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Report

drawn up on behalf of the Committee on Regional Policy, Regional Planning and Transport

on the proposal from the Commission of the European Community to the Council (Doc. 540/77) for a regulation concerning ~~accession~~ to the United Nations Convention on a code of conduct for liner conferences

Rapporteur: Mr C. McDonald

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PE 52.565/fin.

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By letter of 2 February 1978 the President of the Council of the European Community requested the European Parliament, pursuant to Article 84(2) of the EEC Treaty, to deliver an opinion on the proposal from the Commission of the European Communities to the Council for a regulation concerning accession to the United Nations Convention on a code of conduct for liner conferences.

The President of the European Parliament referred this proposal to the Committee on Regional Policy, Regional Planning and Transport as the committee responsible and to the Legal Affairs Committee and the Committee on Economic and Monetary Affairs for their opinions.

On 31 January 1978 the Committee on Regional Policy, Regional Planning and Transport appointed Mr McDonald rapporteur.

It considered the proposal at its meetings of 28 February and 30 March 1978.

At the latter meeting the committee adopted the motion for a resolution with 12 votes in favour and 2 abstentions.

Present: Lord Bruce of Donington, chairman; Mr Nyborg, vice-chairman; Mr Fuchs, deputizing for the rapporteur; Mr Brosnan, Mr Brugger, Mr Cifarelli, Mr Corrie, Mr Damseaux, Mr Hoffmann, Mrs Kellett-Bowman, Mr Mascagni, Mr Noe', Mr Osborn and Mr Starke.

The opinions of the Committee on Economic and Monetary Affairs and the Legal Affairs Committee are attached.

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The Committee on Regional Policy, Regional Planning and Transport hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a regulation concerning accession to the United Nations Convention on a code of conduct for liner conferences

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council¹,
 - having been consulted by the Council pursuant to Article 84(2) of the EEC Treaty (Doc. 540/77),
 - having regard to the report of the Committee on Regional Policy, Regional Planning and Transport and the opinions of the Committee on Economic and Monetary Affairs and the Legal Affairs Committee (Doc. 47/78),
1. Refers to its Resolution of 20 April 1977 on sea transport problems in the Community²;
 2. Welcomes the fact that the Council has now recognized the urgent need to develop a common sea transport policy;
 3. Endorses the view that priority should be given to the definition by the Member States of the Community of a common position on the United Nations Code of Conduct for liner conferences since the lack of a common approach in this matter of international policy would greatly damage the Community's prestige and trading interests;
 4. Considers that in future the Community's merchant fleets should as far as possible be treated as a single merchant fleet in relation to third countries and sees it as a step in the right direction that, for the purpose of the Code of Conduct, 'national shipping lines' of the Member States are to be regarded as including any shipping line from another Member State established in the Member State in question according to the provisions in the EEC Treaty relating to establishment;

¹ OJ No. C 35, 11.2.1978, p. 3

² OJ No. C 118, 16.5.1977, p. 41

5. Welcomes the proposal that cargo should be distributed between the shipping lines of the Member States on a more flexible basis than generally provided for in the Code of Conduct for liner conferences;
6. Welcomes the inclusion in this more flexible system of all OECD countries and hopes that the subsequent negotiations with all the OECD countries will be successful;
7. Regrets the Commission's failure to submit at the same time its proposal on the application of competition rules to sea transport, but is not in favour of postponing the adoption of the present proposal until competition rules are submitted;
8. Regrets further that the Commission has submitted no proposals on joint action by the Member States to combat discrimination against Community sea transport by shipping lines operating under flags of convenience and, in particular, with sub-standard ships, and notes with approval that the Commission is preparing proposals aimed at combating unfair practices by the state-trading countries;
9. Requests the Commission to incorporate the following amendments in its proposal pursuant to the second paragraph of Article 149 of the EEC Treaty.

Council Regulation concerning accession to the
United Nations Convention on a code of conduct
for liner conferences

The Council of the European Communities,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

unchanged

Having regard to the opinion of the Economic and Social Committee

Recitals 1-6

unchanged

6a. If the shipping lines of the state-trading countries still absent themselves from the liner conferences, despite having accepted the Code of Conduct, and sail as independents, special measures will be required to solve this problem.

Recital 7

unchanged

8. Whereas it is necessary to make special arrangements for membership of liner conferences, for the redistribution of the shares of cargo falling to the shipping lines which are members of a liner conference and established in the Community and for consultation between those lines; and whereas the adoption of a Regulation concerning the application of the competition rules of the EEC Treaty to the liner conference agreements is a prerequisite to participation of Member States in the Code of Conduct.

8. Whereas it is necessary to make special arrangements for membership of liner conferences, for the redistribution of the shares of cargo falling to the shipping lines which are members of a liner conference and established in the Community and for consultation between those lines; and whereas the adoption of a Regulation concerning the application of the competition rules of the EEC Treaty to the liner conference agreements is a necessary adjunct to participation of Member States in the Code of Conduct.

Recitals 9 and 10

unchanged

Article 1

Article 1

1. Member States shall, subject to and in accordance with Article 6 of this Regulation, ratify or accede to the Code of Conduct.

