SINGLE MARKET MARITIME

INTRODUCTION

The economic prosperity of the European Union depends on a competitive and buoyant maritime sector. Not only is there significant national and international trade by sea within the Community itself - which the Commission is attempting to encourage in the interests of sustainable mobility - but roughly 90% of its trade with the rest of the world is carried by ship. Moreover, the shipping and related shore industries are major sources of employment.

However, Community operators have been faced, in recent years, with increasing pressures. Rival shipping companies are often insulated from market forces thanks to non-commercial advantages conferred on them by their national governments. Moreover, access to cargoes is regularly restricted because of protectionist measures imposed by many countries. Consequently, there has been a progressive decline in the merchant fleet registered in the Community since the 1970s (despite a brief rally in the 1980s), as owners, desperate to cut costs, have switched to cheaper third country open registers.

Until the late 1970s, the Member States had, in general, pursued the common aim of promoting global liberalisation in the maritime sector through international fora, but had sought to minimise the Community's involvement. As it became increasingly plain that efforts to combat protectionism were proving ineffective, the situation began to change. In 1977, the Council adopted a Decision which established a procedure enabling Member States to consult one another on maritime relations with third countries, and to coordinate joint action within international organisations; and in 1978 it adopted a further Decision relating to third country protectionist activity in the cargo sector.

The 1979 Brussels Package

The first significant development at EU level, however, was the adoption, in 1979, of the so-called 'Brussels Package' which consisted, essentially, of a Regulation on the ratification by the Member States of the Code of Conduct for liner shipping, negotiated within the UN Conference on Trade and Development (UNCTAD). The Code itself accepted that liner conferences (i.e. rate-setting consortia) would form the basic structures of liner shipping, and attempted to limit the cargo reservation and sharing systems desired by the more protectionist developing countries. It provided for cargoes within conferences to be divided up on a 40:40:20 basis, with the national lines of each side in a bilateral trade having access to 40% each, and 20% being made available to third country national 'cross traders'. The Community's Regulation provided for the redistribution of the shares allocated to EC national lines, and enabled the cargo reservation measures to be ignored as far as EC trades with OECD countries were concerned.

The Court of Justice's 1985 ruling against the Council over its failure to take initiatives in the transport sector, and the adoption of the Single European Act, coincided with renewed concerns by Member States over the protectionist activities of third countries. Consequently, the Council adopted, in 1986, a batch of measures which remain at the centre of the Community's maritime policy. One Regulation sets the freedom to establish maritime services, a second relates to the application of competition law, and two further Regulations, which have been invoked only rarely, concern external relations.

Further efforts by the Commission, however, to develop a Community shipping register coupled with tax incentives for employing EU seafarers, and to create a legal definition for a "Community shipowner" were less successful. It was not until late 1992, on the eve of the official start to the single market, that the Council was able to adopt a further important Regulation liberalising domestic services (cabotage) in both the passenger and freight sectors. This law, though, was riddled with long-term derogations; moreover, loopholes related to the thorny issue of manning requirements remain unresolved.

Since 1992, no significant new laws relating to maritime liberalisation have been adopted. Instead, the Commission has taken an increasingly active and strident role in interpreting the Community's competition rules. One part of this has been monitoring the extensive use of state aid to protect shipping companies, ports, and shipyards. Moreover, the Commission has taken a large number of

actions - infringement proceedings, negative Decisions, and court cases - against both shipping and port companies, sometimes with the collusion of governments, trying to close markets through restrictive practices or dominant positions.

Also since 1992, the Commission has published a number of important policy papers which have tried to call attention to the need for further legal moves. In 1997, for example, it took a detailed look at the 1992 cabotage Regulation itself, and a discussion of 'second registers'. The same year, it put forward a green paper on ports in which it suggested there was a need for a more systematic liberalisation of services in main ports with international traffic. Both of these are elaborated on in the body of this chapter. A further four Communications, presented by the Commission in recent years, are worth mentioning briefly.

Four policy papers on the future of Community shipping

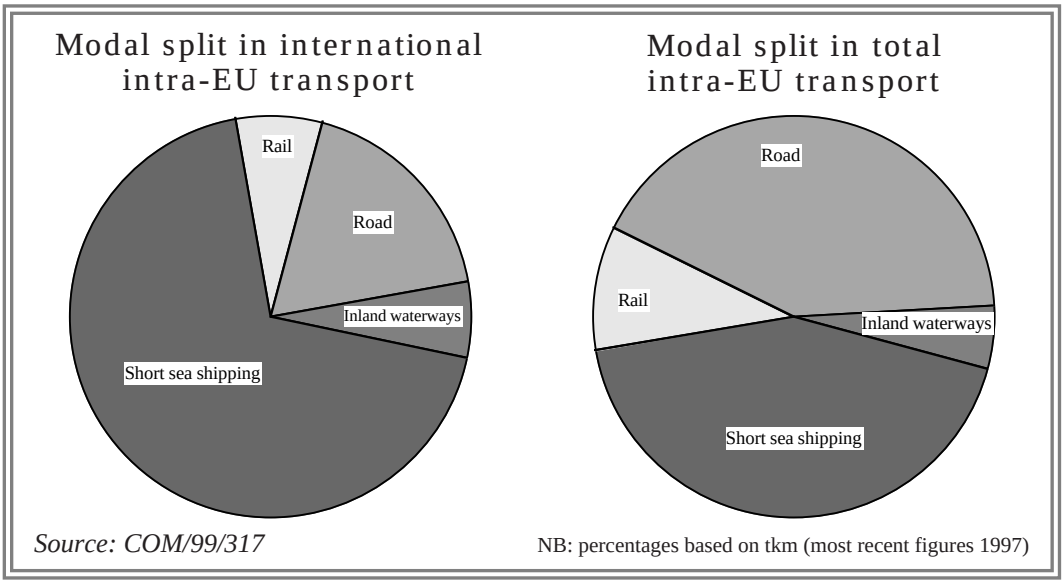
In March 1996, the Commission presented a Communication, entitled "Towards a new maritime strategy", which made a global analysis of the problems faced by the Community maritime sector in the context of EC policy. It suggested a range of actions aimed at maintaining open markets, improving the competitiveness of EC shipping and addressing flaws in state aid policy. The strategy was supported by the Council in a Resolution agreed in December 1996. It said "positive measures are needed to pursue Community objectives in the key areas outlined . . . in particular to foster competitiveness of the Community fleet and the employment of Community seafarers as well as to secure open markets". All the States, with the exception of the UK, also endorsed a statement that maritime competitiveness should be fostered by "using narrowly targeted positive measures such as incentives to reduce the cost of employment of seafaring personnel".

Shaping Europe's maritime future

A second Communication, in March 1996, called "Shaping Europe's maritime future", did not in fact deal with shipping directly, but highlighted the importance of shore-based industries for employment and economic development in the EU, notably with regard to shipbuilding and repair but also relating to ports and marine resources. It made recommendations as to how the economic benefits of those industries could be maximised.

Communications on short sea shipping

Two other papers, in July 1995 and June 1999, looked exclusively at short sea shipping, and outlined a strategy for helping coastal shipping to compete effectively with long-distance road transport. In the first, the Commission focused on action to counter problems such as inadequate infrastructure, cumbersome administrative procedures, poor integration with other transport modes, and long transit times. The Council approved the Commission's plans and, in June 1997, stressed the need for the Member States to support, among other things, "free and fair competition" between shipping enterprises and between transport modes, and to reduce bureaucratic burdens on the sector. In the second paper, the Commission noted that, between 1990 and 1997, short sea shipping had grown by roughly 23% in terms of tonne kilometres. The situation looked "promising" for "more new and existing cargo being carried by sea", it said. Efforts to create round tables and promote debate within industry, for example through the Maritime Industries Forum, had proved relatively successful since the strategy was introduced; but, it warned, certain barriers, identified in its earlier report, still remained.



Source: COM/99/317

NB: percentages based on tkm (most recent figures 1997)

Chapter Four

This chapter looks at the liberalisation of cabotage, and at related developments such as attempts to promote Community registers, to develop a ports policy, and to harmonise crewing laws. More than half the chapter, though, is devoted to chronicling developments in maritime competition policy through the 1990s. A final section looks at the Commission's efforts to develop a Community dimension to maritime relations with third countries. (Maritime safety policies, the cost implications of which are a significant factor in operator competitiveness, especially for Community shipping companies in a global context, are discussed fully in Chapter Ten.)

LIBERALISATION OF INTERNATIONAL SERVICES AND CABOTAGE

The foundation of today's single market in maritime services was laid down in Regulation 4055/86 which provides for the opening up of all international trades within the Community to EC-based or registered operators. It insists that trade routes between Community ports and third countries are open to operators from all Member States on an equal basis. Furthermore, it required Member States, on implementation, to phase out cargo sharing clauses in bilateral maritime agreements with third countries (or else modify them to prevent discrimination against operators from other Member States).

Provisions of Regulation 4055/86

While Regulation 4055/86 effectively liberalised international maritime services among Community operators, deregulating the maritime cabotage market subsequently proved more complex. Although the northern Member States had traditionally provided relatively free access to their domestic markets, some of them operating 'open coast' policies, several of the southern States had taken a more protectionist stance, and were therefore anxious about the possible influx of foreign operators, and the consequent impact on local employment in coastal areas, if deregulation went ahead. Nevertheless, in December 1992, after four years of negotiation, the Council finally succeeded in adopting a Regulation providing for the phased liberalisation of nearly all freight and passenger cabotage in the EU.

The Regulation states: "*As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State.*" However, substantial derogations to the January 1993 deadline were written into the new law, especially benefiting the southern Member States at whom the Regulation was largely aimed.

