MARITIME TRANSPORT AND EC LAW AND POLICY

SEMINAR 4 CABOTAGE & SHORT –SEA SHIPPING

This Seminar will focus on maritime transport cabotage services and short-sea shipping

- cabotage
- short-sea shipping

Reading
Greaves, EC Transport Law, ch.4
Greaves The application of the EU common rules on competition to cabotage, including island cabotage (attached at the bottom of handout)

PART I CABOTAGE

Read attached article on the opening up of island cabotage services.

1. Legal Base
Article 91(1)(b)TFEU laying down the conditions under which non-resident carriers may operate within the Member States.

- almost completely in force since January 1999
- problems with island cabotage

1. ECJ Case-Law

Public service obligations
Article 4
Analir C-205/99 [2001] ECR I- 1271

Safeguards
Article 5

PART II    SHORT-SEA SHIPPING (alternative to road transport)

Considered by the Commission to be the lifeblood of all ports – to become a genuine inter-modal door-to-door concept

European Short-Sea Network Intermodal; short-sea containers are multi-? Seek (a) simplified and rationalization of procedures; (b) promotion of SSS services in ports; (c) interconnection and inter-operation of sea and land networks.

Commission introduced explosive eg electronic forms and now accepted
- COM(2006) 380 final
- COM(2004)453 final – Commission Communication on Short Sea Shipping
- Com(2003)155 final – Commission Communication with a Programme for the Promotion of Short-Sea Shipping


Council Resolution on the promotion of short sea shipping (OJ 2000 C56/3)
Note from Greek & Dutch delegations to Transport Council of 28/03/00 on the promotion of short sea shipping

Documentary procedures to be simplified at EU ports – Directive 2002/6 introduced EU-wide the harmonized use of the forms developed by IMO for ships leaving and arriving in EU ports – (IMO FAL forms)
THE APPLICATION OF THE EC COMMON RULES ON COMPETITION TO CABOTAGE, INCLUDING ISLAND CABOTAGE

Professor Rosa Greaves, Universities of Glasgow and Oslo

1. Introduction

The EC common rules on competition are set out in Chapter 1 of Title VI of the EC Treaty. They comprise two sets of rules: rules applying to undertakings, Articles 81 to 86, often referred to as the ‘EC competition rules,’ and rules on aids granted by States, Articles 87 to 89, better known as the ‘State aid rules’.

The EC competition rules apply to all economic sectors including transport but the procedural regulation adopted to implement those rules, Council Regulation 17/62, was not applicable to the transport industry. It was only in 1986, with the adoption of Council Regulation 4056/86 which laid down detailed rules for the application of Articles 81 and 82 EC Treaty to maritime transport, that procedural rules were established to implement the EC competition rules to this mode of transport.

Maritime transport services provided within a Member State (cabotage) have always been a sensitive area for the application of EC competition rules. Until the end of the twentieth century the national laws of a significant number of EU Member States restricted access to this market to ships registered under their own flag, and, often, to State owned operators. However, since January 1999 when the maritime cabotage services market became fully liberalised, there was no compelling reason as to why the EC competition rules should not fully apply to this market. Nevertheless, as far as island cabotage is concerned, the nature of the market has not changed much in the sense that the imposition of public service obligations or the award of public service contracts are often necessary in order to maintain a regular and efficient provision

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2 Regulation 141/62 (JO 1962 p.2753) excluded the transport industry from the scope of Regulation 17/62 (OJ (Sp Ed 1959-62) p.57) the first general procedural regulation adopted to implement the EC competition rules.
4 The Regulation has been repealed by Council Regulation 1419/2006, OJ 2006 L269/1. However the provisions concerning the block exemption of liner shipping conferences continued to apply until 18 October 2008. This significant change took place after the publication of the White Paper on the review of Regulation 4056/86 (COM(2004)675)
5 Greece was given an extension for island cabotage until 1 January 2004 for regular passenger and ferry services and services provided by vessels less than 650 grt (Article 6(3) of Council Regulation 3577/92, OJ 1992 L364/7).
of maritime services for passengers and goods throughout the year. Where such contracts exist, the Member States concerned may have to ensure that the process of awarding the contracts satisfy the EC public procurement rules. Furthermore, where the Member States compensate the operators for the public service obligations imposed, there may be issues of compatibility of the compensation with the EC State aid rules.6

The paper will first set the scene by placing cabotage services within the context of the development of the EC Maritime Transport Policy from 1986 to 1992. It will also briefly consider Council Regulation 3577/92 (the Cabotage Regulation)7 and the relevant European Court of Justice (ECJ) case-law.

Secondly, the paper will focus on the EC competition rules (Articles 81 and 82 EC Treaty), and consider the likely impact of these rules on cabotage services generally, given that these rules now apply to this type of maritime transport service.

