

Price-fixing on the line

The EC's review of Regulation 4056/86, which permits price-fixing in conferences, is not going well. Only the same old arguments for and against antitrust immunity have so far been tabled, little of which has been backed up by any real evidence. **Matthew Beddow** reports.

The European Commission (EC) could be excused for not yet being swayed by any of the lengthy submissions so far submitted by those in favour of and against the maintenance of Regulation 4056/86. The contentious piece of legislation that permits conference carriers in Europe to fix common tariff rates, THCs and surcharges, as well as discuss supply and demand, is currently being reviewed by the EC. As a source within the organisation recently confided: 'We just appear to be going round in circles.'

Interested parties were asked to submit their views on the legislation in September 2003, but according to a team of outside consultants employed to review all responses, 'the submissions hardly provided any new evidence or proof that compounds the already well-known arguments in favour of and against the [continuation of] block exemption for liner conferences'. It was this same lack of evidence that eventually devalued the last analysis of Regulation 4056/86 by the OECD in 2002.

The consultancy team was led by Professor Hercules Haralambides of Rotterdam's Erasmus University. To complicate the EC's problems, some of the consultants' conclusions have since had to be disowned by the EC as being outside of its terms of reference. For reasons best known to itself, the consultancy not only reported on the responses, but also gave its own views on several important issues. Because of its ocean carrier background, the European Shippers' Council (ESC) claims these conclusions to be heavily carrier-biased.

For example, the Erasmus report stated: 'In view of the fact that nowadays between 80% and 90% of general cargo is carried under service contracts, it could be strongly argued that the antitrust immunity of conference price-setting is becoming increasingly irrelevant, and thus neither party should actually have any strong feelings either on maintaining or abolishing 4056/86.' Shippers are not happy with the view, as it is not based on any actual evidence, and overlooks the effects of common surcharges and

terminal handling charges (THCs), among other things.

A subsequent public hearing held in Brussels at the beginning of December only seems to have added to the EC's frustrations. The event was organised to seek interested parties' views on a number of issues requiring further investigation. Delegates were asked to publicly respond to a number of predefined questions, but few chose to answer the queries directly.

For example, in response to the question: 'Have all alternatives to horizontal price fixing been sufficiently explored?', the European Liner Affairs Association (ELAA), representing conference carriers, declined to comment until it had been clearly proved that the conference system was in need of repair.

On the next question, 'What is the relevant price - oceanfreight rates, all-inclusive prices, spot rates, tariff rates or rates actually paid by shippers?', the ELAA responded that the subject was too complicated for open debate, but would be willing to meet afterwards with the ESC and the EC to discuss the subject in more detail - and that the ELAA would do its best to provide whatever information was required.

Up to now, the ELAA has only tabled tariff rates in support of its view that conferences do indeed provide price stability, one of the cornerstones on which Regulation 4056/86 was originally agreed by Europe's lawmakers. Shippers have provided little better, and even appeared to backtrack on past statements at the hearing. Lawyers representing both the ESC and French Shippers' Council (AUTF) stated that price stability was, in fact, no longer that important, whereas until now, the impression has been given that if it could be proved that conferences did not provide rate stability, Regulation 4056/86 would

need to be revised or even abolished.

Francis Lefebvre of AUTF commented: 'Price stability is not an objective as such. Our members are more interested in low prices, and letting rate levels be determined by normal market forces instead of artificially through the conference system.' Mark Clough, a lawyer with Ashurst Morris Crisp, representing the ESC, added: 'Price stability does not necessarily justify the need for Regulation 4056/86.'

Quite what the EC makes of this is unclear, but a source within the organisation revealed: 'This is not what we expected, but the whole point of a public hearing is to clarify such matters, and we will be guided accordingly.'

As is their way, all EC representatives refrained from passing any opinions at the hearing, only stating that 'all views would be taken away for analysis'. Privately, however, much frustration was expressed over the lack of clarity of some of the responses. Lowri Evans, director of the EC's COMP/D unit, said: 'Our task now is to assess all the information we have received, and report back to Mario Monti, the commissioner responsible for competition policy. He will decide where we go from here.' No timeframe was disclosed.

Monti's next move will either be to ask for more information - and, in this respect, the ELAA's offer to provide more information on freight rates looks interesting - or he can decide that the EC has already heard enough to table a green or white paper setting out recommendations for the European Parliament to debate.

He has much to consider, as his earlier statement, that it is up to the ocean carriers to prove that Regulation 4056/86 is still relevant, is being challenged by ocean carriers. Monti has said that unless the carriers can prove that the legislation is still necessary, the EC will be guided accordingly. But Ken Sørensen, executive director of the ELAA, believes this onus of proof should be shared between the EC, shippers and ocean carriers.

He observed at the hearing: 'The position is like a meeting with a surgeon who orders you to allow him to amputate your leg. You ask the surgeon why he would do that - when you are healthy, and have no problems anyone has diagnosed with your leg. But that, unfortunately, is not the point. The surgeon will say, following the

EC's example: "I will amputate your leg unless you prove to me that it is functioning well and does not require amputation." I ask you, is that the behaviour one would expect from an experienced surgeon? I think not.'

Monti should by now be well aware of the lines' views on this matter. Surprisingly, however, he has not yet chosen to comment on it, so, as made clear by Evans, his dictate still stands as far as the rest of the EC's team is concerned. 