Long transition periods for services in the Mediterranean

Consequently, where maritime services "carried out in the Mediterranean and along the coast of Spain, Portugal and France" were concerned, mainland cruise services remained protected until January 1995; those concerned with the transport of strategic goods (oil, oil products and drinking water) were exempted until January 1997; those operated by ships with a capacity below 650gt were liberalised from January 1998; and regular passenger and ferry services were liberalised from January 1999. Island cabotage services in the Mediterranean and some overseas departments such as the Canary and Madeira archipelagos were also exempt until January 1999. Moreover, in Greece, island passenger and ferry services, as well as those carried out by vessels of under 650gt, continue to be exempt until January 2004 "for reasons of socio-economic cohesion".

The impact of the cabotage Regulation and second registers

The Commission published a report on the impact of the cabotage Regulation in mid-1997. The effects of liberalisation on southern European markets had been negligible, it said, and deregulation of mainland cruise services had had no practical consequences (because all cruise programmes involved at least one island destination), while only a small part of the cargo sector had been liberalised during the reference period. However, the Commission remained optimistic and predicted that liberalisation of strategic cargoes, from January 1997, would have a more profound effect.

The question of second registers

The report also looked at the question of extending EU cabotage rules to the European Economic Area (EEA) and to 'second registers', such as the Danish International Ship Register (DIS) and the Madeira International Ship Register (MAR). The latter two registers had, initially, been able to profit from a derogation so that their vessels could participate in the cabotage regime on the same terms as the EU vessels, despite concerns that they might have substantial cost advantages over those run by EU operators. In anticipation of the derogation period expiring, in December 1996, both the Danish and Portuguese governments adapted their legislation; the former so that DIS vessels could be admitted to EU cargo cabotage (but not DIS passenger vessels which remain excluded), and, the latter, so that MAR ships could have access to mainland (but not island) cabotage. The Commission report concluded that these regimes should continue.

The Commission saw no reason for concern over the extension of cabotage rights to the EEA, and called on transport ministers to endorse a proposal, dating from 1996, to extend the cabotage Regulation. The ministers duly did so at the December 1997 Transport Council, but noted that their approval remained subject to undertakings made by Norway concerning access for vessels on the Norwegian second register to Norwegian cabotage, and it reserved the right to raise the matter again if the Norwegian position should change (Chapter Sixteen).

A REGULATORY FRAMEWORK FOR THE COMMUNITY'S PORTS?

Port services in the EU have traditionally functioned, as a rule, in isolated frameworks protected by exclusive rights and legal or effective monopolies, whether public or private in nature. In recent years the conventional organisation of port services, in particular cargo services, has been subject to increased criticism. Consequently, there has been a tendency gradually to remove restrictions from cargo handling services, which have thus become more open to participation from the private sector. Restrictions on port labour supply, as well as on ship-related services, such as pilotage facilities and mooring, however, remain commonplace.

Historically, Community policy has been to apply EC Treaty rules so as to ensure public and private port undertakings and authorities compete under equal conditions with regard to services of a commercial nature, and that the services should be in conformity with the major freedoms guaranteed under the Treaty (e.g. freedom of establishment, free movement of workers). Restrictions on market access, particularly for ship services, however, have been accepted widely for safety or public service reasons. Complaints from users and potential suppliers have usually been dealt with on a case-by-case basis under competition law (see below).

The 1997 green paper on ports

In 1997, the Commission presented a green paper on ports, which argued for the development at Community level of a regulatory framework aimed at a more systematic liberalisation of services in main ports with international traffic. Such a framework, it argued, would seek to establish a level competitive playing field between and within Community ports while ensuring compliance with port and maritime safety standards. Harmonisation in a number of areas would be necessary, the Commission said, for example with regard to training, equipment standards, and mechanisms to allow for public service obligations and maintain safety standards. Such a framework would also have to take account of the diverse nature of the EU's ports and the variety of services involved.

EP opposition to legislation for market access in ports

The Commission received over 120 replies in response to the green paper, many of them supporting the concept of developing a regulatory framework. The Council, which debated the issue in June 1998, gave cautious backing to the idea, on the understanding that adequate account should be taken of the differences between ports in terms of size and location. The Parliament, however, in a Resolution adopted in January 1999, took a negative approach. It said: "*[The EP] sees no need - for the moment at least - for Community legislation on organisational structure and market access for port services, and looks to the Commission to ensure, within the limits of its present terms of reference, market access for new port undertakings at all the Community's seaports on the basis of transparency, non-discriminatory public service obligations and high safety standards.*"

Despite the Parliament's antipathy, the Commission began preparatory work on a proposal in early 1999. Initial discussions focused on whether the framework should merely ensure a broad based application of the principles of transparency and non-discrimination, or whether there was a case for developing a more precise set of rules covering procedures for allocating contracts, including provisions on public service obligations. It is anticipated that the proposal will be unveiled in 2000 and will take the form of a Directive, with an emphasis on subsidiarity.

ACTIONS TO COMPLEMENT THE INTERNAL MARITIME MARKET

Aside from basic liberalisation measures, the Commission has developed the internal maritime market through a number of complementary measures. An ambitious attempt to reverse the erosion of the EC-flagged fleet, for example, was made by the Commission in 1989 at the instigation of the then Transport Commissioner, Stanley Clinton Davies. It proposed that vessel owners be offered incentives to register ships under a Community shipping register, to be known as Euros, but be obliged to employ exclusively EC seafarers. The Commission later modified the proposal to improve the incentives offered to shipowners and relax the crewing requirement, so that all officers and at least half the crew of Euros vessels should be EC nationals. In response to pressure from the Parliament, it was suggested that shipowners registering vessels with Euros

should be entitled to a reimbursement of seafarers' income tax. However, several States (most notably the UK and Denmark) proved hostile to the concept of, what would effectively, be a mandatory state aid, and to the proposed crewing requirements. The Council also failed to adopt a related proposal aimed at defining a "Community shipowner", on the basis of minimum national ownership criteria.

The 1992 compromise over manning rules

The question of manning requirements has, nevertheless, remained a focus of the Commission's policy efforts. Member States generally view crew nationality requirements for ships entered into their registers as vital for military, civil and administrative reasons; and the internationally accepted 1986 UN Ship Registration Convention states that the "satisfactory" manning by nationals of a flag state is one of two possible preconditions for registering a vessel under a state's flag (the other relating to ownership nationality). However, although there are benefits for the flag state in nationality requirements, these conflict with the additional costs (largely as a consequence of social security expenses) for shipowners of employing EU seafarers, as opposed to third country labour, which may ultimately deter them from using EU registers at all.

Manning rules were, in fact, a major point of dispute during the Council negotiations over the 1992 cabotage Regulation. The Commission had proposed that cabotage services should be made subject to flag state manning rules, as is conventional in international shipping. Traditionally, however, domestic services have been subject to host state rules, where the manning requirements are established by the country in which the services are taking place. The Commission's suggestion was strongly opposed by the Mediterranean States, who said it would give operators from the comparatively liberal northern Member States carte blanche to enter the lucrative and hitherto protected Mediterranean island cabotage markets using cheap third country labour. This, they said, could have disastrous effects on indigenous shipping companies and local employment.

Hostility of Mediterranean States to flag state rules for cabotage

In order to allow the 1992 Regulation to be adopted, the Member States agreed on a clause (Article 3) establishing temporary provisions for manning. Thus, flag state manning rules apply to mainland cabotage and cruise services, although those carried out in vessels smaller than 650gt remain subject to host state rules. Host state provisions also apply to all island cabotage vessels, with the exception of cargo vessels with a capacity of over 650gt carrying out cabotage services preceding or following an international voyage, which became subject to flag state conditions in January 1999.

Proposal to introduce wider use of flag state, rather than host state, rules

In April 1998, the Commission adopted a draft amendment to replace Article 3. It noted, in its explanatory memorandum, that, as far as cargo services were concerned, the only outstanding issue was whether or not island cabotage services carried out by larger vessels which did not precede or follow an international journey should remain subject to host state rules. These services, it said, were often carried out by vessels which alternated between national and international trades over short periods, and it would be impractical to expect vessels from one Member State to change crews before entering another's domestic trades. Moreover, it said, it could see no economic justification for maintaining the status quo. Consequently, it proposed that flag state rules should apply to all cargo cabotage services (mainland and island) using vessels of over 650gt.

EU merchant fleet (vessels of 1,000grt and over)*

	Aus	Bel	Den	Ger	Gre	Fin	Fra	Ire	Ita	Lux	Net	Por	Spa	Swe	UK
Total fleet controlled															
Number	43	126	558	1,526	2,996	219	214	41	534	2	521	143	45	345	657
m dwt	*0.6*	*3.7*	*12.0*	*21.2*	*121.3*	*7.4*	*3.2*	*0.16*	*11.3*	*0*	*4.6*	*3.1*	*0.9*	*16.3*	*21.2*
National flag															
Number	26	4	372	488	837	121	119	34	386	2	378	99	34	167	219
m dwt	*0.12*	*0.01*	*6.57*	*7.42*	*42.3*	*4.29*	*1.42*	*0.14*	*6.51*	*0*	*2.25*	*1.07*	*0.45*	*1.78*	*6.31*
Foreign flag															
Number	17	122	186	1,038	2,159	98	95	7	148	-	143	44	11	178	438
m dwt	*0.47*	*3.72*	*5.41*	*13.81*	*79.01*	*3.144*	*1.76*	*0.02*	*4.75*	*-*	*2.38*	*1.984*	*0.42*	*14.51*	*14.9*
Share of foreign flag in total fleet (%)															
By number	40	97	33	68	72	45	44	17	28	-	27	31	24	52	67
By dwt	*80*	*100*	*45*	*65*	*65*	*42*	*55*	*11*	*42*	*-*	*51*	*65*	*49*	*89*	*70*

Source: Transport DG

*As of January 1998

The Commission argued that the island passenger cabotage market, in which vessels tend to ply the same route for many years, with crews resident in the areas they serve, tends to be more labour intensive than cargo operations, making up 70% of all employment in island cabotage. Taking these factors into account, the Commission's proposal, therefore, provided for a hybrid system under which the host state would be able to insist that all operators respect its own rules on the minimum proportion of EU nationals in the crew, but that flag state manning rules would apply in all other respects. In addition, the Commission suggested that third country crew working in domestic trades should be treated, as far as terms and conditions of employment were concerned, as residents of the Member State in which their vessel was registered. The system would apply to all regular passenger and ferry island cabotage, including mixed passenger-cargo services.