Thirdly, the paper will consider island cabotage with particular focus on the tension between ensuring that a degree of competition exists in this market and acknowledging the public service function of these maritime transport services. The paper will not consider the EC public procurement rules in respect of the award of public service contracts but it will consider generally the application of the EC State aid rules to the grant of compensation when public service obligations are imposed.

2. The maritime transport services market

The transport industry, due to its distinct features,8 was not made subject to every general rule set out in the EC Treaty.9 The compromise that was reached in 1957 was to provide the means for the Member States to work towards a common transport policy10 governed by Title V (Articles 70 to 80) EC Treaty. In particular, Article 80(2) states that the EU Council ‘may….. decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.’ Prior to 1987 there existed no Community provision on the freedom to provide maritime services.11 The first significant liberalisation measure was adopted in 1986 with the enactment of the so-called ‘first maritime package of legislative measures’ which included Council Regulation 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.12

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6 Articles 87 to 89 EC Treaty
9 Article 51(1) EC Treaty expressly states that the ‘[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.’
10 Article 3(f) EC Treaty states expressly that one of the Community’s activities is the adoption of ‘a common policy in the sphere of transport.’
12 OJ 1986 L378/1.
This Regulation, however, excluded coastal shipping within one Member State (cabotage) from its scope. It was not until the adoption of Council Regulation 3577/92, applying the principle of freedom to provide services to maritime cabotage, that the legislative regime to open up the maritime transport services market to competition was completed.

2.1 The Cabotage Regulation and relevant ECJ case law

The liberalisation of maritime cabotage services was first proposed by the Commission as part of the first maritime package in 1986. Having failed to persuade all the Member States to include cabotage services in the liberalisation of maritime services, the Commission proposed a specific regulation in its 1989 second package of maritime measures. Due to lack of agreement, and the necessity to negotiate various compromises, the adoption of the Cabotage Regulation was delayed until 1992.

The scope of the Regulation is set out in Articles 1 and 2. The Regulation provides in Article 1(1) that Community shipowners who have their ships registered in a Member State and comply with all the conditions for carrying out cabotage in the home Member State, to offer cabotage in another Member State (the host Member State). According to Article 2(1) the Regulation covers mainland cabotage, off-shore supply services and island cabotage. Article 2(1) has been interpreted by the ECJ in an infringement action brought by the European Commission against Greece. The ECJ was asked to determine whether towage services on the open sea came within the scope of the Cabotage Regulation. The Court ruled that towage services cannot be regarded as falling within the scope of Article 2(1). Thus, the ECJ adopted a narrow interpretation of the scope of the Regulation. The Court was not prepared to extend the scope of Article 2(1) so as to cover any service incidental or ancillary to the provision of maritime transport services within

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13 Member States such as France, Greece, Italy, Portugal and Spain restricted mainland cargo cabotage and inland passenger services to ships carrying their national flag.
14 Above note 7.
15 The Cabotage Regulation, however, introduced the freedom to this market gradually. All maritime cabotage services were liberalised by January 1999, except for the Greek island cabotage market which was granted a 1 January 2004 deadline. Thus, as confirmed by the ECJ in Case C-285/05 Aktopolias v Naftilias [2006] ECR I-97, no rights on individuals were conferred by Article 6(3) of the Cabotage Regulation prior to January 2004 even where Greece had adopted national legislation implementing the Regulation.
16 Article 2(2) defines ‘Community shipowners’ in the same manner as Council Regulation 4055/86, OJ 1986 L378/1, namely Community nationals established in a Member State or established outside the Community but provide such services to others in a Member State. It also applies to shipping undertakings which are established outside the Community but are ‘controlled by nationals of a Member State’ on condition that the ship is registered ‘in that Member State in accordance with its legislation’. In addition, the Regulation provides expressly for the extension of its scope to nationals of third countries established in the Community if the EU Council do decides (Article 7 of Regulation 4055/86). To-date the Council has taken no such action.
18 Paragraph 33 of the judgment. This ruling is contrary to the Commission’s interpretation of the scope of Regulation 3577/92 as set out at page 8 of COM(2003)595 final.
the Member States. The essential characteristic of maritime cabotage is to serve the purpose of transporting passengers or goods by sea\textsuperscript{19} between two places in the territory of a single Member State.