1. unchanged

2. Member States shall inform the Secretary General of the United Nations by writing that their ratification or accession has taken place in accordance with this regulation.

2. unchanged

¹ For full text see OJ No. C 35, 11.2.1978, p. 3

3. The instrument of ratification or
adhesion shall be accompanied by the
reservation set out in Annex I to
this Regulation.

Article 2

For the purpose of the Code of Con-
duct a 'national shipping line' shall
be regarded as including any shipping
line established under the Treaty
establishing the European Economic
Community in the Member State whose
trade is served by the liner con-
ference in question.

Article 3

1. Where a liner conference operates
a pool in accordance with Article 2
of the Code of Conduct the shipping
lines which are members of the con-
ference and established under the
Treaty establishing the European
Economic Community in that Community
shall, unless otherwise agreed by
them, distribute amongst themselves
their shares of the cargo in accor-
dance with the present article.

2. The cargo shall be distributed by
agreement between the shipping lines
concerned. The share allocated to
each shipping line shall be determined
by the application of commercial
principles and shall in particular
take account of:

- the volume of cargo carried by the
conference and generated by the
Member States whose trade is served
by the conference;
- past performance of the shipping
lines in the trade covered by the
pool;
- the volume of cargo carried by the
conference and shipped through the
ports of Member States.

3. If the shipping lines cannot reach
agreement on the distribution of cargo
between themselves, in accordance with
paragraph 2, the matter shall be
settled by arbitration in accordance
with Annex II.

2a. The instruments of ratification
or adhesion shall be deposited jointly
when the last of the Member States
has ratified or acceded.

3. unchanged

Article 2

For the purpose of the Code of Con-
duct 'national shipping lines' of a
Member State of the Community shall
be regarded as including any shipping
lines from other Member States es-
tablished under the Treaty establis-
hing the European Economic Community
in the Member State concerned.

Article 3

1. Where a liner conference operates
a pool in accordance with Article 2
of the Code of Conduct the shipping
lines of the Community which are
members of the conference, shall,
unless otherwise agreed by them, dis-
tribute amongst themselves the total
shares of the cargo falling to them
under the rules of the Code in accor-
dance with the present article.

2. unchanged ⁽¹⁾

3. unchanged

¹ The amendments in question do not affect the English version

4. The provisions of this Article shall be without prejudice to the application of the rules of competition to sea transport. unchanged

Article 4 unchanged

Article 5

The Commission is authorized to negotiate with the Member States of the Organization for Economic Cooperation and Development, other than the Member States of the European Economic Community, an agreement whereby the arrangements specified in Article 3 shall be extended in relation to the liner conferences serving the trade of those states to the shipping lines which are established in those states and members of those conferences.

Article 6

The ratification of accession of Member States to the Code of Conduct shall take place within one year after the conclusion of the agreement envisaged by Article 5 and the adoption of a Regulation by the Council concerning the application of the competition rules to agreements entered into under the Code of Conduct. If, however, one or more Member States of the Organization for Economic Cooperation and Development are not willing to participate in such an agreement, the Council shall decide, acting by qualified majority on the proposal from the Commission, whether the Member States shall ratify or accede to the Code of Conduct and the period within which this should take place.

Article 5

1. Otherwise unchanged

2. In its negotiations with the OECD Member States the Commission shall also seek to ensure that the procedures laid down in the code for settling disputes between OECD shipping lines are applied in a modified form.

Article 6

1. The ratification or accession of Member States to the Code of Conduct shall take place within one year after the conclusion of the agreement envisaged by Article 5. (25 words deleted). If, however, one or more Member States of the Organization for Economic Cooperation and Development are not willing to participate in such an agreement, the Council shall decide (4 words deleted) on a proposal from the Commission, whether the Member States shall ratify or accede to the Code of Conduct and the period within which this should take place.

2. The Council shall, on a proposal from the Commission, adopt a regulation on the application of the Community's competition rules to liner conferences which are subject to the Code of Conduct. This regulation shall enter into force at the latest on the day on which the Code of Conduct becomes binding on Member States after the joint depositing of the instruments of ratification or accession.

Article 7

The Commission is authorized to open negotiations with the non-member States party or entitled to become a party to the Code of Conduct with a view to the accession of the Community to the Code.

The Commission shall conduct these negotiations in accordance with the directives in Annex III;

Article 8

The Council shall decide, acting by qualified majority on the proposal from the Commission, the scope and implementation of the common action of Member States with respect to amendment of the Code of Conduct and shall in particular in the case of a review conference decide the common action of Member States in relation to amendments concerning:

- (a) the procedure for general freight rate increases;
- (b) the procedure for settlement of disputes;
- (c) the competition of lines not members of a liner conference;
- (d) bilateral traffic based on inter-governmental agreements.

Article 9

Member States shall, in good time, and after consulting the Commission, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this Regulation.

Article 7

unchanged

The purpose of these negotiations shall be to amend the Code of Conduct so as to facilitate the accession of the European Community as such.

Article 8

1. Otherwise unchanged

2. The Council shall in particular decide the measures to be taken in respect of states which have acceded to the Code of Conduct but whose shipping lines regularly absent themselves from the liner conferences.

