question. The Committee asks the Commission to forward the studies referred to in point 2 above as soon as possible, to enable its Opinion to be taken on an informed basis.

Done at Brussels, 30 January 1991.

The Chairman

of the Economic and Social Committee

François STAEDELIN

Opinion on the proposal for a Council Regulation (EEC) on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies[1]

(91/C 69/05)

On 3 July 1990 the Council decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Transport and Communications, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 16 January 1991. The Rapporteur was Mrs Bredima-Savopoulou.

At its 283rd plenary session (meeting of 30 January 1991) the Economic and Social Committee adopted, by 84 votes to 11, with 26 abstentions, the following Opinion.

1. Introduction

1.1. In December 1986 the Council adopted four regulations in the maritime transport sector[2] which constituted the first stage of a common EC policy. In the context of this report, Regulation (EEC) No 4056/86 is the most relevant. On the legal basis of Articles 84(2) and 87 of the Treaty this laid down detailed rules for the application of Articles 85 and 86 to maritime transport. A block exemption was granted in respect of liner conferences subject to certain conditions and obligations to protect the interests of transport users. The Regulation entered into force on 1 July 1987.

1.2. At the time of the adoption of the four regulations, the Council also invited the Commission to consider whether it was necessary to submit new proposals regarding competition in passenger transport, tramp shipping, consortia in liner shipping and agreements between transport users. The Commission undertook to report to the Council within a year on whether it was necessary to provide for block exemptions for passenger-transport services and consortia in liner shipping. The Council noted at that time that 'where the object and effect of joint ventures and consortia is either to achieve technical improvement or cooperation as provided for in Article 2 of the Regulation or where close-knit consortia only cover minor market shares the prohibition laid down in Article 85(1) of the Treaty does not apply to them.'

1.3. With respect to consortia, the Commission had already held a hearing in April 1986 in which all sides of the shipping industry and representatives of the Member States were heard. The objective was to clarify the replies to a questionnaire distributed by the Commission and to obtain additional information on the nature of consortia and in particular how they differed from conferences. Fairly regular discussions between the Commission and industry have taken place in the intervening period.

(1) OJ No C 167, 10. 7. 1990, p. 9.
(2) OJ No L 378, 31. 12. 1986.

1.4. In January 1988 the Commission made an interim report in which it concluded that it was not in possession of sufficient evidence to justify a block exemption for consortia. Further information from shipowners was requested in order to facilitate the Commission's deliberations and analysis.

1.5. An examination of certain specific consortium agreements led the Commission to find that there were certain types of clauses which could be regarded as being likely to meet the requirements for an exemption under Article 85(3) of the Treaty and could therefore be granted an individual exemption under the accelerated and simplified opposition procedure pursuant to Article 12 of Council Regulation (EEC) No 4056/86. With respect to other clauses and arrangements in consortia agreements in particular regarding pooling of costs and revenues it was felt that the Commission would need to examine them case by case.

1.6. The need for clarification of the position of consortia vis-à-vis the competition rules was identified by the Commission in its report on 'Measures to improve the operating conditions of Community shipping' [1], as being one of the positive measures to increase competitiveness of the Community fleet.

1.7. The Economic and Social Committee in its Opinion on the above measures [2] noted:

> 'the importance and practical cooperation and rationalization of the type provided by liner consortia, particularly in the circumstances of over-tonnaging ... the importance of reaching an acceptable and early solution to this issue, similar to that achieved for liner conferences in the first stage of shipping policy.'

1.8. After considerable deliberation following the receipt of further information on consortia, the Commission produced in June 1990 a 'report on the possibility of a group exemption for consortia agreements in liner shipping', with attached proposal for a 'Council Regulation on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies.' [3].

2. General comments

2.1. *Definition and background of consortia*

2.1.1. The Commission recognizes the considerable variety and complexity of the consortia concept. A categorical definition has proved difficult to obtain. However, consortia can broadly be defined as cooperative ventures in the liner sector (of varying degrees of closeness), in which the lines involved engage in a (varying) range of activities on a joint basis, in order to achieve the necessary advantages of economy of scale and of service rationalization in a particular trade. The degree of integration and the breadth of joint activity vary according to the needs and circumstances of the trade in question, but the consortium mechanism preserves as far as possible individual liner company identity.