The sensitivity of the Cabotage Regulation is further evidenced by various time derogations expressly allowed by the Regulation,\textsuperscript{20} the specific provisions on manning,\textsuperscript{21} safeguards\textsuperscript{22} and public service obligations\textsuperscript{23} as well as the duty imposed on the European Commission to report on the implementation of the Regulation every two years.\textsuperscript{24}

**Manning**

Some Member States were reluctant to allow the laws of the home (flag) State (the State where the ship is registered) to apply to the manning of the ship. Thus the provisions on manning set out in the Cabotage Regulation are the result of a compromise. The Regulation provides that the home State laws apply to the manning of ships that carry out mainland cabotage and are over 650 grt.\textsuperscript{25} However, host State laws on manning apply to ships under 650 grt carrying out mainland cabotage and to all ships operating island cabotage irrespective of size\textsuperscript{26} unless the latter are cargo ships, over 650 grt and engaged in consecutive island cabotage.\textsuperscript{27} The Commission, however, was requested to propose a legislative measure\textsuperscript{28} for the EU Council to adopt providing for uniform manning rules for seafarers. Some Member States were unhappy with the proposed measure which provided that seafarers from non-member countries working on board ships carrying out regular passenger and ferry services to enjoy identical employment conditions as those of the residents of the Member States. The proposal was eventually withdrawn in 2001.

The Cabotage Regulation does not specify which manning rules are the responsibility of the host State. In its 2003 Communication\textsuperscript{29} on the interpretation of Regulation 3577/92, the Commission expressed the view that the host State’s competence is not unlimited since it derogates from the fundamental EC Treaty principle of the freedom to provide services. The Commission considers that the host State may specify the crew’s nationality, require the seafarers to have EU social insurance cover and impose national minimum

\textsuperscript{19} The Court cited, with approval, the Greek Government’s reliance on Article 1(4) of Regulation 4055/86 (OJ 1986 L378/1) which states that services are to be considered maritime transport services ‘where they are ………… for the purpose of transporting passengers or goods by sea…..’

\textsuperscript{20} Article 6.

\textsuperscript{21} Article 3.

\textsuperscript{22} Article 5.

\textsuperscript{23} Article 4.

\textsuperscript{24} Article 10.

\textsuperscript{25} Article 3(1).

\textsuperscript{26} Article 3(2).

\textsuperscript{27} These are ships which although operating an island cabotage service, the cabotage leg of the journey follows or preceeds a voyage to and from another Member State (Article 3(3)).

\textsuperscript{28} Com(98)251 final.

\textsuperscript{29} COM(2003)595 final.
wage rules. However, as far as matters relating to safety rules and training (including languages spoken on board) are concerned, the most the host State may demand is compliance with Community or international rules in force such as the Conventions on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and on the Safety of Life at Sea (SOLAS).\(^{30}\)

The ECJ has not had an opportunity to rule on the scope of the host State’s competence on manning but it has been asked to interpret Article 3(3) of the Regulation in *Agip Petroli* Case.\(^{31}\) This provision states ‘……. for cargo vessels over 650 grt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state)’. The Italian authorities refused permission for a Greek registered tanker to take a cargo of crude oil from one port to another, both in Sicily, on the ground that the ship’s crew were not Community nationals. Although the tanker’s cabotage voyage was going to be followed by a voyage directly to another State, this was a voyage without a cargo on board (ie voyage in ballast). According to the Italian authorities Article 3(3) of the Cabotage Regulation applied only where the non-cabotage journey was functionally and commercially autonomous, that is, with cargo on board. The ECJ, relying on the liberalisation objective of the Regulation and the fact that it was not uncommon for voyages in ballast to take place,\(^ {32}\) ruled that Article 3(3) covers situations where the ship sails to another State in ballast.\(^ {33}\) The Court, however, acknowledge that where there was evidence that operators had set up artificially an international voyage in order to circumvent the application of the host state’s manning rules, they would not be able to rely on Article 3(3).\(^ {34}\)

Thus, although only one interpretative ruling has been delivered on the manning provisions, the Court’s ruling in *Agip Petroli* safeguards the principle of freedom to provide services and imposes on the host State the evidentiary burden to demonstrate that the voyage to the other Member State is not *bona fide*.

**Safeguard measures**

As stated above, safeguard measures are permitted under the Cabotage Regulation\(^ {35}\) in case of serious disturbance of the internal transport market due to the liberalisation of cabotage services. Normally, safeguard measures can only be granted by the Commission at the request of a Member State. However, in cases of emergency the Regulation permits unilateral provisional measures to be adopted by the Member State concerned but they may only remain in force for three months and must be notified the Commission.

\(^{30}\) Ibid at point 4.1.

\(^{31}\) Case C-456/04 *Agip Petroli* SpA v Capitaneria di porto di Siracusa et seq [2006] ECR I-3395 (second Chamber).

\(^{32}\) Paragraphs 13 and 17 of the judgment.

\(^{33}\) Paragraph 15 of the judgment. This conclusion is different from the one expressed by the Commission in its Interpretative Communication (COM (2003)595 final) at point 4.2.

\(^{34}\) Paragraph 25 of the judgment.