Hybrid system for island passenger cabotage proposed

In April 1998, the Commission adopted a related draft Directive on manning in international passenger ferry services within the Community. It proposed that third country employees should be subject to the same terms and conditions of employment - including those covering issues such as pay, working hours, health/safety conditions and annual holidays - as nationals of the Member State in which their vessel was registered. Where vessels flying a third country flag were concerned, it proposed, the third country crew should be subject to the terms and conditions applying to residents of the State with which the service in question had the "closest connection". This, it hoped, would remove any cost advantage obtained from employing non-EU labour.

Conditions for employment of third country employees

The Commission explained that its proposal was necessary because some EU-established operators had attempted to exploit the freedom, under the 1986 liberalisation Regulation, to set up regular passenger ferry services under third country flags, using relatively cheap third country labour, in direct competition with Community-crewed ferries on intra-EU routes (though not in the cabotage market which is more strictly controlled by the 1992 Regulation). Although such moves had so far met with limited success, it said, largely due to action by trades unions, similar cases could arise in future. In addition, it expressed concern about carriers partially replacing EU crews with third country nationals, and offering pay and conditions inferior to those conferred on EC seafarers. It also drew attention to a potential "negative spiral", resulting from external factors such as the abolition of intra-EU duty free sales, accelerating the trend to cut costs and, potentially, resulting in the erosion of working conditions and a loss of employment among Community seafarers.

Response of ministers and MEPs to manning proposals

The Transport Council took a look at both the manning proposals in June 1998. The Mediterranean States made it clear that they regarded the cabotage proposal as premature, and that further study of the effects of a move away from host state rules would be required. The northern States, meanwhile, were concerned that the proposed Directive on intra-Community services would undermine the accepted right of flag states to decide manning rules for vessels under their registers. These differences of view were confirmed at the December 1998 Transport Council.

The Parliament, which has codecision powers on the two proposals, effectively tore up the Commission's plan for amending Article 3 of the cabotage Regulation. Although it formally approved the proposal, in March 1999, rather than rejecting it outright, it adopted a series of amendments calling for the deletion of all references to the proposed manning rules. In their stead, the EP called for the adoption of a new clause stating simply that the Commission must review the economic and social impact of the liberalisation of island cabotage and submit a report by January 2001 at the latest. On the basis of this report, it suggested, the Commission should submit a proposal for "a definitive system", to be adopted by January 2003. The draft Directive on manning in international services within the Community was, however, approved by the EP without major amendments.

Cabotage proposal neutralised by the Parliament

STATE AID STILL COMMON IN MARITIME INDUSTRIES

The Commission adopted guidelines on state aid to the maritime sector in 1989, so as to ensure subsidies within the industry were compatible with the single market and did not harm competition between EC firms. These allowed Member States to compensate shipowners for the extra employment-related charges and fiscal costs associated with operating under an EU flag as opposed to a third country register, subject to a national aid ceiling.

However, in its 1996 paper on a new maritime strategy, the Commission noted that, over time, the methods used to calculate the 'cost gap' for different vessel types and for different national flags had proved difficult to apply, and had led to a lack of transparency. In its December 1996 Resolution on the strategy paper, the Council asked for "urgent adoption by the Commission" of revised guidelines for state aids in accordance with Article 87 (Article 92 at the time). The

Commission felt it necessary to insert the following statement into the Council minutes: "*State aids to the shipping sector, as in other sectors, can only be allowed in accordance with the provisions of Article 92 [Article 87 now], and in particular where they do not have the effect of distorting or threatening to distort competition within the Community to an extent contrary to the common interest, taking into account international conditions of competition.*"

Community guidelines on state aid for ship operators

The Commission considered drafting binding rules to bring about more convergence in the Member States' approaches, but, taking account of substantial resistance to harmonisation from many Member States (as demonstrated by the failure of the Euros project), it chose instead simply to issue new Community guidelines. The main emphasis of the new orientations, published in June 1997, is on the reduction of labour costs. They allow Member States to exempt Community shipping from all social security and income tax liabilities relating to Community-based seafarers. In view of the need to promote maritime expertise, they permit subsidies for training, provided they fulfil general criteria in terms of proportionality, non-discrimination and transparency. Various incentive schemes at the level of corporate taxation are also allowed. Although the rules apply in principle to EC-flagged shipping only, the guidelines provide scope for tax relief, on an exceptional basis, for EC-based shipowners whose vessels are flying the flag of a third country, in order to prevent such companies transferring their management outside the Community.

Allowable state aid under the 1997 guidelines

Unlike the previous guidelines, the 1997 measures also set out the conditions by which aid to cover the costs of operating under public service obligations can be granted. Such obligations can, for example, be imposed for scheduled services to ports serving peripheral regions in the Community where normal market forces would not guarantee an adequate service. The contract for operating such services, and the compensation involved, can however only be granted following an adequate public tendering procedure. By 1999, most of the Member States had either revised or were in the process of revising their national aid schemes in line with the new guidelines, and some States, such as Denmark and Greece, had reported finding them effective.

Ensuring Member States' use of state aid is fair

Throughout the 1990s, the Commission took a constructive view of subsidies, aimed at allowing EC operators to compete with third country firms, and approved various Member States' aid schemes and individual aid packages each year. However, it also worked hard to ensure that Member States did not use state aid selectively to give their own operators a particular advantage in the market.

In approving a broad Italian scheme aimed at reducing shipowners' employee and training costs in July 1996, the Commission reserved the right to take "appropriate measures" if the proposed Italian law did not allow ships from elsewhere in the EEA to benefit. Similarly, in April the same year, the Commission approved a French system allowing tax deductions on the acquisition of shares in vessels, but only subject to a commitment by France that it would not apply potentially discriminatory nationality provisions contained in its domestic legislation.

Approval of aid for schemes in Italy and France

In July 1996, the Commission decided to terminate proceedings, started the year before, against aid for the French firm Compagnie General Maritime (CGM). The Commission Decision authorised the aid subject to certain conditions - designed to prevent aggressive marketing and the underpinning of loss-making activities - pending completion of the company's privatisation. The Commission said the aid would make an effective contribution to supporting radical restructuring efforts and the returning of CGM to viability.

The Commission's actions in the sector have also indicated that the state aid guidelines can be applied flexibly if necessary. This was illustrated by its approval, in June 1996, of investment aid for the firm Fratelli d'Amico. The level of the aid, provided to subsidise the purchase of a highly specialised vessel, exceeded the ceiling established by the formulae contained in the 1989 guidelines. However, the Commission considered that the vessel would improve the competitiveness of the Italian fleet and the potential for employing Community seafarers, and therefore decided the aid was justified.

Determined actions against illegal Italian subsidies

It took until July 1997 for the Commission to reach a formal Decision in an investigation, opened in 1994, into the planned Ecu31m recapitalisation of two companies belonging to the Finmare group, Lloyd Triestino and Italia di Navigazione. The recapitalisation was intended to prepare the

two companies for privatisation as part of a restructuring effort put into place by the Italian authorities. There were complications stemming from Finmare's own financial difficulties, Italy's failure to provide sufficient justification for the aid, and the absorption of assets from other companies. Following a decision by Italy to privatise the two companies through public tender, and the publication of a timetable for this process, the Commission was satisfied that the financial support involved was far lower even than the most pessimistic assessments of the two companies' value, and that the Italian state, in putting forward the finance, had acted as a legitimate investor.

Italy ordered to seek repayment of aid to Sardinia

In October 1997, the Commission adopted a more strident Decision ordering Italy to seek repayment of Ecu6.35m in aid paid out under a scheme, operating from 1988-96, which aimed to promote shipping in Sardinia. Under the scheme, the Italian authorities had provided loans and concessionary leases to Sardinia-based shipping companies to help them pay for the acquisition, conversion and repair of commercial passenger and goods vessels. The Commission ruled that the scheme was discriminatory - and hence illegal - because operators were eligible for aid only if they employed Sardinian mariners. It later warned Italy, in December 1997, that a revised version of the scheme, operating from 1996 onwards, might also be illegal.

Decision on Basque aid scheme overturned by the Court

One procedure, dating from the early 1990s, has come back to haunt the Commission. In June 1995, it approved a guaranteed ticket purchase scheme negotiated between Ferries Golfo de Vizcaya and the Basque authorities, worth Eur6m over the period 1995-98 and relating to the Portsmouth-Bilbao service. In a legal challenge to the Decision, brought by Bretagne Angleterre Irlande (BAI), a rival operator, the Court of First Instance judged, in January 1999, that the Commission's analysis of the subsidy measures was based on an inaccurate reading of Article 88-2 (Article 93-2 at the time). Prior to concluding a new Decision, the Commission decided to reopen its original investigation. In a letter sent in June 1999, it informed the Spanish government that it was now of the preliminary opinion that Spain had failed to prove that the purchase of tickets represented a normal commercial transaction, and that it should therefore be considered as an operating aid.

By autumn 1999, the Commission had taken several actions under the 1997 revised guidelines. Four Decisions concerning national aid programmes, adopted in December 1998, were based on the new rules allowing fiscal relief and waivers from normal social security payments. Two French and one Irish scheme were approved, but a second Irish scheme was rejected on the grounds that it would allow aid to be paid out even if shipowners refused to register their vessels in the EU, which would defeat the object of support for EU-registered vessels. A revised Irish scheme, costing Ir£2-2.25m/yr for eight years, was subsequently approved in June 1999.