Article 9

Member States shall, in good time, and after consulting the Commission, which may also take the initiative in this matter, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this Regulation.

Article 10 unchanged

Annex I

For the purpose of the Code of Conduct a 'national shipping line' shall be regarded as including any shipping line established under the EEC Treaty in the Member State whose trade is served by the liner conference in question.

For the purpose of the Code of Conduct, 'national shipping lines' of a Member State of the EEC shall be regarded as including any shipping line from other Member States established under the EEC Treaty in the Member State concerned.

Annex II unchanged

Annex III deleted

EXPLANATORY STATEMENTI. GENERAL COMMENTS

1. Over a lengthy period, your committee has repeatedly drawn attention to the need for a common sea transport policy in the Community. Its greatest success to date was on 20 April 1977 when the European Parliament adopted a resolution on sea transport problems in the Community based on the report drawn up by Mr Seefeld.

This report pointed out that the Community's world-wide trade was dependent on world-wide sea transport. The Community's general interests would be harmed if considerations of trade were always given priority over transport interests. Furthermore, the Community could not make a balanced contribution to orderly world trade if it concentrated on one aspect instead of considering trade and sea transport together.

2. Regrettably, the Commission has failed to prepare a genuine common sea transport policy. For years it has clearly considered itself prevented from doing so by the wording of Article 84(2) of the EEC Treaty which, according to one particular legal interpretation, leaves the initiative in sea transport policy to the Council. However, the European Parliament has never endorsed this timorous legal interpretation.

3. Because of the hesitant approach of the Community institutions the first steps towards a sea transport policy must now be taken under pressure from outside. Pressure is being exerted by UNCTAD and the series of proposals from the Commission and threats of proceedings by the Court of Justice, some of which have since been withdrawn, may be described as a panic reaction on the part of the Community rather than as a sea transport policy.

Further pressure on Community sea transport, stemming in particular from aggressive competition by the fleets of the state-trading countries, will probably result in further Community reactions over the next few years.

Your committee regrets that in the field of sea transport the Community is thus pursuing a piecemeal policy and taking the line of least resistance as it has done for years now in its transport policy, instead of leading the way with a far-sighted development policy and taking the initiative to find new solutions to the present problems in world sea transport.

4. Certain major problems affecting sea transport in the Community are passed over in silence in the Commission's proposal. There is no mention of the dual threat from flags of convenience: the Community's fleets are being reduced in size as ships are re-registered, while the smaller fleets are facing unfair competition from shipping lines operating under flags of convenience. Nor do the Commission's proposals take account of the fact that certain Member States of the Community still have separate sea transport markets, since Italy and France in particular continue strictly to exclude the shipping lines of

other Member States from their market by the 'reservation on cabotage'. Many other internal disputes affecting Community sea transport deprive attempts to uphold a common position vis-à-vis third countries in defence of common interests of their credibility.

5. Your committee nonetheless endorses the Commission's proposal since it is a reasoned, if small, step in the right direction.

6. The Code of Conduct for liner conferences may be seen as a means of reaching a compromise between the traditional seafaring nations and the developing countries which will result in orderly competition and prevent more serious interference in the market, such as totally state-directed trade and 50:50 clauses.

7. The most controversial clause in the Code of Conduct, the 40:40:20 formula for sharing cargoes amongst a pool, will promote the interests of the developing countries; the traditional seafaring nations who would prefer freer competition need not, however, apply this formula strictly to each other. They have made a necessary sacrifice for the benefit of the developing countries but may maintain freedom of competition between themselves. Your committee welcomes the fact that the Commission is intending to negotiate this proposal for all Western industrialized nations within the OECD.

8. The Commission proposes that the adhesion of Community countries to the Code of Conduct should not come into force until the Community introduces competition rules in respect of sea transport. Your committee is opposed to this approach and proposes that this inflexible link between the two measures should be abandoned.

9. Competition rules in respect of sea transport will of necessity be highly controversial measures. We need only consider how disputed, especially by the European countries concerned, is the application of American anti-trust legislation to sea transport and how much ill-feeling it has caused.

10. The Commission has not yet stated how it envisages these competition rules. For the moment, therefore, we cannot exclude the possibility that the Commission has found the philosopher's stone and that its proposals will receive a rapturous welcome. However, we must admit that it is far more likely that the competition rules will be even more controversial than the present Code of Conduct.

For this reason the Community should set itself a deadline while not establishing an inflexible link between the two measures. If the Community adopted the Code of Conduct, this would firstly demonstrate to third countries its goodwill and ability to act; it could then attend to the solution of its own problems.

11. Your committee would like to make two comments on procedure. Firstly, the Economic and Social Committee should also be consulted, and secondly, the Member States of the Community should deposit their instruments of ratification with the Secretary-General of the United Nations simultaneously.

12. On the whole, your committee welcomes the Commission's proposal and recommends its adoption, subject to the minor amendments justified below.

