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COUNCIL REGULATION (EEC) No 4056/86

of 22 December 1986

laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport

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NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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COUNCIL REGULATION (EEC) No 4056/86

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laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

Whereas the rules on competition form part of the Treaty's general provisions which also apply to maritime transport; whereas detailed rules for applying those provisions are set out in the Chapter of the Treaty dealing with the rules on competition or are to be determined by the procedures laid down therein;

Whereas according to Council Regulation No 141 [3], Council Regulation No 17 [4] does not apply to transport; whereas Council Regulation (EEC) No 1017/68 [5] applies to inland transport only; whereas, consequently, the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 in maritime transport; whereas, moreover, the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas this situation necessitates the adoption of a Regulation applying the rules of competition to maritime transport; whereas Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conference [6] will result in the application of the Code of Conduct to a considerable number of conferences serving the Community; whereas the Regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) No 954/79 should take account of the adoption of the Code;

whereas, as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise;

Whereas it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions;

Whereas this Regulation should take account of the necessity, on the one hand to provide for implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market, and on the other hand to avoid excessive regulation of the sector;

Whereas this Regulation should define the scope of the provisions of Articles 85 and 86 of the Treaty, taking into account the distinctive characteristics of maritime transport; whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or

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(1) OJ No C 172, 2. 7. 1984, p. 178; OJ No C 255, 13. 10. 1986, p. 169.
(2) OJ No C 77, 21. 3. 1983, p. 13; OJ No C 344, 31. 12. 1985, p. 31.
(3) OJ No 124, 28. 11. 1962, p. 2751/62.
(4) OJ No 13, 21. 2. 1962, p. 204/62.
(5) OJ No L 175, 23. 7. 1968, p. 1.
(6) OJ No L 121, 17. 5. 1979, p. 1.

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abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market;

Whereas certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition;

Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilizing effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned;

Whereas, however, in order to prevent conferences from engaging in practices which are incompatible with Article 85 (3) of the Treaty, certain conditions and obligations should be attached to the exemption;

Whereas the aim of the conditions should be to prevent conferences from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted; whereas, to this end, conferences should not, in respect of a given route, apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary to transport; whereas, furthermore, loyalty arrangements should be permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference; whereas users must be free to determine the undertakings to which they have recourse in respect of inland transport or quayside services not covered by the freight charge or by other charges agreed with the shipping line;

Whereas certain obligations should also attached to the exemption; whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference, since in the case of inland transports organized by shippers, the latter continue to be subject to Regulation (EEC) No 1017/68; whereas provision should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the Commission in order to enable it to verify that conferences are not thereby exempted from the conditions provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86;

Whereas consultations between users or associations of users and conferences are liable to secure a more efficient operation of maritime transport services which takes better account of users' requirements; whereas, consequently, certain restrictive practices which could ensue from such consultations should be exempted;

Whereas there can be no exemption if the conditions set out in Article 85 (3) are not satisfied; whereas the Commission must therefore have power to take the appropriate measures where an agreement or concerted practice owing to special circumstances proves to have certain effects incompatible with Article 85 (3); whereas, in view of the

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specific role fulfilled by the conferences in the sector of the liner services, the reaction of the Commission should be progressive and proportionate; whereas the Commission should consequently have the power first to address recommendations, then to take decisions;

Whereas the automatic nullity provided for in Article 85 (3) in respect of agreements or decisions which have not been granted exemption pursuant to Article 85 (3) owing to their discriminatory or other features applies only to the elements of the agreement covered by the prohibition of Article 85 (1) and applies to the agreement in its entirety only if those elements do not appear to be severable from the whole of the agreement whereas the Commission should therefore, if it finds an infringement of the block exemption, either specify what elements of the agreement are by the prohibition and consequently automatically void, or indicate the reasons why those elements are not severable from the rest of the agreement and why the agreement is therefore void in its entirety;