\(^{35}\) Article 5.
Where the Commission takes action, the safeguard measure may take the form of a temporary (not to exceed twelve months) exclusion of the area concerned from the scope of the Regulation. The only safeguard measure adopted to-date was in 1993 when Spain acted unilaterally by suspending the application of the Cabotage Regulation for three months. In conformity with its obligation under the Regulation, Spain notified the Commission. Although the Commission abrogated the Spanish measure\(^36\) as it did not consider the situation to be an emergency, it did permit Spain to suspend the application of the Regulation for certain cabotage services\(^37\) for two consecutive periods of six months.\(^38\)

### Public service obligations/contracts and island cabotage

Member States with island territories have always been concerned that the opening up of the cabotage services market may endanger the provision of regular passenger and goods services to, from and between islands.\(^39\) These maritime links are important for the island communities in order for them to sustain their economies. Thus State intervention may be required when the routes are not adequately served by the market. The Cabotage Regulation expressly permits the imposition of public service obligations\(^40\) and the conclusion of public service contracts on a ‘non-discriminatory basis in respect of all Community shipowners’.\(^41\) In imposing public service obligations States may require prior authorisation or operate a licensing system.

The ECJ’s ruling in *Analir*\(^42\) confirmed that prior administrative authorisation\(^43\) and the award of public service contracts are compatible with the Cabotage Regulation as long as three conditions are met. First, the Member State has to provide evidence that there is a real need for State intervention arising from the inadequacy of the regular transport services under conditions of free competition. Secondly, the Member State must demonstrate that the prior administrative authorisation is necessary and proportionate to the aim

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\(^36\) Decision 93/125, OJ 1993 L49/88.
\(^37\) The transport of break-bulk general cargo, transport of dry bulk cargo and transport of chemical products in specialised tankers.
\(^38\) Decision 93/396, OJ 1993 L127/33.
\(^39\) According to the Commission’s Interpretive Communication (COM(2003)595 final) point 5.1, long estuaries or fjords which lead to a detour of about 100 km by road may be treated as islands for the purposes of public service provisions as they cause a similar problem of isolation.
\(^40\) These are obligations imposed on the service provider to ensure standards of continuity, regularity, capacity and pricing which a purely commercial operator might not otherwise assume.
\(^41\) Article 4 of the Cabotage Regulation.
\(^42\) Case C-205/99 *Asociacion Professional de Empresas Navieras de Lineas Regulares (Analir) and others v Administracion General del Estado* [2001] ECR I-1271 (Full Court). A Spanish shipowner association (Analir) sought annulment of a Spanish law as inconsistent with the Cabotage Regulation. The Tribunal Supremo of Spain sought a ruling on several questions relating to the interpretation of Article 4 of the Regulation.
\(^43\) It should be noted that the Commission in the Interpretive Communication (COM(2003)595 final) expressed the view that it would be difficult for a Member State to introduce an authorisation system after the entry into force of the Regulation without infringing the standstill provision set out in Article 7 of the Cabotage Regulation.
pursued. Finally, the Member State has to show that the devised scheme is based on objective and non-
discriminatory criteria that are transparent to the undertakings concerned. The Court also ruled that a prior
administrative authorisation scheme is not incompatible with the Cabotage Regulation by being subject to
conditions other than those set out in Article 4(2) of the Regulation. Thus the Spanish requirement that
those operating these services should have no outstanding tax or social security debts was permitted. The
Court held that the solvency of a Community shipowner is an important and relevant factor to be taken into
account in establishing whether the undertaking concerned has the ‘capacity to provide the service’ within
the meaning of Article 4(2).

The ECJ also ruled that public service obligations and public service contracts may co-exist concurrently or
as alternatives on the same route in order to ensure the regular traffic to, from or between islands as long as
they are applied on a non-discriminatory basis, justified in relation to the public interest objective pursued
and consistent with the principle of proportionality. The Court stated that the two methods have the same
objective but differ in nature and degree. The Court agreed with Advocate General Mischo\(^44\) that situations
could be envisaged where the imposition of public service obligations may not be sufficient to achieve the
objectives. A public service contract sets out the transport services to be performed for consideration which
normally is a financial one. It gives the Member State contractual guarantees. Public service obligations, on
the other hand, are imposed in the absence of a contract. The provider determines which services it will
offer subject only to the obligations imposed by the Member State. Sometimes financial compensation may
be available but the provider has greater control over the services it provides.

In concluding public service contracts or imposing public service obligations, Member States also have to
comply with the Community’s directives in respect of public procurement contracts\(^45\) and the EC Treaty’s
provisions on State aids rules (Articles 87 to 89 EC Treaty). As already stated above, a detailed discussion
on the application of the public procurement rules to public service contracts is outside the scope of this
paper but the application of the State aid rules will be discussed below in section 3.2.

2.2 The impact of the Cabotage Regulation on national markets

The Commission 4\(^{th}\) Report on the implementation of this Regulation, published in 2002,\(^46\) concluded that
penetration by foreign ships into the national cabotage services market remains limited in the majority of

\(^{44}\) Paragraphs 109-111 of the Opinion.