Aid for public service obligations only under fair conditions

In February 1998, the Commission opened a first infringement proceeding relating to public service obligations in the maritime sector. It concerned a contract for a range of publicly-funded ferry services between Spain and the Canary Islands, the Balearic Islands, and the North African enclaves of Ceuta and Melilla which had been operated since 1952 by the ferry company Trasmediterranea. Spain had planned to renew the contract from the beginning of 1998. However, under the revised guidelines, the Commission said, aid to cover the operating losses of essential public services could only be granted if the contract for providing those services was put out to competitive and open tender.

First infringement procedure over public service obligations

Spain duly published calls for tender in the Spanish state official journal and Lloyd's List, but allowed only a limited time for replies - the latter call was published on 23 December 1997, with a closing date of 31 December. The only company to tender within the allotted time was Trasmediterranea, which was duly awarded the contract, together with an Ecu40m subsidy to run the services. The Commission opened an investigation into the affair in February 1998, voicing concerns over the validity of the tendering procedure, and, moreover, suggesting that the contract itself, to last six years and extendible for a further four, was too long.

A further investigation involving public service obligations was opened by the Commission in July 1999. it focused on subsidies given by Italy to the Tirrenia di Navigazione ferry group to support apparently uneconomic domestic ferry services. Opening its enquiry, the Commission expressed concerns that the parameters for the public service obligations in question were set, not by the state, but by the ferry companies within the group themselves. Moreover, it noted that several of the companies operated routes in competition with private firms which did not have the benefit of subsidies. The Commission was, however, keen to emphasise that it had no objection to the principle of public service obligations itself. Its primary objective, it said, was to ensure that the subsidies were kept within acceptable limits and did not offer the group "total material isolation from world market forces".

As of autumn 1999, the Commission was also investigating a number of other aid cases. It was examining payments by France to cover debts run up by the troubled ferry operator BAI (the same company that had won its Court case against Spanish aid), on the grounds that the subsidies did not appear to be granted in the context of a restructuring plan aimed at restoring the company to financial viability, and were therefore of doubtful legality. It was looking at the business relationship between Corsica Marittima, a ferry operator on routes between Italy and France, and its state-owned parent company SNCM, to ensure that no indirect state subsidies were benefiting Corsica Marittima. A further case concerned aid provided by Ireland to Gaelic Ferries to support a livestock transport service between Cork and Cherbourg, which the Commission regarded as potentially excessive.

No Community guidelines on state aid to ports

Traditionally, the Commission has approached port finances with relative caution, taking account of the variety of approaches at national level. With regard to state aid, it has not established firm guidelines on what forms of public intervention are to be considered as aid, or which forms of assistance can be approved. In general, it has considered that public investment in port infrastructure which is accessible to all users on a non-discriminatory basis should not be considered as aid. Other investments, and notably those which favour certain operators rather than others, however, are considered to be state aid and are scrutinised on a case-by-case basis under the general Treaty rules.

EP questions need of unique approach for ports

In recent years, the liberalisation of transport markets and the development of infrastructure within the trans-European networks have led to increased competition between ports, and between commercial enterprises operating within them. A study on seaports carried out on behalf of the Parliament in 1993 took account of these developments and raised the question of whether there was any fundamental difference between investments in port infrastructure and other capital-intensive investments in industrial complexes, and, if not, whether the use of a unique approach for port investments could be justified.

In its 1997 ports green paper, the Commission took account of these factors. It suggested that the EU should alter its policy towards infrastructure financing in order to bring market forces to bear. It raised the prospect of developing a Community framework for infrastructure charging in order to begin applying the principle that investments should generally be financed by port undertakings on a commercial basis. It would draw up an inventory of infrastructure charging patterns and of the ways in which public funds are used in Community ports, the Commission said, so as to provide the necessary data to support future policy decisions. In the meantime, it added, vetting of state aid to undertakings carrying out commercial activities within ports would continue.

EP demand for guidelines on aid and competition among seaports

Responding to the green paper, the European Parliament, in a Resolution adopted in January 1999, was more emphatic. It demanded that the Commission bring forward new guidelines "without delay". They should, it said, be "limited to essentials on the monitoring of aid and competition among seaports", and they should be focused on three areas: "public port infrastructure measures"; "port infrastructure measures for undertakings"; and "port superstructure measures for undertakings". Operating aid, it said, should be banned altogether. Industry lobbies, too, argued strongly for the Commission to draw up guidelines, equivalent to those used in the shipping sector, to clarify its policy on state aid in ports. A number of Member States gave the idea cautious support during the Council's June 1998 examination of the paper.

Inventory of state aid to seaports

The Commission began to compile a state aid inventory in the latter half of 1998. It sent out questionnaires to the Member States, asking them to provide details of the different ways in which public funds were being used in their ports sectors, as well as for information on the related issue of infrastructure charging. They were also asked to set out a more specific profile of financial flows within four or five representative ports as case studies. The Commission is expected to produce a Communication in 2000 using the Member States' responses. It will contain a discussion on how transparency in ports financing could be improved, and develop the case for EC guidelines on aid for ports. Such guidelines are likely to clarify existing policy, rather than introduce new measures.

To date, the European Commission has intervened in relatively few state aid cases involving ports. In 1991, it approved subsidies to support social measures in connection with the restructuring of UK ports; and, in July 1994, it authorised Ecu607m for a 12 year programme of restructuring at French ports.

Chapter Four

Persistent abuses of aid at Italian ports

Among the highest profile aid cases have been those involving the Italian ports sector. As a result of a Court of Justice ruling, in 1991, that Italian ports legislation was illegal, the sector has gone through a period of extensive restructuring and reform, aimed largely at breaking down state-handling monopolies and bringing market forces to bear, in particular by transforming state-owned monopoly dock work companies into private port operators. The subsidies involved have been largely aimed at mitigating the social impact of restructuring and enabling the privatised companies to compete in the market.

The Commission's first Decision, in this respect, was taken in 1993. It approved the payment of Ecu70m in aid "of a social nature" to the Italian Port Management Fund and Italy's social security administration to support social security arrangements for dockers. It also opened an investigation to obtain more information on subsidies worth Ecu33m which were apparently intended to cover the trade deficit of port companies and groups. Following the implementation by Italy in 1995 of a new law providing a further Ecu240m for the ports sector, including Ecu60m to cover trade deficits, the Commission decided, in 1996, to widen the investigation. In a statement, it said: "*The Commission . . . is concerned about the application of certain principles of competition law in the Italian ports and the whole question of distortion of competition if subsidies can be used to improve the financial standing of beneficiaries through write-off of debts.*"

Serious doubts over legality of Italian subsidies

With this case still pending, the Commission took action, in January 1999, over a further series of support measures for the sector announced by Italy a year earlier. Several of the proposed measures, such as funding for infrastructure development in the port of Anacona, were not considered to be state aid, and were approved; consideration of other measures, such as funds to cover the early retirement of port employees, was deferred. However, as in the previous cases, it expressed serious doubts over the legality of further subsidies, worth in the region of Ecu60m, for the, by then, privatised dock work companies, to cover past losses.

Opening an infringement procedure, the Commission noted that the subsidies appeared to be selective, favouring specific undertakings, and threatened to distort competition between EU ports, without being justified in terms of the development of a special economic activity or economic area. Moreover, it emphasised that Italy's failure to provide full details of its restructuring programmes prevented it from considering the matter fully under the terms of Community guidelines on restructuring aid. In autumn 1999, both cases were still pending.

Aid investigations at Portuguese and French ports

A further, less broad-reaching investigation was opened in mid-1998, and focused on Portuguese aid provided to support the restructuring of the state-owned cereals dock-handling company Empresa de Silos Portuarios. In order to settle the company's debts, Portugal arranged for the sale of port terminal assets, such as port silos, to state-owned port authorities, and for the remainder of the debt to be covered by a cash injection. The Commission assessed both measures, worth a little over Esc31bn, as aid, and, in opening the Article 88-2 investigation, noted that, while likely to distort competition, they did not appear likely to restore the company to viability, nor to be in proportion to the anticipated costs and benefits of the restructuring process. This case was also ongoing in late 1999.

In June 1999, the Commission also opened an infringement procedure against France concerning proposed tax exemptions for stevedoring companies. In principle, the scheme was designed to encourage the stevedoring firms to take over port superstructure from the public port authorities. The Commission noted, in a published invitation to submit comments, that out of planned investments worth a total of FFr2,800m, entailing tax relief of FFr623.6m, only FFr2,100m was earmarked for the takeover of existing equipment, the remaining FFr700m going towards the acquisition of new cargo handling equipment in the ports of Le Havre and Dunkirk.

Investigation into French support for stevedoring firms

The tax relief must be considered as a state aid, the Commission argued, because it favoured specific undertakings, and thereby affected competition between its recipients and their rivals. Moreover, given that most ports are involved in international trade, it risked distorting competition between Member States. Furthermore, it said, the aid scheme did not fall directly under the scope of application of existing horizontal rules, such as the guidelines on regional aid or the guidelines on rescue and restructuring aid. "The assistance to be granted may have a negative effect on trading conditions", it concluded, notably with regard to the capacity increases at Le Havre and Dunkirk.

State aid to shipbuilding - on a massive scale

While discussing state aid in the maritime sector, it is necessary to record that the subsidies received by Community shipowners - which have amounted to roughly Eur300m annually since 1996 - are greatly exceeded by those paid out to the related shipbuilding sector. According to the Commission's Seventh Survey on State Aid, subsidies for shipbuilding over the period 1995-97 averaged Eur1.445bn annually (compared with an average of Eur1.72bn in the 1993-95 period). The level of aid paid out reflects the problems faced by EU shipyards in the global marketplace.