II. COMMENTS ON THE INDIVIDUAL ARTICLES IN THE PROPOSAL AND THE PROPOSED AMENDMENTS

Introduction:

The Commission proposes that the European Parliament should be consulted on this regulation but not the Economic and Social Committee. The Commission is presumably working on the assumption that the Economic and Social Committee as constituted at present cannot consider matters relating to sea transport policy. Your committee sees no obstacle to its being consulted. Firstly, the ESC is an advisory not a decision-making body, and secondly we must assume that even if this committee were reconstituted it is by no means certain that its members would include one or more experts on sea transport matters. The composition of the Economic and Social Committee until now has not resulted in equal representation at all times for all modes of transport in the 'Transport' subcommittee. It is therefore proposed that the Economic and Social Committee should be consulted on this important matter.

Recitals:

The major shortcoming of the Code of Conduct which so far has been spotted neither by the layman nor apparently by some experts, is that the state-trading countries, led by the Soviet Union, have placed their whole negotiating strength on the side of the developing countries and against the Western industrialized nations in order to damage the latter and curry favour in the eyes of the former. It is a fact that the shipping lines of the state-trading countries are members of very few conferences. Mostly they sail as independents and compete with the conferences. Therefore, the Code of Conduct as a whole is not really binding on them. But the Code has an economic advantage for the shipping lines of the state-trading countries: it stabilizes freight rates and will probably tend to increase them. These increased or at least more stable rates can then be more easily undercut by the state-trading countries avidly seeking hard currencies, even at a slight loss which would be borne by their citizens.

It is therefore proposed that a new recital (6 a) should be inserted to facilitate a solution to this problem.

It is true that shortly after the signing of the Code of Conduct, certain shipping lines from the state-trading countries opened negotiations with various conferences with a view to accession, but little has been heard of this recently. A further addition to the Commission's proposal is

proposed in Article 8, with a view to solving the problem of the state-trading countries.

It is proposed that a minor amendment should be made to the eighth recital to the effect that the adoption of competition rules by the Community should not be made a prerequisite for the ratification of the Code of Conduct. At present the conferences are sailing without any Code of Conduct or competition rules at all. There is no reason why they should not sail with a Code of Conduct but without competition rules during a transitional period if the competition rules should be delayed, and we should take particular account of the fact that the ratification procedure would be excessively delayed if it were only to begin after the adoption of competition rules.

Article 1:

It is proposed that the Member States should deposit their instruments of ratification simultaneously and jointly with the Secretary General of the United Nations. On the one hand, this would be a symbolic gesture and an earnest of intent on future cooperation, while on the other it would have the practical advantage that on completion of all the proposed joint procedures the Code would in fact enter into force simultaneously for all the Community's shipping lines. If this were not the case, the question might arise, for example, whether, during a transitional period, cargo should only be shared between the Community countries which had already ratified the Code. Under the Commission's present proposal, this problem might affect a whole financial year even if there were no postponements of the deadline for ratification.

Article 2:

The proposed rewording is mainly intended as a clarification. According to the Commission's text, shipping lines of a Member State would no longer be 'national' shipping lines, but only those established under EEC law. Furthermore, the Commission's text seems to allow the misunderstanding that 'national' shipping lines of a Member State could also be shipping lines from third countries established according to EEC law in that Member State. It is clear that the Commission does not intend either of these interpretations.

Article 3:

The proposed rewording for this article again seeks to clarify the text.

The Commission clearly intends to introduce cargo sharing between all the Community's shipping lines and not simply between those established under Community law in a country other than their country of origin. Furthermore, it seems appropriate to define more clearly what is to be

shared, i.e. that share of cargo which accrues to them jointly according to the rules of the Code.

In point 2, we should twice refer to the Member States in the plural, since clearly the intention is that when cargo is shared between the Community's shipping lines, the cargo of each Member State is not to be considered in isolation, but rather the total cargo of all the Member States served by a conference.

Article 4:

Your committee welcomes this provision which will promote cooperation between the Community's shipping lines within the conferences. (No change).

Article 5:

Your committee welcomes the fact that the more liberal procedure for sharing cargo in pools is to be extended to all Western industrialized nations, that is, to the Member States of the OECD and proposes that a modified procedure for settling disputes should be adopted by these states.

Article 6:

Your committee is certain that the elaboration of Community competition rules on sea transport is an important adjunct to the adoption of the Code of Conduct. However, it is opposed to the idea that the adoption of the Code should depend on the adoption of competition rules.

The Code of Conduct is itself an important step towards abolishing discrimination practised by the conferences. For example, once the Code of Conduct has been adopted, the conferences will no longer be able arbitrarily to exclude individual shipping lines from membership. Governments will have to cooperate to some extent in supervisory procedures and in settling disputes. For this reason it is unnecessary to wait for the introduction of Community competition rules on sea transport.

The adoption of these rules might in fact prove far more difficult and take far longer than envisaged; linking their adoption to the ratification of the Code could well result in practice in a postponement of the adoption of the Code to the distant future. The difficulty of adopting Community competition rules on sea transport and the length of time necessary cannot yet be estimated, since the Commission has not yet submitted any proposals. This being so, your committee considers it more sensible to separate the two procedures.