\(^{45}\) In its Interpretative Communication, the Commission expressed the view that abiding by the public
procurement rules would entail ‘at the minimum, a sufficient degree of publicity, in order to ensure an
effective competition, as well as the organization of a transparent and non-discriminatory selection
procedure proportionate to the aim to be achieved’ at point 5.4, page 15.

the Member States. A 5th Report to be published in 2008 is expected to conclude that maritime cabotage is surviving where there is no competition from other modes of transport.\textsuperscript{47} It is also evident that the cabotage market penetration of ships flying non-Member States flags is very reduced. However, the nature of the market is changing with more ships providing combined cabotage and international maritime transport services. As far as island cabotage is concerned, these are mostly served by public service lines of mixed cargo and passenger type.

The impact of opening up the cabotage services market varies. Some Member States have not been affected at all,\textsuperscript{48} some have completed the liberalisation of maritime cabotage by the deadline,\textsuperscript{49} whilst others,\textsuperscript{50} which were permitted to implement the Cabotage Regulation gradually, were affected in different ways. For example, the Cabotage Regulation produced no impact on the evolution of the maritime cabotage services market for France since, in practice, France applied the host State rules as established by the Regulation. Nevertheless, the Commission took infringement action against France for failing to amend national law within a reasonable period. France failed to amend a provision of the 1977 Customs Code which provided that French cabotage services were reserved for ships flying the French flag. France had taken administrative measures\textsuperscript{51} to ensure temporary application of the Regulation but the ECJ affirmed\textsuperscript{52} the Commission’s position that these steps were insufficient to discharge France’s EC Treaty obligation to remove national law incompatible with Community law.\textsuperscript{53}

Similarly, the introduction of the Cabotage Regulation appears to have had no significant impact on the Italian cabotage market where both goods and passengers are transported in cabotage by ships flying the Italian flag. Although there is some evidence of some ships flying non-Member States flags appearing on the cabotage market, they have not remained in the market.

Some Member States such as Greece and Portugal, with significant island cabotage, have not suffered a detrimental impact due to the existence of public service contracts (Greece) and public service obligations

\textsuperscript{47} The description of the cabotage market in this section relies on the unpublished material, namely the conclusions prepared on the economic developments in maritime cabotage for the forthcoming 5th Report.
\textsuperscript{48} Belgium, Ireland, Netherlands, Latvia, Lithuania and Slovenia as well as Cyprus, Estonia, Malta and Poland where cabotage is practically irrelevant.
\textsuperscript{49} Denmark, Finland, Germany, Sweden, United Kingdom, Iceland and Norway.
\textsuperscript{50} France, Greece, Italy, Portugal and Spain.
\textsuperscript{51} A circular setting out the terms of the Cabotage Regulation and a footnote had been added to the Customs Code.
\textsuperscript{53} The ECJ relied on an established principle of Community law that a breach of a EC Treaty obligation exists where a Member State retains a national law incompatible with Community law even where the Community measure, such as the Cabotage Regulation, is directly applicable within the national legal orders of the Member States. In June 2007 the Commission sent Spain a letter of formal notice for failing to abide by the ECJ’s judgment in Case C-323/03 Commission v Spain [2006] ECR I-2161 (Second
Greece awards public service contracts after a call for tender. The contracts contain provisions for the operating the public service routes and thus a considerable cost rise for these services is a direct consequence of the liberalisation of island cabotage. Portuguese cabotage services are subject to public service obligations whose provisions are transparent, non-discriminatory and open to all operators wishing to offer these services. For both Greece and Portugal the host-State rules for manning permitted by the Cabotage Regulation for island cabotage are very important on these trades for safety and social reasons.

The Spanish cabotage market has been mainly concerned with applying host-State rules and thus avoiding ships operating these services with lower fixed seafarers costs, namely ships registered in non-Member States.

Thus, almost ten years from the full liberalisation of maritime cabotage services, the market is diminishing for cargo traffic between mainland territory ports and it is only marginal in respect of cargo traffic between small islands. Furthermore, there is a blurring of the limits between international maritime services and cabotage services as more ships operate these services consecutively. As for passenger cabotage services are concerned, it is marginal between ports on the mainland territory with the possible exception of seasonal market for tourists. Passenger services between islands are subject to public service obligations or public service contracts whilst those from and to mainland-island services retain their importance since these routes can only be serviced by ferries.

3. The EC common rules on competition and the maritime transport services market

In this section the application of the EC competition rules to maritime transport will be explained briefly followed by an analysis of their application to maritime cabotage services. Then, EC State aid rules will be considered in the specific context of island cabotage services market.

