregor, Gour and Co and others* (1885) 15 QBD 476 and, in the House of Lords [1892] AC 25.

established by the US Congress, the Shipping Act of 1916[3] did introduce some specific provisions addressing the matter: conferences were not forbidden as such, but their behaviour was regulated by a US agency. Yet, for the first real US strike against the conference system, one had to wait until 1958, when the US Supreme Court decided the case *Federal Maritime Board v. Isbrandtsen Co.*[4], sanctioning the activities of a liner conference composed by several non-US shipping lines. This led to a reform of the US Shipping Act in 1961, under which the operation of liner conferences in the maritime trade with the United States was severely restricted.

Since no other State had antitrust laws, nor considered in any way unlawful the activities and practices of liner conferences, this approach by the United States led to significant confrontations and even conflicts of jurisdictions at the international level, with many European states even enacting blocking or claw-back statutes, whose purpose was that of nullifying the attempt by the United States to apply their antitrust provisions to liner shipping companies operating in the trade with the US.

This lasted practically until 1984, when a new Shipping Act 1984 was adopted:[5] in this new statute, the application of antitrust principles was relaxed, and liner conferences did enjoy a partial antitrust exemption also in the US legal regime, this allowing the solution of the existing conflicts especially in the Trans-Atlantic trade. The Shipping Act was finally improved through the Ocean Shipping Reform Act (OSRA) 1998[6], which is still in force (but might be modified soon[7]). Yet, some intuitions of the Shipping Act 1984 did create some new standard terms for liner conferences at the global level and were hence imitated also in non-US trade: reference is made, in particular, to the obligation entrusted to the conferences to allow their members to stipulate service contracts with shippers having different content than those generally applied, or to permit a conference member to declare an "independent action" vis-à-vis all other members and hence discontinue coordination or collusion for certain matters for a given period of time.

As we shall see shortly, all the above is the history of international antitrust; and yet, the experience found on both sides of the Atlantic Ocean, and the mutual (albeit sometimes belated) will of the US and the European legal systems to find a compromise solution for the international regulation of these cartels, was and is a "laboratory case" quite useful for the understanding and development of international competition law.

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[3] 39 Stat. 728 (1916), as amended 46 U.S.C. §§ 801-42 (1958).

[4] *FMB v. Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958).

[5] Shipping Act of 1984, 46 App. U.S.C. 1701.

[6] Public Law 105-258, 112 Stat. 902, Ocean Shipping Reform Act of 1998.

[7] See *infra* XI.

V. The liner conference system as a tool for development during the years of the New International Economic Order and the UNCTAD Code of Conduct for Liner Conferences, 1974

The liner conference system encompassed all the world trade including that with the southern hemisphere. Given the possibility to set up a merchant marine without technological barriers, during the decade of the 1960s an interest grew in the then-called less developed countries to participate in maritime trade, which was seen as a mechanism to foster economic development, reduce trade dependence on foreign countries and improve the balance of payments.

After all, the purchase of line vessels and their placement in international routes was only a matter of investment, since no technological barrier existed for setting up a national merchant marine.

In pursuing this goal, the then less developed countries relied heavily on the UN Conference for Trade and Development (UNCTAD), in those times much more influential than now: UNCTAD produced papers and studies on liner shipping and on the conference system, and it theorised on the need for a global codification of the equal sovereign right of all States to ply for trade at the international level.

In particular, the basic idea was that of reserving portions of national cargo traded in international commerce for the national shipping lines. And since international liner routes were covered by liner conferences, they became the instrument chosen to establish this equitable participation: hence, from private cartels among shipowners, liner conferences were transformed into a regulatory framework for allocating cargo at the international level.

This objective – *de facto* using the stability of maritime trade allowed by the liner conference system – was achieved first through unilateral legislation reserving to the national shipping lines the transportation of substantial portions of cargo to be moved in international maritime routes; not seldom, this legislation evolved into agreements between two States sharing an interest due to their bilateral trade.

Eventually, the whole matter was established at the multilateral level through the UNCTAD Convention on a Code of Conduct for Liner Conferences, signed at Geneva in 1974.[8]

Part I of this Convention envisaged a global allocation of rights to carry a substantial portion of the liner trade generated by each country using national shipping lines operating within a conference.

Countries were at liberty to define the legal requirements to be considered a national shipping line for the purposes of the carriage of goods by sea. Cargo carried by the conferences was allocated according to the 40:40:20 formula, *i.e.* 40 per cent of the cargo was, respectively, allocated to the national shipping lines of the countries served by a given bilateral trade and the remaining 20 per cent was available for third country shipping lines, also called cross-traders.

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8 Available also at <www.unctad.org/ttl/ttl-docs-legal.htm>.

Additionally, and consequently, the Code of Conduct established a right of each country to have its national shipping lines admitted into a conference serving its trade.