Whereas, in view of the characteristics of international maritime transport, account should be taken of the fact that the application of this Regulation to certain restrictive practices or abuses may result in conflicts with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests; whereas consultations and, where appropriate, negotiations authorized by the Council should be undertaken by the Commission with those countries in pursuance of the maritime transport policy of the Community;

Whereas this Regulation should make provision for the procedures, decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85 (1) and Article 86, as well as the conditions governing the application of Article 85 (3);

Whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas, in particular, in view of the special characteristics of maritime transport, it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory;

Whereas in certain circumstances undertakings may, however, wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are in conformity with the provisions in force; whereas a simplified procedure should be laid down for such cases,

HAS ADOPTED THIS REGULATION:

SECTION I

Article 1

Subject-matter and scope of the Regulation

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services.

2. It shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services.

3. For the purposes of this Regulation:

(a) tramp vessel services means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings

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where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand;

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

(c) transport user means an undertaking (e.g. shippers, consignees, forwarders, etc.) provided it has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a conference or shipping line for the shipment of goods, or any association of shippers.

Article 2

Technical agreements

1. The prohibition laid down in Article 85 (1) of the Treaty shall not apply to agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:

(a) the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations;

(b) the exchange or pooling for the purpose of operating transport services, of vessels, space on vessels or slots and other means of transport, staff, equipment or fixed installations;

(c) the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

(d) the coordination of transport timetables for connecting routes;

(e) the consolidation of individual consignments;

(f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.

2. The Commission shall, if necessary, submit to the Council proposals for the amendment of the list contained in paragraph 1.

Article 3

Exemption for agreements between carriers concerning the operation of scheduled maritime transport services

Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85 (1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.

Article 4

Condition attaching to exemption

The exemption provided for in Articles 3 and 6 shall be granted subject to the condition that the agreement, decision or concerted practice shall not, within the common market, cause detriment to certain ports, trans-

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port users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

Any agreement or decision or, if it is severable, any part of such an agreement or decision not complying with the preceding paragraph shall automatically be void pursuant to Article 85 (2) of the Treaty.

Article 5

Obligations attaching to exemption

The following obligations shall be attached to the exemption provided for in Article 3:

1. *Consultations*

   There shall be consultations for the purpose of seeking solutions on general issues of principle between transport users on the one hand and conferences on the other concerning the rates, conditions and quality of scheduled maritime transport services.

   These consultations shall take place whenever requested by any of the abovementioned parties.

2. *Loyalty arrangements*

   The shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations. These loyalty arrangements shall provide safeguards making explicit the rights of transport users and conference members. These arrangements shall be based on the contract system or any other system which is also lawful.

   Loyalty arrangements must comply with the following conditions:

   (a) Each conference shall offer transport users a system of immediate rebates or the choice between such a system and a system of deferred rebates:
      — under the system of immediate rebates each of the parties shall be entitled to terminate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months; this period shall be reduced to three months when the conference rate is the subject of a dispute;
      — under the system of deferred rebates neither the loyalty period on the basis of which the rebate is calculated nor the subsequent loyalty period required before payment of the rebate may exceed six months; this period shall be reduced to three months where the conference rate is the subject of a dispute.

   (b) The conference shall, after consulting the transport users concerned, set out:
      (i) a list of cargo and any portion of cargo agreed with transport users which is specifically excluded from the scope of the loyalty arrangement; 100 % loyalty arrangements may be offered but may not be unilaterally imposed;
      (ii) a list of circumstances in which transport users are released from their obligation of loyalty; these shall include:
         — circumstances in which consignments are dispatched from or to a port in the area covered by the conference but not advertised and where the request for a waiver can be justified, and
         — those in which waiting time at a port exceeds a period to be determined for each port and for each commodity or class of commodities following consultation of the transport users directly concerned with the proper servicing of the port.