Annual subsidies of over Eur1.4bn

Although shipbuilding is not a facet of transport policy as such, these subsidies affect the prices paid by shipowners for new vessels, and can therefore influence investment decisions. Moreover, as substantial sources of employment, shipyards have a bearing on the prosperity of many of Europe's maritime regions. In its 1996 Communication on "Shaping Europe's maritime future", the Commission noted the following: "*The maritime industry sectors are interdependent. Safe, efficient and environmentally friendly maritime transport can only be achieved if all sectors contribute equally to these goals.*" In this context, it is relevant to note, if only briefly, how Community aid policy has been directed at maintaining its shipbuilding industry.

Community shipbuilding policy since the mid-1980s has been designed to help EU yards to survive in a market characterised by overcapacity, due to a decline in demand for ships and an increase in production, notably in the Far East. It has sought to help EU yards, which have comparatively high production costs, compete with lower-cost third country yards, and to provide safeguards against unfair competition from the predatory pricing policies of some shipbuilding nations. It has also sought to ensure that EU yards compete with one another on a fair, transparent and equitable basis.

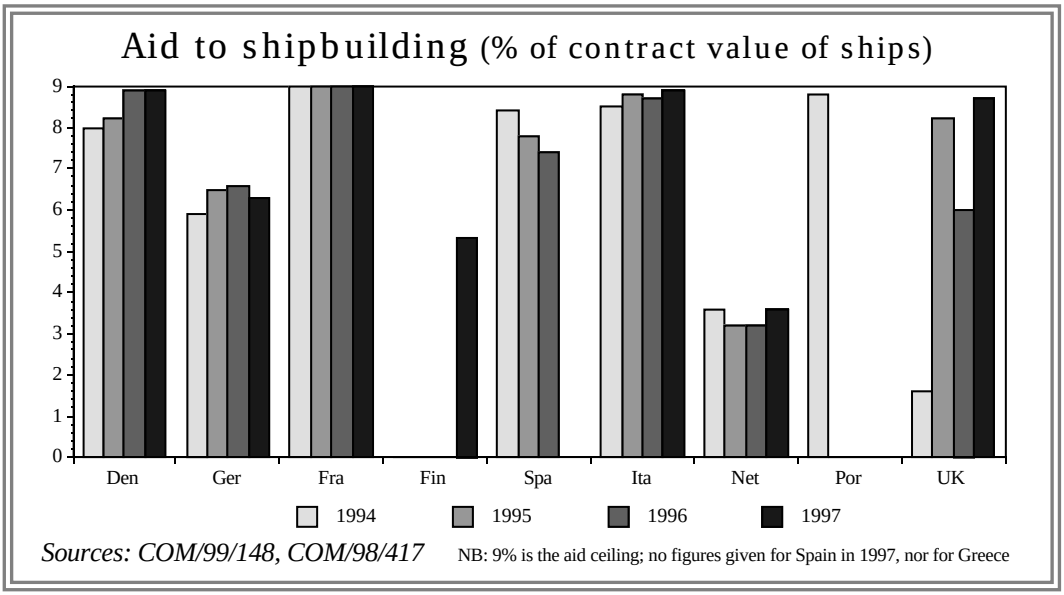
Annual extensions for the Seventh Directive

The essence of this policy was consolidated in the Seventh Directive, adopted in December 1990. Although initially only valid for three years, it was extended annually until 1998. It allowed shipbuilding and ship conversion activity in the EU to be supported by operating aid, subject to a common ceiling reflecting the difference between the costs of the most competitive EC yards and the prices charged by their main international competitors. This ceiling, set at 28% of the contract value in 1987, was progressively reduced, to reach 9% by 1992 (and 4.5% for vessels with a contract value of less than Ecu10m), where it remained until 1999.

The only operating aids exempted from these limits were credit facilities complying with the 1981 OECD Understanding on Export Credits for Ships, and subsidies granted as development assistance to poorer countries. The Seventh Directive also allowed aid to support the restructuring of yards in financial difficulties, subject to strict commitments on capacity restraints, and permitted closure aid provided that the resulting capacity reductions were of a "genuine and irreversible nature". It also provided scope for regional investment aid, as well as other subsidies permitted under the terms of Article 87 (Article 92 at the time) of the Treaty.

The failure of the OECD Agreement

The OECD Agreement on shipbuilding was concluded in 1994. Signed by the major shipbuilding nations, it sought to restore normal competitive conditions in the shipbuilding industries by



Sources: COM/99/148, COM/98/417 NB: 9% is the aid ceiling; no figures given for Spain in 1997, nor for Greece

effectively banning most shipbuilding subsidies, with certain exceptions (e.g. aid to promote research and development, social aid related to closures, export credits). In response, the EU's Council of Ministers adopted a Regulation, in December 1995, giving effect within the EU to the new aid rules once the Agreement had been fully ratified. However, the Agreement, originally slated to enter force in January 1996, was kept in limbo by the failure of the US to ratify it, despite strong diplomatic pressure from the EU. In the absence of the international agreement, the EU's Council of Ministers felt justified (although with the three Scandinavian countries voting against) in adopting a special Regulation, in June 1997, to allow exceptional aid payments to specific yards in Germany, Spain and Greece. The Regulation required the Commission to carefully monitor the restructuring programmes in Spain and Germany and provide annual reports to the Council. Shortly after, the Commission authorised large restructuring aid packages for all three countries, using a combination of the Seventh Directive and the exceptional aid Regulation.

Exceptional aid payments agreed for Germany, Spain and Greece

By mid-1997, with the OECD Agreement still stalled, the EU's industry ministers agreed that a new shipbuilding policy was needed at EU level to replace the outdated Seventh Directive. Following lengthy and difficult discussions, a Regulation was formally adopted in June 1998, and came into force in January 1999. In line with the objectives of the OECD Agreement, it provides for the abolition of operating aid as of January 2000. The scope for regional investment aid for shipyards has been substantially cut back, with the maximum aid intensity for yards in the poorest areas being reduced from 75% (of eligible investment costs) to 22.5%. Scope for restructuring and closure aids has been retained, while other subsidies (e.g. for environmental investments and for innovation) will continue to be authorised if they fulfil the relevant EC guidelines.

Operating aid abolished from 2000

Throughout the 1990s, though, the Commission has been obliged to make strenuous efforts to stop Member States attempting to flout the rules. The restructuring of the shipbuilding sector in the former East Germany - for which special, generous aid conditions applied for much of the 1990s - caused severe difficulties for the Commission's competition authorities, and has been the subject of a variety of Commission investigations. The Bremer Vulkan case, for example, has become notorious: authorised restructuring aid for two newly-privatised yards was siphoned away by the parent company to relieve its own financial difficulties, and the German government then sought to replace the lost aid with new unauthorised funds.

EU concern over South Korea's shipbuilding policies

At an international level, meanwhile, the EU's efforts in the late 1990s have focused on attempting to accelerate the entry into force of the OECD Agreement, and to combat unfair pricing practices by third countries. The shipbuilding policies of South Korea, for instance, have been a major source of concern. The Commission believes a loan from the International Monetary Fund, to help South Korea overcome the effects of financial troubles in South East Asia, may have been used to subsidise shipbuilding. The country's government has repeatedly denied the suggestion; and a visit to Korea in mid-1999 by the then Industry Commissioner Martin Bangemann did little to resolve the dispute. The EU is expected to continue pressing for a solution within international fora.

RESTRICTIVE PRACTICES AND ABUSES OF DOMINANT POSITIONS

A further key aspect of Community competition policy in the maritime sector is the prevention of collusion between maritime operators which can damage the interests of their customers, the shippers, and of rival shipowners. There are two main forms of international cargo shipping services: bulk 'tramp' trade and scheduled liner shipping. Because cargo rates are generally negotiated freely on a case-by-case basis in the bulk trade market, there is little collusion between operators. The Commission's attention, therefore, has generally been focused on liner trades, where regular services operate on given routes according to set tariffs, and where cooperation between vessel operators is commonly used as a means of mitigating high operating costs.

Cooperation between liner firms generally falls into one of two categories: conferences and consortia. Liner conferences involve groups of two or more shipowners who operate a cooperation agreement on a particular route or routes, centred around the joint setting of freight rates. Liner consortia, on the other hand, involve agreements on technical or operational cooperation, such as joint fixing of schedules and the exchange or cross-chartering of vessel space. They do not include provision for fixing freight rates, but it is not uncommon for consortia to operate within conferences.

The maritime competition Regulation 4056/86

The maritime competition Regulation 4056/86, agreed as part of the 1986 package, sets down detailed rules on how the competition Articles 81 and 82 (85 and 86 at the time) of the Treaty should be applied to maritime transport. It interprets the provisions of Article 81-3 which allows for the main restrictions of Article 82-1 (preventing anticompetitive agreements and concerted practices) to be waived under certain circumstances. It permits groups of undertakings to restrict

competition between them provided that, by doing so, they contribute to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The Regulation, which in effect provides a specific block exemption for liner conferences, further requires that conference agreements should be compatible with Article 82, which prevents abuses of a dominant market position.

Landmark Decisions impose fines on liner conferences

The Commission has demonstrated its willingness to uphold competition rules on liner trades on several occasions. Two landmark Decisions came in 1992, following complaints made by Denmark some years earlier. In the first Decision, in April 1992, it imposed fines totalling Ecu15m on the members of 11 shipowners' committees which had sought to reserve for themselves all freight on routes between France and 11 African countries, in order to charge higher freight rates.