2.1.2. Consortia generally combine the concepts of vessel cost sharing and cargo pooling. Participants in consortia commit themselves to the venture through a cost sharing system whereby, in effect, all vessels become a joint responsibility. The responsibility for providing containers normally rests with the individual participants for whom they serve as an important means of retaining corporate identity. Members usually carry each other's containers on each other's vessels under mutual slot charter or other space-sharing arrangements.

2.1.3. As indicated a considerable variety of consortia types exists, with groups which are akin to profit-making companies at one end of the scale and looser groups, only a little more formed than space-sharing arrangements, at the other. Areas where consortia may agree to cooperate include: joint scheduling, space/slot exchange, equipment pool, joint operational office, joint-terminal operation, joint-terminal contracts, cargo pool, revenue pool, net-results pool, holding of conference voting rights, joint marketing, joint bills of lading, joint price fixing, joint consolidation and joint haulage. These functions are set out in tabular form in Annex 1 of the Commission's report.

2.1.4. Parties in a consortium accept limitations upon their own autonomy as individual companies within a framework of agreed cooperation, subject to review after fixed periods.

[1] Doc. COM(89) 266 final of 3 August 1989.
[2] OJ No C 56, 7. 3. 1990, p. 70.
[3] Doc. COM(90) 260 final of 18 June 1990.

2.1.5. Consortia are fairly recent phenomena born out of the container revolution in the 1960s/70s which called for the building of much larger ships to effect economies of scale and increase ship productivity. The degree of investment needed to re-equip to meet such technology innovation was beyond the capability of most single shipowners. It became clear then that the vast majority of existing liner companies were no longer the optimum commercial unit for raising the huge capital sums involved.

2.1.6. Many of the shipping lines which once provided conventional liner-cargo services grouped together to form consortia, first at national level and then also internationally. This both facilitated the funding of the substantial capital investment required and also enabled coordination of the substantial reduction in the number of cargo vessels which containerization necessitated (1 containership replacing about 5-7 conventional ships). It also permitted the maintenance of frequent regular services through slot chartering which would not otherwise have been possible for large numbers of individual companies. Examples here include trades (such as those with Central America or West Africa) where there are several countries at each end of the route, but the cargo moving in either or both directions warrants only one or two ships each month.

2.1.7. In the same way that the formation of liner conferences a century ago was an example of structural adjustment of commercial pressures through the best use of existing shipping resources on individual routes, so the mechanism of consortia has provided the means of transition from conventional shipping to container shipping by pooling resources and collectively building the correct number of ships most suited to the trade in question.

2.2. *Usefulness of consortia*

2.2.1. There has been widespread recognition of the value and usefulness of consortia as tools of rationalization in the container age. In its report on consortia the Commission states its belief that the 'Community shipping industry needs to attain the necessary economies of scale to compete on the world liner shipping market' and that 'consortia can help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress'. The Committee subscribes to these findings.

2.2.2. Moreover, the users of shipping services offered by consortia reap important benefits resulting from their operation: they are assured regular sailings, economies of scale are made in the use of vessels and port installations; consortia offer high quality services by using more modern vessels, equipment and port installations; by pooling services consortia respond to the call of numerous shippers for more efficient door-to-door shipments. The Committee subscribes to the above merits of consortia for shippers listed in the Commission report.