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The conference must, however, be informed in advance by the transport user, within a specified period, of his intention to dispatch the consignment from a port not advertised by the conference or to make use of a non-conference vessel at a port served by the conference as soon as he has been able to establish from the published schedule of sailings that the maximum waiting period will be exceeded.

3. *Services not covered by the freight charges*

Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.

4. *Availability of tariffs*

Tariffs, related conditions, regulations and any amendments thereto shall be made available on request to transport users at reasonable cost, or they shall be available for examination at offices of shipping lines and their agents. They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.

5. *Notification to the Commission of awards at arbitration and recommendations*

Awards given at arbitration and recommendations made by conciliators that are accepted by the parties shall be notified forthwith to the Commission when they resolve disputes relating to the practices of conferences referred to in Article 4 and in points 2 and 3 above.

Article 6

Exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services

Agreements, decisions and concerned practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5 (1) and (2) are hereby exempted from the prohibition laid down in Article 85 (1) of the Treaty.

Article 7

Monitoring of exempted agreements

1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Section II:

— address recommendations to the persons concerned;

— in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11 (4) or withdraws the benefit of the block exemption which they enjoyed.

2. *Effects incompatible with Article 85 (3)*

(a) Where, owing to special circumstances as described below, agreements, decisions and concerted practices which qualify for the exemption provided for in Articles 3 and 6 have nevertheless effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, the Commission, on receipt of a complaint or on its own initiative, under the conditions laid down in Section II, shall take the measures described in (c)

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below. The severity of these measures must be in proportion to the gravity of the situation.

(b) Special circumstances are, *inter alia*, created by:

(i) acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or

(ii) acts of conference which may prevent technical or economic progress or user participation in the benefits;

(iii) acts of third countries which:

— prevent the operation of outsiders in a trade,

— impose unfair tariffs on conference members,

— impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on types of vessels).

(c) (i) If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation.

If the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85 (3) (b) of the Treaty the Commission shall withdraw the benefit of the block exemption. At the same time it shall rule on whether and, if so, under what additional conditions and obligations an individual exemption should be granted to the relevant conference agreement with a view, *inter alia*, to obtaining access to the market for non-conference lines;

(ii) If, as a result of special circumstances as set out in (b), there are effects other than those referred to in (i) hereof, the Commission shall take one or more of the measures described in paragraph 1.

Article 8

Effects incompatible with Article 86 of the Treaty

1. The abuse of a dominant position within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty.

3. Before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement.

Article 9

Conflicts of international law

1. Where the application of this Regulation to certain restrictive practices or clauses is liable to enter into conflict with the provisions laid down by law, regulation or administrative action of certain third countries which would compromise important Community trading and shipping interests, the Commission shall, at the earliest opportunity, undertake with the competent authorities of the third countries concerned, consultations aimed at reconciling as far as possible the abovementioned interest with the respect of Community law. The

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Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations.

2. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with an Advisory Committee as referred to in Article 15 and within the framework of such directives as the Council may issue to it.

3. In exercising the powers conferred on it by this Article, the Council shall act in accordance with the decision-making procedure laid down in Article 84 (2) of the Treaty.

SECTION II

RULES OF PROCEDURE

Article 10

Procedures on complaint or on the Commission's own initiative

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85 (1) or 86 of the Treaty or to enforce Article 7 of this Regulation.

Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

Article 11

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85 (1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 7 of this Regulation.

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Articles 85 (1) or 86 of the Treaty or Article 7 of this Regulation, in respect of any agreement, decision or practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 85 (1) and of Article 85 (3) of the Treaty, it shall issue a decision applying Article 85 (3). Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 12

Application of Article 85 (3) — objections

1. Undertakings and associations of undertakings which seek application of Article 85 (3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of Article 85 (1) to which they are parties shall submit applications to the Commission.

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2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85 (3), the agreement, decision or concerted practice shall be deemed exempt, insofar as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six year period, that the conditions for applying Article 85 (3) are not satisfied, it shall issue a decision declaring that the prohibition in Article 85 (1) is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 85 (1).

