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Editorial

Recent EU Commission activities in maritime and trade law

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EDITORIAL

Recent EU Commission activities in maritime and trade law

The last few weeks of 2003 saw several interesting legal developments in the European Commission with implications, direct or indirect, for maritime and trade law. This issue's editorial surveys a few of these developments. Without doubt, one of the more significant policy issues is the review of the block exemption for liner conferences. The closing date for the submission of views and comments was back in the summer of 2003 but the review is still underway. The Commission sought views from interested parties as to whether the block exemption from antitrust law for liner conferences should be abolished or retained, with amendments. The immunity enjoyed by liner conferences has long been under threat – some would say for good reason. The current review should bring into focus the economic arguments for and against the retention of that protection from competition law. Liner conferences have had to modify their trading practices to ensure that they do not fall foul of antitrust legislation and that they act within the bounds of their antitrust immunity. The new year should see the debate carry on and it will be interesting to see whether the Commission will propose a policy shift and support the OECD's recommendation for the abolition of antitrust immunity for conferences. If the Commission does so, that would be an express departure from the policy adopted in many other sea-faring countries, such as the United States, Canada, Australia and Japan.

Another important plank of EU legislative activity towards the end of 2003 was the publication of the Green Paper on rules of origin applied under preferential trade arrangements. The Green Paper argues that the current EU framework for determining, managing and supervising preferential origin is no longer wholly suitable and should be radically restructured. Preferential trade arrangements are aimed at increasing reciprocal trade in goods and access to the Community market for products from developing countries by eliminating or reducing customs duties, but they are only workable if tariff preferences are applied to goods that have actually been obtained or sourced from the country granted the preference. There have, however, been problems with the application of this principle, largely because it is unclear under the current framework what constitutes originating products or status. The problem is most acute where the goods in question have been manufactured or processed in an originating country using non-originating, imported goods. If processed goods are to obtain originating status, the processing must be substantial enough to establish a genuine link between the products and the country. The Green Paper identifies three areas where clarification is needed:

- The definition of the conditions for acquiring originating status and the legal framework to achieve and support these;
- Supervision to ensure that the conditions are applied fairly; and
- The establishment of procedures to ensure an optimal division of tasks and responsibilities between traders and the authorities.

The current system for administering and supervising the rules of origin is based very much on administrative co-operation between the authorities of the importing country and those of the exporting country which certifies and verifies the origin of the products. There are clearly

practical difficulties with a system that relies so heavily on mutual trust and co-operation. The Green Paper also raises the concern of the high costs involved in the implementation of the administrative system. As far back as 1997, the Commission had identified the vulnerability of the system to fraud and unfairness (see also Joint Cases T-186/97 *Kaufring AG and others* (Judgment of the Court of First Instance of 10 May 2001) (the *Turkish televisions* case). A few recommendations were proposed but they were largely piecemeal solutions. The Green Paper calls for a review of these certification and supervision procedures and seeks suggestions for a more long-term, integrated solution. The consultation will close on 1 March 2004.

As far as ship and port safety is concerned, the Commission has requested the Parliament and the Council to extend the application of the International Safety Management Code to cover all ships (IP/03/1751, 17 December 2003). The proposal is that Member States will be able to deny access to or refuse the departure of any ship not in possession of ISM certificates. Moreover, classification societies and the organisations responsible for carrying out ISM compliance audits will have to meet the quality and best practice standards laid down in the new proposal. It will be recalled that the ISM Code was given mandatory application after the sinking of the *Estonia* (Council Regulation 3051/95, OJ L320/14, 30 December 1995) but only in respect of ro-ro passenger ferries. The new proposed Regulation is clearly in line with the timetable of action laid down by the International Maritime Organisation.

The new year has seen airport and aircraft security come under the media spotlight. The cancellation of several inbound US flights, the screening of passengers' personal details before they board flights bound for the United States, the requirement for finger-prints and photographs to be taken of passengers not under the US visa waiver scheme, and the debate over the use of 'sky marshals' on aeroplanes more or less dominated the front pages of the broad sheets. Much less obvious but no less significant are the measures adopted by the United States and the EU to enhance maritime transport security. On 18 November 2003, an agreement with the United States to include transport security co-operation within the scope of the EU/US Customs Agreement was signed. The agreement complements the measures taken by the US authorities on port and cargo security, such as the Container Security Initiative (CSI) which requires pre-screening of containers by US customs officers at ports of shipment. The agreement provides for co-operation between EU customs authorities and their US counterparts to ensure that cargo lists are supplied to US authorities 24 hours before loading to enable the United States to carry out automated targeting analysis to ascertain high-risk containers. The agreement also provides for the adoption of minimum standards for inspection technologies and screening methodologies.

'Intermodal transport' in the United Kingdom was given a bit of a spotlight by the Commission in December 2003. On 10 December, the Commission authorised a new aid scheme, the Company Neutral Revenue Scheme ('CNRS'), to support the movement of intermodal containers by rail in the United Kingdom. The scheme however only applies to the territories of Great Britain. The grant will provide support for deep-sea and short-sea intermodal container business that currently uses rail. The CNRS provides fixed grant rates which are payable in arrears for each container carried by rail. Any company, whether or not owned or controlled by UK nationals, can apply for revenue support under the scheme if it is acting as the operator or contractor of an eligible rail service. The budget for 2004/5 is £22 million, £23 million for 2005/6 and £24 million for 2006/7. The Commission's authorisation was issued with a declaration that the scheme is not in breach of EU aid and internal market legislation.

In terms of substance, it is undeniable that the EU policy process in the context of international maritime and trade law is particularly rapid. The Commission's goals are ambitious. In 2003 radical proposals were considered and introduced. That trend is not likely to slow down in 2004. This is largely because the Commission, in consideration of the principle of subsidiarity, sees this sector very much as its natural domain. The international element makes it more convenient and expeditious for the Commission, rather than Member States, to get involved.