Practical consideration of deadlines strengthens your committee's attitude; according to the Commission's wording of Article 6, the ratification should take place within one year of the adoption of competition rules. This means that most countries will only initiate their ratification procedure when the competition rules are adopted. It will then be at least another year before all the ratification procedures are concluded after

which, pursuant to Article 49(2) of the Code, another six months will elapse before the Code comes into force in the ratifying country. Should the agreement still not be in force by then, a further six months is stipulated in Article 49(1) before the agreement enters into force. Almost two years can be saved if the adoption of competition rules is not made a prerequisite of accession.

If there is any chance at all of such competition rules being adopted by the Community, the period laid down for negotiations with the OECD countries and the ratification procedures, together with the deadlines set out in Article 49 of the Code of Conduct should be sufficient for the drafting of these competition rules.

Your committee therefore proposes that in Article 6 the inflexible link between the two measures should be deleted and a new paragraph 2 inserted to include a time-based link as a directive provision.

Article 7:

Your committee fails to see why the terms of the negotiating mandate should be set out in the Annex and not in Article 7 itself. It is proposed therefore that Annex 3 be deleted and its brief text included here.

Article 8:

As already mentioned in the comments on the recitals, a paragraph 2 in this article could stipulate the necessity to seek, in conjunction with the Code of Conduct, a solution to the problem of competition from shipping lines of the state-trading countries. Since this is not a problem which can be solved within the framework of a Code of Conduct, the appropriate text must be inserted as a new paragraph 2 in this article.

Article 9:

Since this regulation is to be adopted partly in application of Article 84(2) of the EEC Treaty, all its institutional provisions on procedure are innovations which cannot be interpreted on the basis of precedents, should any doubt arise. In order to prevent any misunderstanding, it should be made clear that the Commission can take the initiative in the consultations provided for in this article. This is all the more essential since for years the Commission's right to submit proposals on a common sea transport policy has been disputed.

Article 10:

No comments.

Annex I:

This Annex should be more accurately worded in line with the text of Article 2.

Annex II:

No comments.

Annex III:

This Annex should be deleted and its text incorporated in Article 7.

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

Draftsman: Mr I. Stetter

By letter of 2 February 1978 the President of the Council of the European Communities consulted the European Parliament, pursuant to Article 84(2) of the EEC Treaty, on the proposal from the Commission of the European Communities to the Council for a regulation concerning accession to the United Nations Convention on a Code of Conduct for Liner Conferences.

The President of the European Parliament referred this proposal to the Committee on Regional Policy, Regional Planning and Transport as the committee responsible and to the Legal Affairs Committee and the Committee on Economic and Monetary Affairs for their opinions.

On 3 February 1978 the Committee on Economic and Monetary Affairs appointed Mr Stetter draftsman. The committee unanimously adopted the opinion at its meeting of 2 March 1978.

Present : Mr Glinne, chairman; Mr Notenboom, vice-chairman; Mr Stetter, draftsman; Lord Ardwick, Mr Brugha, Mr Jakobsen, Mr Lange, Mr Normanton, Mr Nyborg and Mr Ripamonti.

1. The Committee on Economic and Monetary Affairs recently examined the importance of shipping to the Community and problems connected with the United Nations Convention on a Code of Conduct for Liner Conferences in its report on the Community shipping industry (Rapporteur: Mr J.L. PRESCOTT, Doc. 479/76). The views set out there are still relevant and there is therefore no need to repeat them here although of course the present opinion is, in a sense, a supplement to that report.

2. It should be noted first of all that the Commission's proposal has been referred to three of the European Parliament's Committees, although not to the Committee on External Economic Relations or the Committee on Cooperation and Development. Subsequent referral of this subject to these committees as well would, of course, delay the adoption of the European Parliament's opinion on this subject which would be unfortunate in view of the desire to have it adopted by the April part-session at the latest.

In these special circumstances, the Committee on Economic and Monetary Affairs has considered it its duty to make a brief examination of some of the aspects which would normally fall to these two committees.

3. In the PRESCOTT report, the committee explained the background to the Code and the widely differing attitudes which the Member States took at the time of the vote in the UN. When assessing the Commission's proposal it is necessary to bear in mind the diverse interests of the Member States regarding international sea transport and also the original purpose of the Code which was to enable those developing countries that wished it to build up their own merchant fleets.

To be weighed against this there is of course the spirit and letter of the EEC Treaty.

4. The UN Code has not yet entered into force and the required number of major shipping nations has not yet ratified it. The individual Member States as well as the Community have a key role here. If, for example, the Federal Republic of Germany or France were to ratify the Code unilaterally, contrary to the EEC Treaty, it is possible that, for example, Japan might also ratify it and hence the required degree of endorsement would be achieved.

5. The failure of the industrialized countries to agree on a joint approach to the Code is indefensible. Continued disunity will undoubtedly lead to the conclusion of bilateral agreements and the adoption by some developing countries of unilateral national legislation. The situation will then gradually become more and more confused and in time perhaps even chaotic.

There is thus an urgent need for an international solution. The Community has an important role to play in achieving this international unity but, at the same time, there is a pressing need for unity among the Community's own Member States.