Cewal members fined for illegal practices

The second Decision, in December 1992, was directed at three liner conferences implicated in the same trade. The Commission found that the conferences - Cewal, Cowac and Ukwal - had acted illegally in order to eliminate competition. The Cewal members were fined a total of Ecu10m, with the bulk payable by the dominant operator within the conference, CMB. The Cewal members subsequently challenged the Decision in the Court of First Instance. Although the October 1996 judgement did not overturn the ruling, it did reduce the fines slightly. CMB and Dafra Lines then lodged further appeals in the Court of Justice. In an Opinion given in November 1998, the Court's Advocate General recommended that the Commission's Decision should itself be upheld, but that the fines should be quashed because the Commission had committed errors of law in the way it informed the shipping companies of the penalties their actions could incur. (A final ruling was still awaited a year later - an unusually long time between Opinion and final judgement.)

In June 1994, the Commission adopted a report on the application of the competition rules to liner shipping. It focused on the legal position of rate fixing by liner conferences for the land section of a multimodal transport. It concluded that this practice was contrary to competition law and should not benefit from the existing block exemption. It suggested that a new approach could be worked out, allowing organisational efficiencies which would benefit the shipper as well as the shipowner.

The illegality of inland price fixing agreements

Subsequently, the Commission took two Decisions prohibiting inland price fixing agreements. The first, in October 1994, concerned the Transatlantic Agreement (TAA), a now defunct tariff fixing conference which at the time accounted for 70% of the containerised liner services between northern and western Europe and the eastern coast of the US. Under pressure from the conference's rivals, and having noted that a tiered tariff structure and a programme of capacity freezes had enabled the conference to raise cargo rates substantially in 1993, the Commission banned the TAA in October 1994. It stated that the Agreement was illegal because it was aimed only at increasing prices rather than improving services, and because the tariff structure was not in line with that required in the Community definition of a conference. It reinforced this view in December 1994, by imposing fines totalling Ecu10,000 on each of the members of the Far Eastern Freight Conference for fixing inland rates on a multimodal container service between northern Europe and the Far East.

Between these two Decisions, the EU's transport ministers, meeting in November 1994, called for an experts' group to examine whether rate fixing might be permitted for inland services in certain circumstances, as a way of promoting intermodal transport. The group's final report, made public in November 1997, included an in-depth scrutiny of a new 'hub-and-spoke' system proposed by the industry under which operators would collaborate in setting up strategic hub terminals. Thus, the normal single land leg of an intermodal service would be divided into a 'trunk leg' between port and terminal, and a 'local leg' between hub and destination. If the trunk leg were carried out by rail or inland waterway, and only the final leg by road, the operators argued, there would be significant environmental benefits. Moreover, empty containers would only need to be moved between the hub and local destinations. The resulting reduction in container movements would reduce costs substantially. However, the industry also argued that inland price fixing would be essential in order to provide sufficient revenue for setting up such systems.

Findings of the experts' group on rate fixing

The experts' group admitted the system could have a number of benefits, but pointed out that it was in the conference members' interests to cooperate in creating such systems in order to increase efficiency and reduce costs, without needing further incentives. It rejected, therefore, the idea of extending the block exemption provisions to cover inland price fixing and suggested that even recommended tariff systems should not be allowed, because of their "clear incompatibility"

with competition law. The group was able to suggest only limited ways of encouraging intermodal transport through the competition route, such as an extension of the block exemption to cover ancillary services directly linked to maritime transport, e.g. lighter services.

TACA warned over inland rate fixing

Even while the group was still deliberating, however, the Commission took an important decision. In November 1996, it withdrew immunity from antitrust fines for inland price fixing activities carried out by the Trans-Atlantic Conference Agreement (TACA), a successor to the TAA. TACA had attempted to justify such price fixing as necessary to allow the development of a computerised reporting system for empty containers, under the so-called European Inland Equipment Exchange Arrangement. The Commission, however, reiterated its view that "inland price fixing is a manifest and serious infringement of the competition rules".

Heavy fines imposed on TACA members

A Decision concerning TACA's maritime activities was taken in September 1998. The Commission imposed fines totalling Eur273m on 15 members of TACA for abusing their joint dominant position on the North Atlantic container market. Although the conference lines had notified the agreement, and had requested an exemption under Article 81-3 (Article 85-3 at the time), the Commission refused. Instead it accused the conference of trying to eliminate competition by encouraging non-conference lines to join the cartel, and by restricting the availability of individually negotiated service contracts for shippers. Several of the shipping lines concerned immediately lodged appeals against the Decision in the Court of First Instance.

The Commission's Decision on the Europe Asia Trades Agreement

A second, rather unusual, Decision was taken by the Commission, in April 1999, in a bid to clarify further its position on liner conferences. It outlawed the already defunct Europe Asia Trades Agreement, which had operated until September 1997 on trades between Europe and the Far East. The conference, while it existed, had sought to maintain high cargo prices by implementing a capacity management programme among its members. This, the Commission claimed, was illegal. Although the conference was no longer operating, it said, a Decision in the case was needed in order to increase legal certainty in the sector, and thereby make lines aware of Community policy and prevent disagreements.

Although the debate over competition rules for liner shipping subsequently continued, by 1999 a more cooperative environment had evolved. The shipping industries and the Commission were working together within the so-called 'transition group' to resolve disputes and establish an 'interim agreement' laying down an agreed interpretation of Regulation 4056/86.

Not-below-cost rule accepted by the Commission, but challenged in Court

A less belligerent stance within the industry was demonstrated with the notification of a successor conference to TACA, the North Atlantic Agreement. It sought to address the Commission's concerns by limiting itself to a "not-below-cost" rule, under which the member lines agreed not to provide inland transport services, connecting with maritime services carried out under the conference tariff, at a loss. In August 1999, the Commission agreed to accept this rule on the grounds that it would remove the risk of below cost pricing on the inland leg undermining the stability brought about by the conference tariff on the maritime leg. At the same time, though, the Commission said it had doubts about the maritime provisions of the new agreement - especially those allowing the exchange of information - and would investigate them further, for fear they could harm competition between the TACA lines when negotiating individual service contracts. It is worth noting that, in autumn 1999, the European Council of Transport Users launched a challenge to the Commission's acceptance of the not-below-cost rule in the Court of First Instance.

Lesser control needed for non-rate fixing liner consortia

Community policy with regard to liner consortia has been less controversial. The Commission has tended to favour the creation of consortia because they generally help to improve the productivity and quality of shipping by encouraging rationalisation between consortium members and by encouraging economies of scale in terms of vessel operation and use of port facilities. As a rule, transport users obtain a fair share of the benefits from consortia, provided competition exists in the relevant trades; moreover, their creation does not appear to lead to the same level of animosity from shippers as the rate fixing conferences.

In early 1992, the Council adopted a framework Regulation enabling the Commission to authorise block exemptions for "agreements, decisions and concerted practices between liner shipping companies". On the basis of this measure, and following a lengthy period of extensive consultations with interested third parties and a Member States' advisory committee, the Commission adopted, in April 1995, a Commission Regulation establishing a five year block exemption for liner consortia.

The exemption applies to international liner shipping, to or from Community ports, intended exclusively for the carriage of cargo, chiefly containers. It refers, in principle, only to consortia with a share of under 35% of the relevant market, or under 30% when operating within a conference. However slightly larger-scale groupings - which do not account for more than 50% of trade on the route in question - are able to benefit from the exemption under a "simplified opposition procedure", involving a call for comment from interested parties. The exemption itself allows a range of cooperative activities including: joint fixing of sailing timetables and ports of call; the exchange, sale or cross chartering of space or slots aboard vessels; joint provision of containers, chassis and other equipment; the joint exercise of voting rights in liner conferences; and the joint operation or use of port terminals and related services.

The five year block exemption for liner consortia

Following the entry into force of the block exemption, the Commission received a large number of notifications and pre-notifications, many of them concerning existing consortia. A substantial proportion were sent 'comfort letters' indicating that the agreements in question were indeed covered by the block exemption. A smaller number of slightly larger groupings - numbering eight in 1996 and 1997 - were approved under the simplified opposition procedure, once the Commission had concluded that they would improve the quality and frequency of liner services offered to shippers, while remaining subject to effective competition.

Where consortium agreements do not fall under the block exemption Regulation, the Commission is still able to approve them under the terms of Article 81-3 of the Treaty. In September 1997, for example, it granted an exemption for slot-swapping arrangements between P&O Nedlloyd, Sea-Land, Moller-Maersk Line and the Orient Overseas Container Line. In March 1998, it endorsed the latest incarnation of the Southern Africa Container Service consortium. Both ventures, by their size and nature failed to fulfil the criteria for automatic exemption, but were approved by the Commission because of their potential benefits, and because they would not eliminate competition on the routes concerned.

Alternative procedure for approval of consortia

Actions against ferry price and marine insurance cartels

While its most high profile antitrust activity has concerned the liner trades, the Commission has also sought to protect competition in other markets, both through the use of the general Treaty competition rules and the Community merger Regulation. In October 1996, for example, it took a Decision fining five Channel ferry companies - P&O European Ferries, Stena Line, SeaFrance, Brittany Ferries and North Sea Ferries - for operating a price fixing cartel in 1992. On the basis of complaints from the companies' customers, the Commission investigated and found that, although the cartel had introduced an illegal surcharge on freight, it had been withdrawn within two months, after it had proved ineffective. Consequently the fines imposed were set at a nominal level, ranging from Ecu400,000 to Ecu25,000.

A different kind of competition problem has been presented by the agreements between marine protection and indemnity insurers within the International Group of P&I Clubs. The clubs are non-profit mutual associations established by the shipowners who are their clients. The International Group's 19 members account for around 90% of the worldwide market for protection and indemnity insurance. Because collaboration between the clubs is necessary to allow them to insure against large-scale risk-factors (such as severe marine pollution), the Group was initially granted a ten year competition exemption, in 1985, allowing cooperation in areas such as pricing and the pooling of liabilities. When this came up for renewal, however, the Commission took the opportunity to address competition issues raised by shippers.