Part II of the Convention prescribed a global antitrust statute for liner shipping, in which a general exemption of liner conferences from the prohibition of cartels was foreseen, together with a series of rules aimed at reducing the risk that conferences might exploit their market power vis-à-vis their competitors (independent liner shipping companies) and their counterparts.

Hence, and for the first time in history, a comprehensive convention on antitrust matters came into existence – albeit limited in scope to liner shipping – in which detailed rules were set and agreed upon to legitimate the cooperation among liner shipowners: in exchange for their international legitimacy, they were entrusted to serve also "public" goals like trade participation in the interests of the respective economic and political systems.

The Code of Conduct was a landmark success – maybe the most important – of the New International Economic Order: notwithstanding its belated entry into force, only in 1983, nine years after its signature, its provisions were substantially applied in world liner trade (with the exception of that involving the US) long before, at least in respect of cargo sharing formulas; furthermore, the antitrust provisions contained in Part II of the convention became a benchmark for the national statutes which, in different legal systems including the then European Communities, would regulate competition matters in liner shipping.

Yet, its achievements were short-lived: progressively, by the mid-eighties of the last century, the development of containerization determined substantial changes both in the market structure and in the organizational patterns of liner trade: the market for liner shipping became highly concentrated and this M&A process brought about the acquisition of many "national shipping lines" by larger, global carriers; moreover, containerization engendered new forms of cooperation among shipowners (those consortia and global alliances examined above[9]), as well as new patterns of trade among countries: like in the air transportation sector, containers helped the growing of a "hub and spoke" model of liner shipping, *in lieu* of a (bilateral) point-to-point model, which was the typical frame on which liner conferences were formed and organised.

The above phenomena carried with them a progressive decrease of the market share carried by liner conferences. This, in turn, also determined a decrease of the market shares on which the 40:40:20 formula would apply, since it was applicable only to conference trade and not to trade carried by non-conference liners.

Additionally, the liberalization of world trade occurring a few years later cast doubt on the international feasibility of a liner shipping system advocating a rigid allocation of cargo quotas; consequently, a progressive abandonment occurred in respect of the "public" role of the national shipping lines as well as of the international legitimacy of their claim to carry part of their "national trade". The above, coupled with the already mentioned concentration in the liner shipping markets,

9 See *supra* III.

caused the gradual loss of importance of national shipping lines in world trade and eventually their disappearance at least as a legal notion.

Even if, in essence, the application of the Code of Conduct (albeit still in force) has faded away, its lesson remains and can be summarised as follows: in a legal environment which was totally unregulated, liner conferences and its members massively exploited their market power to the detriment of shippers, especially the weaker ones who were located in the less developed countries.

Consistent with a… "beggar thy neighbour" approach (or, in less strong terms, with a national welfare approach), the States whose merchant marines were exploiting other markets did not care to establish limitation to the conferences' behaviours, not even to apply competition rules, save the already mentioned exception of the United States.

The reaction of the exploited States resulted in a large portion of liner trade shifted from OECD shipping lines to the "national" shipping lines of these States, irrespective of any efficiency reason: from a pure market and competition point of view, this meant an overall loss both for the OECD shipping sector and for world trade.

Indeed, a fair allocation of world trade shares among shipping lines took place for a couple of decades; yet, this achievement no longer exists, at least as a general rule, since globalization schemes have substantially altered also the shipping industry, with the consequences that we shall shortly examine.

VI. Shipping and competition law in the wake of E(E)C

The European (Economic) Community had a terrestrial scope and not a maritime one: suffice it to note that the transport policy contained in (old) Title V of the E(E)C Treaty did not foresee any application of the relevant provisions to shipping and rather empowered the Council to "decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport".[10]

The "extraterritorial" nature of shipping for EC law was confirmed upon the enactment of the first EEC Regulation applying the competition rules of the then EEC Treaty, whose scope of application did not include maritime and air transport.[11] Indeed, E(E)C competition law was (theoretically) applicable to shipping

[10] See Art. 84(2) (thereafter Art. 80[2]) of the EC Treaty, now Art. 100 of the Treaty on the Functioning of the European Union (TFEU), whose precise (modified) terms establish the following: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions".

[11] For sake of precision, EEC Regulation No. 17/62, implementing Articles 85 and 86 of the Treaty (OJ 1962 No. 13, p. 204–211) did not establish anything about its scope of application. Soon after, however, EEC Regulation No. 141/62 (OJ 1962 No. 124, p. 2751) exempted transport from the application of EEC Regulation No 17. Some years later, road, rail and inland waterways transport did include antitrust regulation (EEC Regulation No 1017/68 applying rules of competition to transport by rail, road

under the “provisional instruments” established by former Article 84 EC, but this possibility remained, in fact, theoretical and was never used.