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3 and shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 15 (2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85 (1) and of Article 85 (3) are satisfied, the Commission shall issue a decision applying Article 85 (3). The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

Article 13

Duration and revocation of decisions applying Article 85 (3)

1. Any decision applying Article 85 (3) taken under Article 11 (4) or under the second subparagraph of Article 12 (4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85 (3) continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit; or

(d) where the parties abuse the exemption from the provisions of Article 85 (1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 14

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

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— to impose obligations pursuant to Article 7;

— to issue decisions pursuant to Article 85 (3).

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 85 (1) or Article 86, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 12 (3).

Article 15

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.

2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.

3. An Advisory Committee on agreements and dominant positions in maritime transport shall be consulted prior to the taking of any decision following upon a procedure under Article 10 or of any decision issued under the second subparagraph of Article 12 (3), or under the second subparagraph of paragraph 4 of the same Article. The Advisory Committee shall also be consulted prior to the adoption of the implementing provisions provided for in Article 26.

4. The Advisory Committee shall be composed of officials competent in the sphere of maritime transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.

5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. This notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 16

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request, the Commission shall state the legal basis and the purpose of the request, and also the penalties provided for in Article 19 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the person authorized to represent them by law or by their constitution, shall be bound to supply the information requested.

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5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 19 (1) (b) and Article 20 (1) (c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 17

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 18 (1), or which it has ordered by decision pursuant to Article 18 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of such authority in carrying out their duties.

Article 18

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorized by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and vehicles of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 19 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 19 (1) (c) and Article 20 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such

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authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. To this end, Member States shall take the necessary measures, after consulting the Commission, before 1 January 1989.

Article 19

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of 100 to 5 000 ECU where, intentionally or negligently:

(a) they supply incorrect or misleading information, either in a communication pursuant to Article 5 (5) or in an application pursuant to Article 12; or

(b) they supply incorrect information in response to a request made pursuant to Article 16 (3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 16 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 17 or Article 18, or refuse to submit to an investigation ordered by decision issued in implementation of Article 18 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of 1 000 to one million ECU, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 85 (1) or Article 86 of the Treaty, or do not comply with an obligation imposed under Article 7 of this Regulation;

(b) they commit a breach of any obligation imposed pursuant to Article 5 or to Article 13 (1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 15 (3) and (4) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place after notification to the Commission and before its Decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

Article 20

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of 50 to 1 000 ECU per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85 (1) or Article 86 of the Treaty the termination of which it has ordered pursuant to

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Article 11, or to comply with an obligation imposed pursuant to Article 7;

(b) to refrain from any act prohibited under Article 13 (3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 16 (5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 18 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 15 (3) and (4) shall apply.

Article 21

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 22

Unit of account

For the purpose of applying Articles 19 to 21 the ECU shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 23

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 11, 12 (3) second subparagraph, and 12 (4), 13 (3), 19 and 20, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 85 (3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 24

Professional secrecy

1. Information acquired as a result of the application of Articles 17 and 18 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 23 and 25, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

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3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 25

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12 (3), second paragraph, 12 (4) and 13 (3).

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 26

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the scope of the obligation of communication pursuant to Article 5 (5), the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23 (1) and (2).

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Article 26a

The prohibition in Article 85 (1) of the Treaty shall not apply to agreements, decisions and concerted practices which were in existence at the date of accession of Austria, Finland and Sweden and which, by reason of that accession, fall within the scope of Article 85 (1) if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in Articles 3 to 6 of this Regulation. However, this Article shall not apply to agreements, decisions and concerted practices which at the date of accession already fall under Article 53 (1) of the EEA Agreement.

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Article 27

Entry into force

This Regulation shall enter into force on 1 July 1987.

This Regulation shall be binding in its entirety and directly applicable in all Member States.