6. The Commission's new proposal differs from the proposal it submitted in 1975¹. The 1975 proposal was based on a Community solution: the Member States were to ratify the Code with certain reservations, including that by which the Community should be considered as a single area for the purposes of the 40-40-20 rule, so as to avoid any discrimination in the Member States on the grounds of nationality.

The basis of the Commission's new proposal is that the Member States should accede to the Code, but that the Member States should agree that the distribution of cargo between themselves should not be undertaken according to a fixed quota system, but rather according to 'commercial' principles and that the Commission wishes for these arrangements to be extended to include all OECD member countries. A further precondition is that the Council should adopt a regulation on the application of the competition rules of the EEC Treaty to agreements entered into under the Code.

7. Both the existence of liner conferences and the distribution of quotas according to nationality must be seen as a restriction of competition.

8. The draftsman welcomes the fact that, in its proposal, the Commission speaks of ensuring 'fair' competition and not 'perfect' competition. The objective of the Community's rules on competition cannot be to abolish the system of liner conferences, which must be seen as a precondition for maintaining ordered conditions within international maritime transport and stable transport links. They will also have a stabilizing effect on the market.

To the best of the draftsman's knowledge, the proposal for a regulation on the application of the rules of competition to the shipping industry being prepared by the Commission will be submitted towards the end of the first half of 1978 at the earliest. It has for this reason not been possible for the Committee on Economic and Monetary Affairs, which is the committee responsible for competition policy, to make a more detailed assessment of the competition policy aspects of liner conferences.

¹ COM(75) 302 final

9. The introduction of a 40-40-20 quota system will be a new example of flag discrimination and hence a break with the policy of liberalization pursued hitherto. The developing countries should, however, be enabled, in one way or another, to obtain a certain proportion of the cargo. The application of a quota system to maritime freight carried to and from these countries appears to be a suitable method and is in any case the one which the developing countries themselves prefer.

In this situation the Community's task is to find a solution which is compatible with the principles of the EEC Treaty and which will do the least harm to the structure of the Community's shipping industry.

In this connection the Committee on Economic and Monetary Affairs finds that any subjection of sea transport between Community countries, and between the Community and the rest of the world, to a system of quotas based on national criteria clearly contravenes the EEC Treaty since it would both affect intra-Community trade and distort the conditions of competition between shipping companies.

The crucial factor is not whether the cargo goes through a port of one of the Member States.

All cargo carried by shipping companies registered in one of the Member States must be subject to the rules of the EEC Treaty.

10. However, a Community solution is not sufficient in itself. Many of the Member States are traditional seafaring nations, sailing all the world's seas. Because of his special knowledge of Danish conditions, the draftsman will allow himself to illustrate this by giving some figures for the distribution of freight earnings of Danish shipping line companies in 1975:

- freight within the OECD: Dkr 782 m (35%)
- freight between the OECD and the rest of the world: Dkr 1,340 m (60%)
- freight outside the OECD: Dkr 106 m (5%)

An arrangement covering only the Community would only affect 46% of Danish shipping lines' freight revenue.

The draftsman is convinced that an examination of, for example, the pattern of maritime shipping trade carried on by the United Kingdom will reveal approximately the same structure. A quota system for maritime freight for OECD countries will have immeasurable consequences for the foreign currency earnings of these two countries (amongst others) from maritime transport and will therefore weaken their balances of payment.

11. The draftsman has not considered it to be this committee's task to examine in detail here the special problems raised by the merchant fleets of the state-trading countries. He would merely say that an international quota agreement cannot be regarded as an adequate, effective and sure method of tackling them. The problems raised by the practices of the state-trading countries (dumping, etc) have to be solved in another way.

12. The Commission's proposal is by no means an ideal solution, but on the other hand, it should be seen as an attempt by the Commission to apply the principle 'half a loaf is better than none'.

The committee feels that if the Member States agree on this proposal and provided that an agreement is reached on the same principles covering the OECD countries, this will be a considerable step forward; it would ensure the continued freedom of maritime transport between OECD members, while at the same time meeting the wishes of the developing countries.

13. It should be emphasized that even if the Council adopts the regulation proposed by the Commission without lengthy negotiations, it will probably not enter into force for some time. With regard to Article 6 of the proposal for a regulation, agreement must first be reached on the provisions to be included in the regulation on the application of the rules of the EEC Treaty on competition to maritime transport: the other OECD states must also be persuaded to accept the principles laid down in this regulation.

Although Article 6 may render the present proposal for a regulation ineffective even after adoption, it cannot be dispensed with because the reservations regarding an OECD solution and 'fair' competition need to be stated if the Commission's proposal is to be accepted.

Comments on individual articles

Re Article 2

The wording of Article 2 must be seen as a breach of the principle of the free movement of services within the Community since it requires that a shipping line should be registered in the Member State whose trade is served by the liner conference concerned. The draftsman prefers the Commission's original proposed reservations¹: any shipping company registered in a state within the Community shall be regarded as a 'national shipping line' with respect to any liner conference engaged in the external trade of one or more Member States.