Therefore, when the UN Code of Conduct was signed, the Community was unprepared to speak with a single voice on this important piece of international legislation, having both competition and regulatory aspects as well as clear effects on Community maritime transport. After a few years of debates, the E(E)C clarified its position vis-à-vis its shipping policy and the Code of Conduct, and by means of EEC Regulation No. 954/79[12] invited Member States to ratify it.

And when the Code entered into force in 1983, it was clear not only that a European policy on maritime transport had to be implemented with some rules, but also that the gap in the application of competition rules to maritime transport had to be filled as soon as possible.

This would take place a few years later with EEC Regulation No. 4056/86[13], which eventually introduced a special antitrust regime for liner shipping, establishing a block exemption for liner conferences. Regulation No. 4056/86 was in fact modelled after Part II of the Code of Conduct, and it repeated its structure both in respect of the antitrust exemption for cartels among liner shipping companies and with the introduction of rules aimed at prohibiting conferences from abusing their market power with shippers or with competing liners.

Tramp, cabotage and cross liner trade were not encompassed by the scope of application of this Regulation and were to remain under the “theoretical” measures of then Article 84 EC until 2008.

As we shall see, Regulation No. 4056/86 is no longer in force, so that it is outside of the scope of this paper to analyse its contents: suffice it to mention, however, that it did allow price fixing cartels among liner shipping companies to exist in European maritime trade, both between EC Member States and between them and third countries.

It was, needless to say, an unprecedented derogation from the application of competition law to hard-core agreements restricting competition that had no parallel in any other industrial or commercial field.

VII. The antitrust immunity for shipping cartels in the light of EC competition policy and the case-law developed under Regulation No. 4056/86

Yet, the idea of hard-core cartels being exempted from the prohibitions of Article 81 EC (and now Article 101 TFEU) was hard to live with. And in fact, the Commission and the EU Court of First Instance (now the General Court) made clear that the antitrust immunity enjoyed by liner conferences was not to be intended as an overall retreat of EC competition rules in the maritime sector.

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and inland water way, OJ 1968 No. L 175, p. 1−12). But not shipping, for which nothing was enacted until the end of 1986 (see *infra* note 13).

[12] OJ 1979 No. L 121, p. 1−4.

[13] OJ 1986 No. L 378, p. 4−13.

The above was, hence, implemented through a narrow interpretation of any antitrust immunity in the maritime sector. Therefore, and in the first place, no immunity could ever be pronounced in the event a liner conference abused its dominant position in a given market under then Article 82 EC (and now Article 102 TFEU). And in this vein, it is worth mentioning that, because of the specific linkages existing among conference members, the dominant position was immediately considered as being jointly held by any and all shipping companies member to a conference, irrespective of the market share held by each of them.[14]

On the other hand, not only the abuse of a dominant position was struck down by EU competition law, but the mere achievement of such a dominant position would be fatal to maintaining antitrust immunity: this was expressly established by Regulation No. 4056/86 and was thereafter strictly implemented.

More generally, one can easily say that the exception of liner conferences was never intended as operating *per se*, and, rather, price fixing agreements among shipowners and all related aspects of liner conferences agreements have always been subject to the condition precedent that no disproportionate harm to competition arises from the operation of a liner conference on a given trade: therefore, and in the first place, the exemption was granted as long as the conference members did not discriminate or distort trade vis-à-vis shippers, ports or users; by the same token, the antitrust immunity for conferences would be removed if an excessive imbalance in the bargaining positions with shippers had resulted.

We have already recalled that, with the emergence of containerization in liner trades, other arrangements among shipowners developed, *i.e.* consortia:[15] these agreements, which have become very common among liner carriers, did not enjoy a "relaxed" interpretation of cartel prohibition under Regulation No. 4056/86 and were indeed strictly scrutinised.

As a matter of fact, the joint operation of liner shipping companies increases schedules and provides an enhanced offer for liner transportation along specific routes; hence, consortia do have, in principle, positive results for users. In such a situation, they fully qualify for an exemption in respect of cartel prohibition under Article 101.3 TFEU (formerly Article 81.3 EC); and yet, the block exemption regulations regularly issued for consortia (the latest one being established by Council Regulation No. 246/2009[16], implemented by Commission Regulation No. 906/2009[17]) have always been limited in time and have never included the possibility for carriers to agree on prices and tariffs.

Moreover, and above all, their exemption was subject to demonstrating that a sufficient level of competition remained in the trade, this being measured with an analytic reference to market shares in affected trade, with decreasing critical thresholds if the members of the consortium were also joining a liner conference. *De facto*, liner conferences and consortia often co-existed on a given route, the

[14] See the Commission decision 93/82/EEC, *Cewal*, OJ 1993 No. L 34, p. 20.

[15] See *supra* III.

[16] OJ 2009 No. L 79, p. 1−4.

[17] OJ 2009 No. L 236, p. 31−34.