3.1 The EC competition rules

As stated in the introduction above, Regulation 4056/86 was adopted in order to lay down detailed rules for the application of the EC competition rules to the maritime transport services industry. Regulation 4056/86 was a hybrid instrument since it provided the procedural rules for the enforcement of the EC competition
rules to maritime transport services and also contained specific substantive rules in respect of exceptions and block exemptions for certain categories of maritime agreements which were likely to be anti-competitive within the meaning of Article 81(1) EC Treaty. As far as Article 82 EC Treaty is concerned, Article 8 of Regulation 4056/86 reiterated that this Article applies directly without the need for a prior decision. For example, where the conduct of an exempted liner conference had effects incompatible with Article 82, the Commission had the power to withdraw the benefit of the automatic exemption, but before taking a decision the Commission was empowered to address to the conference recommendations for termination of the infringement. However, this Regulation applied ‘only to international maritime services from or to one or more Community ports’ and thus it did not apply to cabotage.

The modernisation of EC competition law regime

The European Commission proposed the modernisation of EC competition law in a White Paper issued in 1999. Competition law legislation already adopted in 1999 and 2000 is also considered to be part of the modernisation process. This legislation consists of the third generation of block exemption regulations dealing with vertical agreements and horizontal cooperation agreements, namely specialisation agreements and research and development agreements. Post 1999 modernisation measures introduced a more economic approach to the enforcement of Article 81 EC Treaty. The policy adopted is no longer one of prescribing the restrictions that can be included in an agreement but rather to list fewer forbidden

55 These are routes which are used by passengers and private cars and/or commercial distribution vehicles.
56 Article 2 provided exception for certain technical agreements.
57 Block exemption regulations permit agreements that comply with specified conditions and obligations to be exempted from the prohibition of Article 81(1). Article 6 of the Regulation granted an exemption for agreements between transport users themselves or between users and conferences concerning rates, conditions and quality of liner services. Furthermore, Article 5 of the Regulation contained detailed provisions as to when the liner conference agreements themselves could be exempted en bloc from the prohibition of Article 81(1). Consortia agreements remain exempted under Regulation 823/2000, OJ 2000 L100/24.
59 Article 1(2).
60 The Regulation also did not apply to tramp services.
restrictions (the so-called hardcore restrictions) that, if included, will deny the agreement automatic protection under the block exemption regulation. Whether agreements between undertakings benefit from an automatic exemption from the prohibition of Article 81 (1) is primarily determined by the size of the market share of the undertakings concerned. Larger undertakings will have to carry out a self-assessment applying both Article 81(1) and 81(3) to determine whether their agreements are lawful. Thus, innovative ways of doing business may be developed more easily without fear of losing the protection afforded by these legislative derogations. Most block exemption regulations are accompanied by detailed guidelines to assist the undertakings and their advisers as to whether the agreement fall within the scope of the regulation. The guidelines also provide useful guidance on the evaluation of whether agreements falling outside the block exemption regulation may, nevertheless benefit from the exception under Article 81(3) EC Treaty.

However, the most significant change that has taken place post 1999 was the adoption of Regulation 1/2003 that has had a major impact on how EC competition law is applied and enforced. Regulation 1/2003 abolished the notification system as well as the Commission’s exclusivity to grant individual exemptions under Article 81(3) EC Treaty. Thus a radical change of policy on the enforcement of EC competition rules took place. National competition authorities became directly involved in the enforcement of the EC competition rules, thus providing an effective solution to the inability of the European Commission to cope with the very large amount of notifications. A European competition authorities’ network (ECN) was established to provide, inter alia, the mechanism for more experienced national authorities to share best practices, the forum to deal with the allocation of cases in order to avoid duplication of work or contradictory decisions, and to assist in maintaining a coherent and effective system of enforcement. Regulation 1/2003 has been amended by Regulation 1419/2006 to bring maritime transport under the common competition enforcement regime applicable to all economic industry sectors.

Application of EC competition rules to cabotage services

Guidelines are available to assist undertakings (and/or their advisers) in assessing the compatibility of their agreements with Article 81 EC Treaty. For example, Commission Notices on Agreements of Minor Importance (OJ 2001 C368/13); on the application of Article 81(3) EC Treaty (OJ 2004 C101/97) and on the meaning of ‘affect trade between Member States’ (OJ 2004 C101/81).

The most relevant one for the provision of maritime services are those concerning horizontal cooperation agreements. Above at note 63.


Commission Notice on cooperation within the Network of Competition Authorities OJ 2004 C101/43.