¹ COM(75) 302 final

Re Article 3

This article exempts the distribution of cargo among Community shipping lines from the standard 40-40-20 quota system. An attempt is made in Article 5 (see below) to extend this exemption to the whole OECD area.

The draftsman is concerned about the wording of paragraph 2, which is unclear and could possibly be interpreted in different ways. The three criteria specifically named for the allocation of cargo in fact conflict with the introductory provisions of the paragraph according to which the share allocated to each shipping line should be determined by the application of commercial principles. The draftsman also finds it objectionable that what amount to guidelines for the subsequent provisions on competition should be laid down at this point¹.

With regard to the Danish situation, with which the draftsman is particularly well acquainted, a large part of Danish exports are shipped through Gothenburg and Hamburg. This is partly because shipping companies taking part in a conference often prefer to pay transport expenses on the cargoes concerned to the selected port of shipment.

Thus if for example exports of Danish goods through Hamburg can be cited under Article 3(2) by West German shipping companies, the consequence of the criteria laid down in paragraph 2 will be:

- irrational changes of ports of shipment;
- the irrational establishment of subsidiaries, branches etc.

For these reasons the draftsman suggests that the three specific criteria mentioned in Article 3(2) should be deleted.

Re Article 4

The draftsman feels that frequent contacts between conference members are obviously necessary. The question is whether Article 4 is superfluous.

Re Articles 5 and 6

Article 6 lays down two preconditions for ratification of the Code by the Member States:

- the contracting of an agreement between the Community and the member states of the OECD, whereby the rules specified in Article 3 (exemption from fixed quotas) will apply to the whole OECD area;

¹ See also Article 3(4) and the comments on Article 6 below.

- the adoption of a Community regulation on the application of the competition rules to agreements entered into under the Code of Conduct.

It is of course essential that the present regulation and the Community's rules on competition should not conflict with one another. It may be very difficult to reach agreement on the formulation of these rules on competition but, as stated above, the committee does not feel able to take a more detailed position on the aspects concerned with competition policy before the Commission proposal is published.

It is moreover not immaterial which OECD Member States might possibly subscribe to the agreement described in Article 5. For example, a refusal by the USA or Japan to take part would be so serious for some of the Community's shipping lines that the Commission's proposal that the Council, if necessary acting by qualified majority, should call upon the Member States to ratify the Code, must be regarded as unrealistic.

For these two reasons, the Member States ought to retain the opportunity to deposit a veto, if need be, 'to safeguard their vital interests'.

Re Article 7

The draftsman considers it right to prepare the way for the Community as such to accede in due course to the Convention.

Re Article 8

The draftsman considers it unrealistic to deprive the Member States of their right of veto on the Community's policy towards the subsequent UN Review Conference especially as this Article does not stipulate in what direction the Community will attempt to change the Code. The draftsman must therefore recommend that the Member States be enjoined to include in their documents of ratification or accession a reservation regarding the provisions of the Code regarding freight rate increases and the settlement of disputes, including the right of veto of national shipping companies.

Conclusions

1. The Commission's proposal must be seen as a finely balanced compromise which one must be very wary about disturbing.

2. The Committee on Economic and Monetary Affairs will return to the formulation of the Community's competition policy for maritime shipping when the Commission's proposal on this subject becomes available.
3. A Community solution would be too limited. An OECD solution must be the precondition for implementation. This means that the Code will live up to its original objective in practice: to make it possible for developing countries to develop their merchant fleets if they should so wish.
4. The Committee on Regional Policy, Regional Planning and Transport is urged to propose the following amendments in its report to Articles 2, 3, 6 and 8 of the Commission's proposal for a resolution;
 - Article 2: 'For the purpose of the Code of Conduct a 'national shipping line' shall be regarded as including any shipping line established in accordance with a Member State's legislation and whose port of registration, head office or principal place of business is situated within the Community, with regard to every liner conference which is entered into in one or more Member State's trade with third countries'.
 - Article 3(2):
'The cargo shall be distributed by agreement between the shipping lines concerned. The share allocated to each shipping line shall be determined by the application of commercial principles'.
 - in Articles 6 and 8 the proposal for a 'qualified majority' should be altered to 'in accordance with the provisions of the EEC Treaty'.
 - the Member States ought, in Article 8, be urged to include in their documents of ratification or accession a reservation on the rules of the Code concerning:
 - (a) the procedure for general freight rate increases;
 - (b) the procedure for settlement of disputes, including the right of veto of national shipping companies.

OPINION OF THE LEGAL AFFAIRS COMMITTEE

Draftsman: Mr Bayerl

At its meeting of 20 February 1978 the Legal Affairs Committee appointed Mr BAYERL draftsman.

The draft opinion was considered at its meeting of 22 March 1978 and adopted unanimously.

Present: Sir Derek Walker-Smith, chairman; Mr Bayerl, draftsman; Lord Ardwick, Mr Bangemann, Lord Brimelow, Mr Broeksz, Mr Brosnan, Mr Guertsen, Mr Luster, Mr Masullo, Mr Rivierez and Mr Shaw.