International Group of insurers obliged to make concessions

These concerns related largely to provisions in the International Group agreement obliging all members of the Group to offer the same amount of cover, even if shipowners should request a lower level than that on offer, as well as to restrictions on prices charged by individual clubs. Further problems were identified within the pooling agreement, a subsidiary claim sharing arrangement between 18 of the Group's members. However, after extensive discussions, the Group made concessions which the Commission believed addressed its concerns, allowing it to grant new exemptions for both agreements. These were formally approved in April 1999, and, according to the Commission's 1998 competition report, reflected a "new policy towards insurance pools".

On occasion, the Commission has used the Community's merger rules to protect the shipping market from the creation of a dominant position. In October 1996, for example, P&O and Stena Line notified the Commission of a plan to pool their ferry operations in the narrowest part of the Channel, on the Belgian Straits and the Short French Sea. The companies argued that the venture was necessary to allow them better to compete with the Channel Tunnel in the cross-Channel

market. SeaFrance, a subsidiary of the French rail company SNCF, submitted a complaint about the venture. The Commission found that the proposed joint ferry operation would infringe Article 81-1, but could be exempted under Article 81-3, especially because of difficulties likely to be encountered by operators following the abolition of duty free sales. However, the Commission was only prepared to offer the derogation for three years, to March 2001, by which time it expected to have had an opportunity to assess the impact of the venture on the short sea market.

Short-term approval only for P&O-Stena Channel venture

Short sea - 1996 capacity and carryings

	Capacity (m pcu)	Carryings (m pcu)	Capacity utilisation (%)
Eurotunnel	9.12	4.94	54
P&O	11.8	5.1	43
Stena	7.09	2.79	39
SeaFrance	4.05	1.26	31
Hoverspeed	0.67	0.36	53
Sally and Sally/RMT	3.16	1.22	38
Total	**35.9**	**15.7**	**44**

Source: OJ/99/L163

pcu - passenger car unit

The application of Community competition policy in ports is somewhat complex, partly due to the variation in port size and status, but also because of traditional monopoly management practices throughout the EU. While the Community is neutral with regard to the public or private status of port operators, the Treaty rules insist that public and private port undertakings must compete under equal conditions where commercial services are concerned. With single market pressures having grown throughout the decade, the Commission and the Court of Justice have both taken a number of Decisions in favour of port users and against the abuse of dominant positions by monopoly operators.

Competition action by the Commission can be separated into three areas: access to ports; competition between ports; and competition between undertakings carrying out ports services.

Abuses by Stena Sealink of port authority role at Holyhead

Interim order against Sealink to prevent damage to B&I

In the first of these areas, the Commission has taken the firm position that the owner of port infrastructure is abusing its dominant position if it restricts access to port infrastructure. In June 1992, it found that Sealink (a British ferry operator which was also the port authority at Holyhead) had clearly abused its dominant position in breach of Article 82 (Article 86 at the time). In its capacity as port authority, Sealink had permitted changes to its own ferry sailing times which might have caused serious damage to a rival operator (and complainant), B&I. The Commission made an interim order for Sealink to put alternative schedules into effect, to prevent irreparable damage to B&I's business, while it continued its examination of the case. Sealink immediately took the case to the Court of First Instance. But, within a few weeks, the two parties had reached agreement on new sailing schedules, and had notified the Commission, which then had no need to reach a formal Decision. Sealink withdrew its legal challenge to the Commission's Decision shortly after.

Conditions where company has two roles

The following year, the renamed Stena Sealink was again in trouble for similar abuses of its dominant position. Sea Containers complained to Brussels, in April 1993, that Stena Sealink was refusing it access at Holyhead for a new high-speed ferry service. In July, the Commission issued a notice indicating its sympathy with the complainant and the need, again, for interim measures. In October, Stena Sealink offered Sea Containers access to the port on conditions which the Commission found reasonable. Although Sea Containers did not, at first, accept those terms, it did so once the Commission had indicated there was no longer any need for interim measures. In this case, unlike the one brought about by B&I's complaint, the Commission issued a formal Decision in order to clarify the legal position. It suggested that, where a company has two roles, as in the case of Sealink, it can only normally ensure non-discriminatory behaviour under certain conditions: separate management, the establishment of a non-discriminatory code of practice, a consultation procedure for port users, and arrangements for independent arbitration in the even of disputes.

Danish government involvement in Rodby port restrictions

On the same day as the Stena Sealink Decision, in December 1993, the Commission issued another port Decision, this time under Article 86 (Article 90 at the time) concerning public undertakings, in conjunction with Article 82 (Article 86 at the time). The Danish state railway company, DSB, was the port authority for Rodby, but also provided ferry services in conjunction with Deutsche Bahn,

the German state-owned rail operator. Euro-Port, a subsidiary of Stena, had applied to set up a rival ferry service, either from the existing port, or by building new facilities on adjacent land. When both applications were refused, the Commission examined the situation and found that there was no objective justification for the double refusal. More recently, in 1996, the Commission intervened over the Danish authorities' refusal to grant access to harbour facilities at Helsingor for Mercandia, rivals of Scandlines, a car ferry operator partly owned by the Danish state. Following talks with the Commission, Denmark agreed to allow access to the port for a second ferry company.

An Italian scheme under which two state-owned ferry companies, Italia di Navigazione and Tirrenia di Navigazione, benefited from substantial discounts on pilotage fees at the Port of Genoa, was the subject of a negative Commission Decision in October 1997. The Commission considered that the discounts amounted to discrimination in favour of specific users of the port, and were therefore illegal. The Court of Justice had, in fact, already condemned the rebate system in 1994, and it had subsequently been amended twice by Italy, but without all the discriminatory factors being removed. In its 1997 Decision, therefore, the Commission ordered Italy to dismantle the system entirely.

Italy ordered to dismantle rebate scheme

In recent years, there has been less need for the Commission to intervene in the second area, to ensure fair competition between ports. In an article published in its regular competition bulletin in February 1998, the Commission stated: "*[It is] essential that competition between ports be allowed to thrive and should not be undermined by the restrictive practices of land-based operators or maritime companies.*" One case, though, stands out. After a two year investigation, the Commission took a Decision, in March 1994, to fine DB Ecu11m for abusing its power within the combined transport grouping Maritime Container Network by forcing up prices on rail freight services through Germany from Dutch and Belgian ports in order to favour those operating from German ports. This was the first time that the Commission had imposed fines in a case of this sort. DB appealed to the Court of First Instance against the grounds on which the Commission had based the decision, but without success. A further appeal, to the Court of Justice, was dismissed in April 1999 (Chapter Six).

DB fined for favouring German ports

The slow process of dismantling labour laws at Italian ports

With regard to the third area of ports services, the Commission's activities have been largely confined to Italy, where it has been trying to encourage the dismantlement of long-standing dock work monopolies. Under Italian laws adopted in 1960, dock workers in publicly-owned Italian ports were organised into dock work companies, which were given a legal monopoly in the supply of dock labour, including that required by private companies operating terminal concessions. The dock work companies themselves were only open to Italian nationals. The Court of Justice ruled, in 1991, that these laws, by their very nature, encouraged the dock work companies to abuse their dominant positions, and were therefore incompatible with Article 82 (Article 86 at the time) of the Treaty.

Subsequently, in response to pressure from the Commission, Italy began to reform its legislation. Under laws adopted in 1994 and 1996, the statutory dock work companies lost their overall monopoly on labour supply, and were themselves effectively reformed in order to be able to compete in a commercial marketplace. The sector as a whole was substantially deregulated and reformed, with the creation of autonomous port authorities, and the separation of port management from port operations. However, the former dock work companies retained two important monopolies, for the supply of temporary labour and for the sub-contracting of labour-intensive services. This meant that the companies became, in effect, exclusive suppliers of such services to their commercial competitors.

In October 1997, therefore, the Commission adopted a Decision declaring the revised laws illegal, and ordering Italy to abolish the remaining dock worker monopolies. Its assessment of the illegality of the Italian legislation was confirmed shortly afterwards by the Court of Justice, in a ruling passed down in February 1998. The ruling was requested by the Pretura Circondariale of La Spezia in the context of criminal proceedings against La Spezia Container terminal, a company which stood accused of having procured temporary labour from sources other than the former dock work companies. The Court concluded that the statutory monopolies created by the new legislation would, like the older laws, encourage the companies concerned to abuse their dominant positions.

Italian dock worker monopolies declared illegal

The Court, meanwhile, has adopted several rulings upholding the application of public services at Italian ports. In March 1997, for example, it ruled that charges imposed on the users of the port of Genoa by a private company operating a pollution surveillance service on behalf of the Genoese port authority were valid, and did not constitute abuse of a dominant position by the authority.

The charges were legal, the Court said, because the case involved a public service, to which the EC competition laws did not apply. In June 1998, the Court handed down a judgement concerning tariffs. Corsica Ferries, France, had sought compensation in the Italian courts for what it considered to be unfair mooring charges at Genoa and La Spezia. The case was referred to the Court of Justice. It decided the mooring charges were legal under both Article 30 (Article 28 at the time), because they were not discriminatory, and under Article 86-1 (Article 90-1 at the time), because the charges could legitimately be considered as indispensable for the provision of a service of general economic interest.

IN SEARCH OF AN EXTERNAL MARITIME RELATIONS POLICY

As in the airline sector, the Commission has consistently taken the view that the Member States have more to gain in international maritime relations by presenting a common front than by operating on an individual basis in their own narrow interests. The basis for coordinated action at Community level was taken as early as 1977, with the adoption of a Council Decision establishing a Member States' consultation procedure. Through this, the Council has been able to adopt common objectives to harmonise the EU position in international negotiations, and where necessary, to grant the Commission mandates to carry out talks on behalf of the Community. With the adoption of the 1986 legislative package, which substantially increased Community involvement in the maritime sector, the importance of such consultations increased.