OJ 2006 L269/1.
How will the new competition regime apply to maritime cabotage services? Any agreements/arrangements between cabotage operators (competitors) or between cabotage operators and other service providers (non-competitors) that affect trade between Member States will have to be compatible with Article 81(1) EC Treaty. Agreements restricting competition within the meaning of Article 81(1) may be lawful provided that they meet the four conditions set out in Article 81(3) EC Treaty. Such agreements must increase efficiency and enable consumers to receive a fair share of the resulting benefits as well as not containing any restriction which is not indispensable to the attainment of these objectives and, finally, not to eliminate competition arbitrarily. The Commission has issued draft guidelines on the application of Article 81 EC Treaty to maritime transport to assist undertakings and their advisers as to how to apply Article 81 to various maritime arrangements. In the guidelines the Commission sets out the principles it applies when defining markets and assessing cooperation agreements in the maritime sector. It also emphasises that existing guidelines such as those concerning the application of Article 81 EC Treaty to horizontal agreements and guidelines concerning the application of the exception under Article 81(3) EC Treaty are particularly relevant to maritime arrangements. Although the guidelines do not specifically address cabotage services, they will be relevant insofar as cabotage services are provided either as liner or tramp shipping services. The burden is now on undertakings and their advisers to assess correctly the compatibility of their business arrangements with Articles 81 and 82 EC Treaty. There is no longer the possibility of notifying their agreements to the European Commission and seek either a declaration of inapplicability of Article 81(1) or an individual exemption under Article 81(3).

The provider of cabotage services, particularly where they have been awarded a public service contract, and are therefore the sole operators on a particular route, may be considered to be in a dominant position within the meaning of Article 82 EC Treaty. Although that position must be held in a substantial part of the common market, individual ports have been held to meet that condition and so that condition can easily be met in the context of the cabotage market. If the undertaking concerned holds a dominant position their market conduct must not be abusive within the meaning of Article 82. It is the abusive conduct, not the dominance of the undertaking that is incompatible with Article 82 EC.

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70 For example, an agreement between A, a shipping undertaking offering cabotage services in Member State A, and B, another undertaking offering similar cabotage services in Member State B, not to attempt to compete on each other’s territory.
73 OJ 2004 C101/97.
74 Above note 71 at paragraph 10 of the Draft Guidelines.
Infringement of the EC competition rules may result in heavy fines\(^75\) and there is always the possibility of a private enforcement action given that Articles 81 and 82 have direct effect and may be relied on in private litigation before national courts.

### 3.2 The State aids rules

Another important set of competition rules, particularly as far as island cabotage is concerned, are those on State aids, namely Articles 87 to 89 EC Treaty. State aids refer to subsidies and other measures which public authorities give to industrial and commercial undertakings, and are generally considered to distort competition by favouring certain operators. Article 73 EC Treaty complements the general EC Treaty State aids provisions within the specific context of the transport industry by providing two additional exceptions, one of which is particularly relevant to cabotage services. This exception concerns aid that is a ‘reimbursement for the discharge of certain obligations inherent in the concept of a public service.’\(^76\) This refers to a well-defined and established practice\(^77\) whereby the State compensates undertakings for the cost of providing services that the undertakings are required to provide by law or acts of a public authority. Public service obligations, a concept that originates from French administrative law, has been defined in Article 2(4) of the Cabotage Regulation as ‘obligations which the Community shipowner in question, if he were considering his own commercial interests, would not assume or would not assume to the same extent or under the same conditions.’\(^78\)

The objective of Article 73 EC Treaty is to ensure that national measures adopted to coordinate transport, and any State aids that may be granted together with such measures, are compatible with the Common Transport Policy and to allow for conditions of competition to exist. Article 87 EC Treaty sets out the basic prohibition together with a number of mandatory and discretionary circumstances where State aids will be compatible with the common market. Unlike the EC competition rules regime described above, the European Commission has exclusive discretion in deciding whether the State aid meets the conditions set out in Article 87(3).\(^79\) Article 88 EC Treaty is concerned with enforcement. The Article requires the Commission to monitor State aids, imposes a duty on Member States to notify State aids to the Commission before putting them into operation and provides for a Commission investigative procedure to

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\(^{75}\) Regulation 1/2003 permits fines to be imposed up to 10% of the annual turnover of the undertakings concerned.

\(^{76}\) Article 73 EC Treaty.

\(^{77}\) See section 2.1 above for further details.

\(^{78}\) The concept was originally defined in Article 2 of Regulation 1191/69 (OJ 1969 L156/1) in the context of transport by road, rail and inland waterways. The concept has also been clarified by the European Court of Justice in Case 36/73 Netherlands Railway Company of Utrecht v Netherlands Minister of Transport and Waterways [1973] ECR 1299.

\(^{79}\) Article 87(3) EC Treaty permits 5 situations where the aid may be considered to be compatible with the internal market.
be undertaken.80 The most recent guidelines on State aids to maritime transport were published in 200481 and they do apply to cabotage services.82

3.3 Island cabotage and public service obligations/contracts.

As already identified above, public service obligations are a common feature of island cabotage and Member States are permitted to intervene, in a non-discriminatory manner, where there is a market failure to provide lifeline island cabotage.