I. INTRODUCTION

1. The United Nations Convention on a Code of Conduct for liner conferences was signed in Geneva in April 1974. The Convention will enter into force when at least 24 states with at least 25% of world tonnage have acceded to it. This is not yet the case, but it will be so if the Member States of the European Community accede to it as envisaged in the present proposal for a regulation.

2. In its draft regulation the Commission proposes that the Member States ratify the Code of Conduct (Article 1), on the understanding that:

- the definition of 'national shipping line' is altered somewhat (Article 2),
- the distribution of cargo within the EEC need not necessarily be effected in accordance with the 40-40-20 rule (Article 3),
- shipping lines consult other Member States in the same Conference prior to the Conference agreement (Article 4),
- the Commission is authorized to conduct negotiations with OECD countries outside the EEC concerning the distribution of cargo within the OECD (Article 5),
- ratification should be subject to the conclusion of an agreement with the other OECD countries and the adoption of a regulation on competition rules (Article 6),
- the Commission is authorized to negotiate, on behalf of the EEC Member States, the accession of the Community to the Code of Conduct (Article 7).

II. APPLICABILITY OF THE EEC TREATY

3. The proposal for a regulation is based on Article 84(2) of the EEC Treaty which reads as follows:

'The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'.

4. The question of deciding which particular provisions of the EEC Treaty are to be applied to transport by sea has arisen in the past.

5. When the Council adopted Regulation No. 141 of 26 November 1962¹ (which stipulated that Regulation No. 17 on the rules of competition was not applicable to the transport sector), it followed implicitly that the general provisions of the EEC Treaty did apply to this sector. In a judgment given on 4 April 1974² the Court of Justice found that the general rules of the EEC

¹ OJ No. 124, 28.11.1962

² Case 167/73, Reports 1974, p. 359 et seq.

Treaty did apply to sea and air transport.

III. CONFLICTS WITH THE EEC TREATY

6. Although the Commission proposes that the Community should accede to the Convention, it nevertheless considers that some parts of the Convention are incompatible with certain articles of the EEC Treaty.

The subjects at issue are:

(a) Discrimination according to nationality (Article 7 of the EEC Treaty)

7. Article 2 of the Convention provides for a distribution of cargo based primarily on nationality: 40% of cargo is reserved for the shipping lines of the country of origin, 40% for the country of destination and 20% for third countries' shipping lines. Furthermore, Article 1 of the Convention states that membership of a liner conference is connected with nationality.

8. Under Article 7 of the EEC Treaty, however, discrimination on grounds of nationality is forbidden. For this reason the Commission has adopted a broader definition of the concept of 'national shipping lines' than that given in the Convention itself, so as to include not only those shipping lines which have their head office in a particular Member State, but also those of other Member States established there pursuant to Articles 52 to 58 of the EEC Treaty. Under Article 1 of the proposal for a regulation, this definition must be added to the act of ratification or accession. The Legal Affairs Committee approves this broader definition since it complies with Article 7 of the EEC Treaty.

(b) Rules on competition (Articles 85 and 86 of the EEC Treaty)

9. The distribution of cargo and the fixing of cargo rates may have an unfavourable effect on trade between the Member States. Consequently these agreements come within the scope of Article 85(1) of the EEC Treaty. It is, however, not impossible that some agreements may fall under the derogation provision of Article 85(3), but this certainly does not apply to all of them.

10. In view of the fact that members of liner conferences are granted certain privileges, there is a possibility that some lines may acquire a dominant position on the common market. A dominant position is not in itself a violation of the EEC Treaty but abuse thereof is forbidden under Article 86 if it adversely affects trade between Member States.

11. It has, however, not yet proved possible to draw up rules of competition. Therefore the Commission suggests in Article 6 of its proposal for a regulation that the ratification of or accession to the Code of Conduct by the Member States can only take place once the Council has adopted a

regulation concerning the application of the competition rules to agreements entered into under the Code of Conduct. However, the Commission hopes to submit a proposal for this in the middle of 1978.

12. In the otherwise excellent draft report by Mr McDONALD on behalf of the Committee on Regional Policy, Regional Planning and Transport (PE 52.565) it is suggested that the connection between rules of competition and accession to the Convention should to a certain extent be removed.

This, it is proposed, should be done by deleting the condition that rules on competition must be adopted before the Code of Conduct is ratified (Article 6 of the proposal for a regulation). Instead, the Council is urged to adopt a regulation on the rules of competition before the Code of Conduct enters into force (new Article 6(2)).

13. The Legal Affairs Committee would point out that it is aware of the need for the Convention to enter into force as quickly as possible. It does not, however, consider it right to include a provision such as Article 6(2) in the proposal for a regulation. This measure would mean that the Convention could enter into force without any competition rules being decided on. In view of the fact that the work of drafting the rules on competition is well on the way to completion, the Legal Affairs Committee proposes that they be incorporated in the present proposal for a regulation itself.

IV. CONCLUSION

14. The Legal Affairs Committee considers it regrettable that the Commission of the European Communities has still not made any proposals on rules of competition for sea transport.

15. Given the need for the present Convention to enter into force quickly, the Legal Affairs Committee proposes that the Commission should incorporate the rules on competition in the present proposal for a regulation.