The role of the Member States' consultation procedure

On behalf of the Community, the Commission has often carried out consultations with major players in the maritime sector. The principal point of contact with developed countries has been the Maritime Transport Committee of the OECD, whose meetings the Commission attends. In parallel, it has participated in the Consultative Shipping Group and that group's dialogue with the US, and, in recent years, it has held regular contacts with Japan. In addition, it frequently organises seminars and conferences to promote cooperation with third countries, and it provides technical assistance to individual countries or groups.

The Commission participates systematically in the work of international organisations involved in maritime transport, and in the negotiation of international conventions covering international shipping. As well as contributing to work in areas such as safety, environmental protection and crewing practices, carried out by the International Maritime Organisation (IMO) and the International Labour Organisation (ILO), it continues to argue for free trade and fair competition in several fora. During the Uruguay Round, for example, the Commission carried out general negotiations on services under the Code of Conduct agreed with the Member States and the Council. In the UNCTAD, the Community is represented in the Standing Committee on Services (however, it only has limited observer status).

International organisations and bilateral agreements

Maritime provisions exist in numerous general agreements between the EC and third countries and regions. Such agreements include the successive Lome Conventions with African and Caribbean countries, the Europe Agreements with the CEEC, the Partnership and Cooperation agreements with the former Soviet republics, the European Economic Area Agreement, and the Association Agreements with the Mediterranean countries (Chapters Fifteen and Sixteen). The Commission's aim is always to move towards unrestricted access to international trade under conditions of fair competition on a commercial basis. The Commission believes that the use of such maritime clauses in more general agreements, has produced "satisfactory results" on a number of occasions.

Third country protectionist measures

Although the so-called traditional maritime nations have, with some exceptions, tried to maintain an environment encouraging open trading and free enterprise in recent years, a large number of third country governments have - despite the Community's best efforts through general agreements and international fora - developed significant protectionist measures in favour of their own shipping lines. Such practices include: the allocation of cargoes; restrictions on doing business, for example by preventing non-national lines establishing branch offices or shipping agencies, making the acquisition of licences difficult and imposing discriminatory duties on foreign companies; and discriminatory treatment of vessels in ports. Among the most worrying phenomena, according to the Commission, has been the tendency to bilateralise trades through cargo sharing agreements which reserve portions of cargoes for national lines at each end of a trade. Although the intra-OECD trades are free from such arrangements, they are prevalent elsewhere, and numerous Member States have been drawn into taking part, simply to gain access to cargoes.

The need to replace or revise the two 1986 Regulations

The legal instruments adopted in 1986 gave the Community certain powers to address these problems. The basic liberalisation Regulation 4055/86, as well as establishing the freedom to

provide services in the maritime sector, obliged Member States to phase out or adjust bilateral cargo sharing agreements with third countries, and prevented them from extending arrangements or negotiating new agreements except under exceptional circumstances. On the basis of this law, the Commission has pursued a number of infringement proceedings against several Member States. Of particular concern have been agreements concerning trades between Central and West Africa and Belgium, Luxembourg, Portugal and Italy, although other market sectors have also been affected. A number of these cases were resolved in 1998 following pressure from the Commission and a ruling from the Court of Justice against Belgium and Luxembourg in June, which declared that cargo sharing clauses in their maritime accord with Malaysia were illegal. Two further judgements, in September 1999, against Belgium and Luxembourg for agreements with African countries came to the same conclusion.

A first action under Regulation 4058/86

The Commission's focus on bilateral agreements was prompted, in part, by the failure of diplomatic consultations with the Central and West African countries conducted within the framework of the Lome Convention. The consultations began in October 1987, following complaints from Denmark about trade restrictions on the West Africa-EC routes. The complaints led the Council to take action for the first time under Regulation 4058/86, which provides for a coordinated diplomatic reaction to trade restrictions, followed if necessary by joint counter-measures. The talks themselves were successful to begin with, but the joint statement produced at their conclusion, and endorsed at the highest level by the African-Caribbean-Pacific (ACP)-EEC council of ministers, was subsequently rejected by the ACP partners. Attempts in 1989 to revive the dialogue failed.

To date, this remains the only occasion on which action has been taken based on the provisions of Regulation 4058/86. The Commission maintains that the threat of counter-measures contained in the Regulation has served as a valuable deterrent against restrictive measures being taken by third countries. However, in its 1996 Communication on developing a new maritime strategy, the Commission admitted "there is a widespread view that Regulation 4058/86 needs reviewing in the light of developments and experience gained since 1986".

Regulation 4057/86 on unfair pricing practices

The fourth Regulation (4057/86) contained in the 1986 legislative package, on unfair pricing practices in maritime transport, provides for Member States to impose redressive duties on individual third country shipowners which, due to non-commercial advantages or incentives granted by their home state, are able to offer very low freight rates in an attempt to win market share. This Regulation was invoked in 1989 when the Council took action against the Korean firm Hyundai Merchant Marine, but has not been used since. The Commission believes that, like Regulation 4058/86, it forms a useful deterrent against anticompetitive behaviour. However, it has also identified a number of drawbacks: the Regulation can protect companies which the Community has no interest in protecting, because of its rather broad definition of a Community shipowner, which does not require any economic link with Community industry or lay down any conditions on registration; moreover, it is considered out of date, because operators now tend not to risk entering a trade by heavy underbidding.

The Commission's 1997 Communication on external relations

Concerned about the failure of the existing instruments to address persistent barriers encountered by EU firms in some of the EU's larger trading partners, the Commission put forward, in March 1997, a Communication outlining its plans for the future development of the Community's external maritime relations. These included the consolidation of international developments towards liberalisation, addressing specific problems caused by third countries, taking action to secure fair competition on a commercial basis, and cooperation with and assistance to third countries.

The key objective of a multilateral agreement in the WTO

The Commission stated, in the report, that the main instrument for Community action in terms of securing market access should be negotiations within the World Trade Organisation, scheduled to begin in 2000. It suggested, however, that every means should be used to achieve EC objectives in the meantime, "in the expectation that they could eventually become a springboard for a multilateral agreement in the WTO". The Community's "fundamental objective" for the talks remains, as it has been throughout the decade, the conclusion of a multilateral agreement involving "commitments from the widest number of countries, including all countries with significant shipping activity, for effective standstill on restrictions in the provision of shipping services and elimination of existing restrictions within a fixed time scale". Areas to be covered during the new round are expected to include access to, and use of, port facilities, auxiliary services and ocean transport.

In the absence of an existing agreement, the Commission proposed a strategy consisting essentially of three main elements. In the first place, the Commission said, the Community should

further develop its relations with third countries by means of:
- Community agreements and consultation procedures leading to the progressive transformation of existing bilateral regimes, as well as forms of dialogue with third countries to promote a common approach to shipping policy issues;
- action to address problems arising from restrictive or discriminatory measures of third countries;
- action to secure fair competition on a commercial basis;
- cooperation actions and technical assistance to third countries.

Means for developing relations with third countries

Secondly, the Commission said, the EU should develop cooperative action in the field of shipping as a component of a global approach to the transport services and systems of Europe so that they can develop in as integrated a way as possible. Thirdly, the Community should reinforce its role within the relevant international organisations, so as to reflect the development of Community shipping policy, it said. The Communication also listed a wide range of specific actions including the conclusion of bilateral or regional agreements, the continuation of talks, and the use of demarches to problem countries. Furthermore, the Commission advised that, eventually, it would put forward proposals to revise the two 1986 Regulations concerning external relations.

Most importantly, though, the Commission also proposed strengthening the legal basis for its policy through two means: Council mandates for bilateral agreements negotiated at EU level, and a beefed up consultation procedure. As a prelude to developing the policy towards other countries, the Commission asked the Council for mandates to begin negotiations with India and China, two countries with important, but relatively closed, markets and significant national restrictions on the business activities of foreign firms. The Commission argued forcefully that "the negotiating power of the Community representing the fifteen Member States is far greater than that of the individual Member States". Despite some initial hesitation, therefore, the Member States granted the mandates at the December 1997 Transport Council. According to the Commission, the Council's decision broke new ground since the two mandates were not only the first of their kind for external maritime agreements, but were also the first so-called "mixed competence" mandates in the transport sector as a whole.

Council mandates for negotiations with India and China

However, by autumn 1999 actual negotiations had yet to begin. Informal contacts between the Commission and India revealed a willingness on the Indian side to enter talks, but bureaucratic delays and an uncertain political environment in the country prevented substantive progress being made. Informal contacts with China, in 1998, failed to elicit a positive response, although by then sustained pressure from the Community had managed to wring limited concessions for EU firms with regard to market access.

Draft consultation procedure unpopular in the Council

The second legal prong of the 1997 strategy was a proposal for a mechanism, to replace the 1977 Decision, whereby Member States would be required to consult one another, in a specially created committee, at least every two months "on questions concerning shipping matters and dealt with in international organisations and on relations with third countries in shipping matters, and on the negotiation, conclusion and functioning of bilateral or multilateral agreements in this sphere". It would debate suggestions put forward by the Commission, and either approve them on a qualified majority, or else refer them to the Council for a Decision. The Commission justified the move by the fact that institutional changes in UNCTAD required new working arrangements on the part of the Community, which was now expected to speak on its own behalf in shipping matters rather than be represented as part of an OECD grouping, as it had been until 1992.

Furthermore, the draft Decision proposed a system whereby a Member State contemplating a bilateral agreement with a third country would have to provide the Commission with "justification for the proposed agreement, its objectives and a draft text". The Commission would then authorise or reject the agreement and justify its decision. Assuming clearance form the Commission, the Member State concerned would have to consult it again before signing any agreement, and, if necessary, could be required to renegotiate any part not considered to be in the Community's interest.

The draft Decision, however, met a with a lukewarm response when the Council discussed it in December 1997. Although most States support the Commission's objectives, a majority made it clear that they preferred to achieve those objectives by making better use of existing legal instruments.