As far as public service contracts are concerned a simplified public procurement procedure is available where the service is to be provided to small islands which are defined as less than 300,000 passengers per year.83 The simplified procedure enables Member States to have a call for expressions of interest with no need for a formal tender call as long as the procedure is transparent and non-discriminatory.84 The simplified procedure applies to both passenger and goods but in the latter case only where the service cannot be provided under competitive conditions.85

When imposing public service obligations or awarding public service contracts, Member States may have to provide financial compensation where the shipping services required would not otherwise be provided by private commercial operators.86 In such cases, the financial compensation itself may be incompatible with the State aid rules and require notification to the European Commission under Article 88 EC Treaty.

The most significant ECJ ruling on the compatibility of financial compensation with the EC State aid rules is Altmark.87 Soon after the ECJ ruling, the European Commission published a Communication on a framework for State aid in the form of public service compensation88 but the transport sector is excluded from its scope.89 Although the Altmark ruling was delivered in the context of inland transport, the principles set out in the ruling are of general application. The ECJ stated that compensation for public

80 As far as maritime transport is concerned the Commission has adopted a series of directives in order to assist the ship-building industry.
81 OJ 2004 C13/3.
82 Ibid at point 2, 3rd paragraph, on the scope and objectives of the guidelines.
84 A Scottish example can be given where a six year public service contract was awarded to CalMac Ferries Ltd in 2007 to operate lifeline ferry services for the communities of the Clyde and Hebrides.
85 The European Commission issued a reasoned opinion under Article 226 EC Treaty to Greece at the end of 2005 claiming the latter to have failed to comply with the maritime cabotage rules. The Commission considered that Greece had not provided evidence for the need to impose on almost all intra-island shipping services, public service regimes.
86 For example, the contract awarded to CalMac Ferries Ltd (see above note 84) included a £43 million subsidy for the first year of operation alone.
87 Case C-280/00 Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747 (Full Court).
services does not constitute a State aid within the meaning of Article 87(1) EC Treaty where the following four conditions are met. First, the operator of the service must be required to discharge public service obligations and the obligations themselves must be transparent, that is, clearly defined. Secondly, the methodology for calculating the compensation has to have been established in advance in an objective and transparent manner. Thirdly, the compensation must not exceed what is necessary to cover the cost incurred in discharging the public service obligations. Finally, where a public procurement procedure has not been applied, the level of compensation has to be determined on the basis of an analysis of the costs that a typical and efficient undertaking would have incurred in discharging the obligations. In respect of the third and fourth conditions relevant receipts and reasonable profit for discharging the obligations are to be taken into account. If the conditions are met, the Member State has no obligation to notify the European Commission.

However, where a State aid is given, the 2004 Commission Communication on the guidelines on State aid to maritime transport90 sets out the parameters within which State aid to maritime transport would be approved under Article 87(3)(c) EC Treaty91 and/or Article 86(2)92 EC Treaty which governs undertakings entrusted with the operation of services of general economic interest. The guidelines reiterate that public service obligations and contracts may be imposed on island cabotage as provided in Article 4 of the Cabotage Regulation.93 Public service contracts should not be awarded for longer than six years.

4. Concluding observations

For some Member States the opening up of maritime transport cabotage services market was considered undesirable, particularly as far as island cabotage was concerned. There were fears that private commercial undertakings, operating under the flag of the home State, would enter the island cabotage market but be only interested in offering shipping services on profitable routes and avoid the host State’s manning rules.

89 Ibid at point 3.
90 Above note 81.
91 This Treaty provision states that ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’
92 This Treaty provision states that ‘[U]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.’ The European Commission has adopted a Decision (OJ 2005 L312/67) on the application of this Treaty provision in respect of compensation granted to such undertakings. This Decision does not apply to inland transport but it does to maritime transport services (paragraph 18 of the preamble and Articles 2(1)(c) and 2(2)). Thus compensation for the provision of public service obligations/contracts has to fulfill the conditions set by this Decision as well as those contained in the Cabotage Regulation.
93 Point 9 of the guidelines.
This would have been disastrous for some remote island communities whose isolation is a matter of concern.

The Cabotage Regulation recognised the importance of island cabotage and provided conditions that have proven sufficient to enable Member States to ensure that shipping services are maintained in unprofitable routes where island cabotage services are operated under public service obligations or under public contracts where financial compensation is often granted. Nevertheless, Greece still maintains national laws whose compatibility with the Cabotage Regulation is doubtful. Such rules make market access even more difficult for shipping undertakings established elsewhere in the EEA as it prevents them from competing for the award of public service contracts servicing the Greek islands.

Thus, as far as the island cabotage services market is concerned, the anti-competitive practices that have been investigated to-date have been limited to failures of the Member states to implement the Cabotage Regulation and to breaches of the EC State aid rules rather than the EC competition rules. It is difficult to envisage much change on this market for the foreseeable future.

94 For a full discussion of these Greek national measures, see Chapter ?????