3. Specific comments

3.1. In light of the indisputable commercial value of consortia, the Committee believes that a regulatory regime for them under the EC competition rules is necessary based upon two premises: preservation of a free competitive environment whilst avoiding as far as possible, bureaucracy. The Committee acknowledges the economic importance of consortia in view of the fact that nowadays they are increasingly taking over the role of conferences in the liner trades and this trend is expected to continue. Moreover, the Committee recognizes that consortia are a relatively new phenomenon—as contrasted to liner conferences—and since structural changes are proceeding rapidly in world shipping, the Community has to move cautiously vis-à-vis their legal treatment. The Committee also notes that in practice consortia with a pure Community constituency are non-existent (see annexes of the Commission Report). In fact most of them consist of Community partners together with non-EC European or even other country partners. Thus, the link of their legal treatment to EC positive measures for competitiveness of the Community fleet would in practice entail extending the benefit of positive measures to non-Community interests.

3.2. The Commission's proposed Council Regulation enables it to grant a group exemption pursuant to Article 85(3) of the Treaty. The draft Council Regulation envisages a group exemption also for multimodal consortia which would cover the inland transport activities of consortia. Conditions and obligations attaching to the group exemption will be decided at a later stage in a Commission Regulation. According to the Commission's report 'the details of these requirements can only be fixed after further consultations with parties concerned and with Member States'. It is the Commission's intention to cover under a broad and far-reaching group exemption 'as wide a variety as possible of the kinds of clauses which are found in consortia agreements'.

3.3. *Regulatory regime for consortia*

3.3.1. With regard to the most efficient regime for consortia under the EC competition rules, the Commit-

tee has explored several possibilities. Namely, no regulation at all, amendments of Regulation (EEC) No 4056/86 granting block exemption, a new Regulation granting block exemption and an individual exemption on a case-by-case basis. Decision on one course of action presupposes decision on the following issues: whether consortia are tantamount to liner conferences, whether they restrict competition and whether they provide efficient services to shippers.

3.3.2. Some interested circles feel that consortia do not restrict competition. Alternatively, if it is found that they do restrict competition, for the sake of simplicity and consistency with treatment for liner conferences, they argue for an amendment of Regulation (EEC) No 4056/86 rather than an independent self-contained regulation. Other interested circles feel that consortia restrict competition and perform different functions compared to conferences and, therefore, their regulatory regime cannot be covered by Regulation (EEC) No 4056/86 but under a new Regulation taking into account their specific characteristics. Yet other interested circles feel that, in view of the variety of types of consortia agreements and their complex form, the Commission can only proceed by way of an individual exemption, each consortium being judged on its own merits on a case by case basis. However, the Committee agree that whatever the final form of legal treatment to be applied to consortia, it should provide for a high degree of transparency of their operations.

3.3.3. On balance, the Committee finds that consortia do provide efficient services to shippers and are not tantamount to liner conferences. In some instances they have stimulated competition but in other instances they have restricted competition. Although a wide variety of consortia types exist with different functions, it is possible to identify certain common characteristics justifying a common legal regime for them.

3.3.4. In light of the above considerations, the Committee—steering a middle course of action—believes that a new independent Regulation granting block exemption is required. This Regulation is necessitated by the fact that consortia perform different functions as compared to liner conferences. Since consortia in some cases restrict competition, a block exemption under Article 85(3) seems desirable, taking into account the benefit deriving to shippers from consortia operations.

3.4. *Procedural approach*

3.4.1. With regard to the best procedural approach concerning the regulatory regime of consortia, the Committee notes that the Commission is proposing a Council Regulation on block exemption enabling the Commission to proceed by Regulation and define the terms and conditions for such an exemption. The Committee has explored the alternative possibility of proceeding by way of a Council Regulation granting block exemption and defining at the same time its terms and conditions. Such an option falls upon the stumbling block of the so-called institutional issue and runs counter to standard practice. Namely, it has been standard practice for the Council to adopt a Regulation enabling the Commission to issue a Regulation on the application of Article 85(3) of the Treaty to various sectors of economic activity [1]. This was the case with civil aviation, exclusive distribution agreements, patent licensing, specialization agreements. The Economic and Social Committee invariably has delivered favourable Opinions [2] to this practice. Despite apprehensions expressed that proceeding in such a way would amount to giving a blank cheque to the Commission on maritime transport, on balance this procedure can be accepted provided that, before adoption of the enabling Council Regulation, the Commission will reach agreement with interested parties on the specific terms and conditions of the group exemption. The Committee is convinced that there is no need to depart from standard practice, subject to prior commitment of the Commission on the specific terms of the group exemption in order to avoid unpleasant surprises.

3.4.2. Adoption of the enabling Regulation mechanism has the concomitant advantage of legal certainty which will be created by the quick adoption of a Council Regulation, to remove the state of uncertainty in which consortia are confined today as regards their legal treatment under EC competition law. On the other hand, discussions on the precise terms and conditions of a block exemption may take a long time to mature between the Commission, Government experts and interested circles. Meanwhile, a block exemption would have been granted under the Council Regulation enabling the Commission to refine its terms at a later

[1] OJ No L 374, 31. 12. 1987, p. 9; OJ No L 285, 29. 12. 1971, p. 46.

[2] OJ No C 237, 12. 9. 1988, p. 6; OJ No C 237, 12. 9. 1988, p. 9; OJ No C 237, 12. 9. 1988, p. 11.

stage. The enabling Regulation mechanism functions satisfactorily in all sectors of the economy and has also the advantage of flexibility by adapting the block exemption to changing circumstances to cover new types of consortia agreements. The Committee believes that transparency of procedures should be safeguarded in that respect.

3.5. *Multimodal transport*

3.5.1. Most consortia deal with multimodal transport. The proposed Regulation envisages group exemption for multimodal consortia which would cover their inland transport activities, together with their maritime activities. Such a block exemption should be coupled with adequate conditions—to be defined at a later stage—safeguarding free competition. The selection by shippers of carriers offering only sea-leg operations should not be affected by the block exemption of consortia and shippers should maintain in practice and not only in theory the choice of carrier for the sea-leg of transportation and discrimination of merchant haulage should be prohibited.

3.6. *Legal basis and comments on the Articles of the Regulation*

3.6.1. The proposed Regulation has as a legal basis Article 87. There is no mention of Article 84, paragraph 2, although Regulation (EEC) No 4056/86 having a dual legal basis (87 and 84, paragraph 2) offers a valid precedent. The Committee believes that mention of Article 84, paragraph 2, together with Article 87, is necessitated also by the fact that block exemption to maritime consortia has both maritime transport and competition law implications. The treatment of liner consortia is part and parcel of the positive measures package for maritime transport and all such measures are to be adopted under Article 84, paragraph 2. Hence, the need for a dual legal basis.

3.6.2. The Regulation must clearly define its scope: The Committee notes that—whilst the Commission's Communication refers to consortia in liner trades—neither the title nor the operative part of the proposed Regulation make reference to 'liner' consortia. This omission should be corrected in Article 1 because it may be misinterpreted as equally extending to consortia in tramp vessel services as defined in Regulation (EEC) No 4056/86.

3.6.3. Article 1 of the Regulation must provide a precise and clearcut definition of liner consortia.

3.6.4. Article 4 of the Regulation provides for comments of interested parties to be forwarded to the Commission 'not less than one month'. This period is unrealistically short even as a minimum period.

4. Conclusions

4.1. The Committee believes that the Commission should spell out more clearly along what lines it intends to proceed concerning terms and conditions of the block exemption. Such conditions should safeguard free competition at three levels: within the consortium, within the conference, within the trade, as well as transparency.

4.2. In light of the above considerations—and more particularly, the commitment of the Commission on conditions/obligations of the group exemption—the Committee argues for a legal treatment of consortia subject to checks and balances without granting a blank cheque either to the Commission or to consortia.

Done at Brussels, 30 January 1991.

The Chairman

of the Economic and Social Committee

François STAEDELIN

APPENDIX

The following amendments, tabled on the basis of the Section Opinion in accordance with the Rules of Procedure, were defeated during the discussion:

Point 3.4

After the first two sentences of 3.4.1 delete the remainder of that paragraph as well as the whole of 3.4.2 and substitute:

'While it has been standard practice for the Council to adopt an enabling regulation and for the Commission to issue subsequently a more detailed implementing regulation in various sectors of economic activity (e.g. civil aviation, exclusive distribution agreements, patent licensing, specialisation agreements), and while the Economic and Social Committee has delivered favourable Opinions on this practice, it notes that a different precedent has been set for maritime transport in Regulation (EEC) No 4056/86, which is the overall instrument applying Articles 85 and 86 of the Rome Treaty to shipping. The Committee considers that, in the interest of consistency and of legal certainty, the same procedure should be adopted in regard to the regulation granting a block exemption to liner consortia as that in Regulation (EEC) No 4056/86. The Committee believes that transparency of procedures will be safeguarded by such a procedure.'

Reason

These paragraphs are inconsistent with existing EC shipping legislation. Whatever the practice in other sectors, the fact is that the umbrella regulation applying the Treaty's competition rules to maritime transport is Regulation (EEC) No 4056/86. This amendment proposes that the same arrangement should apply here as for that earlier regulation. The overall approach in Regulation (EEC) No 4056/86 has been endorsed by the Economic and Social Committee and we should remain consistent.

The essence of the proposed amendment is that a block exemption with defined terms and conditions would provide legal certainty at the outset, so that Community liner shipping companies operating within consortia, shippers seeking to avail themselves of consortia services and all other interested parties would know precisely where they stood and that the Community institutions would have defined what conditions and obligations the liner consortia would be required to meet.

The existing text of 3.4.1 also contradicts 3.4.2. Paragraph 3.4.1 would require the Commission to 'reach agreement with interested parties on the specific terms and conditions of the group exemption' and for the Commission to give 'prior commitment' on these. But 3.4.2 suggests that the Commission may 'refine' the specific terms at a later stage and even adapt them — unilaterally and without further consultation — to changing circumstances in the future. This does not safeguard transparency and — contrary to the assurances suggested in the present text — does run the risk of 'giving a blank cheque to the Commission'.

Voting

For: 30, against: 58, abstentions: 20.

Point 3.5.1

Delete third sentence and substitute the following:

'The terms and conditions for such a block exemption should be defined, thus safeguarding free competition.'

Reason

Consequential change. 'To be defined at a later stage', will no longer be applicable if the amendment to 3.4 is adopted.

Voting

For: 38, against: 52, abstentions: 15.

Point 4.1

In line 1, make the following insertion: '... the Commission's proposal for a Council Regulation should spell...'.

Reason

Same as for 3.4.1 and 3.4.2.

Voting

For: 32, against: 52, abstentions: 17.

Point 4.2

In lines 1-2, delete 'the commitment of the Commission on' and substitute 'in regard to'.

Reason

Consequential change.

Voting

For: 33, against: 54, abstentions: 15.

Opinion on the proposal for a Council Regulation (EEC) concerning the creation of a supplementary protection certificate for medicinal products[1]

(91/C 69/06)

On 3 May 1990, the Council decided to consult the Economic and Social Committee, under Article 100A of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 9 January 1991. The Rapporteur was Mr Hilkens.

At its 283rd plenary session (meeting of 30 January 1991), the Economic and Social Committee adopted the following Opinion with 81 votes in favour and 5 abstentions.

Whilst essentially endorsing the Commission proposal and the greater protection for the European pharmaceuticals industry for which it provides, the Committee would make the following observations and suggestions.

1. Introduction

1.1. This proposal, which is based on article 100A of the EEC Treaty, falls within the framework of a Community health policy or, more specifically, of an Internal Market for medicinal products.

1.2. In assessing the draft, all the consequences of the proposed legislation must be taken into account. The pharmaceuticals sector and market exhibit certain peculiarities which affect both producers and consumers.

1.3. On the supply side, the need for extensive research makes patent protection necessary. Effective patent protection is, however, subject to gradual 'erosion' owing to the numerous tests called for by the application dossier. On the demand side, medicinal products are of crucial importance for public health and therefore rate highly on the scale of consumer

[1] OJ No C 144, 8. 5. 1990, p. 10.