

**COUNCIL REGULATION (EEC) No 4057/86**  
**of 22 December 1986**  
**on unfair pricing practices in maritime transport**

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 draft Regulation submitted by the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(2)</sup>,

Whereas there is reason to believe, *inter alia* on the basis of the information system set up by Council Decision 78/774/EEC <sup>(3)</sup>, that the competitive participation of Community shipowners in international liner shipping is adversely affected by certain unfair practices of shipping lines of third countries;

Whereas the structure of the Community shipping industry is such as to make it appropriate that the provisions of this Regulation should also apply to nationals of Member States established outside the Community or cargo shipping companies established outside the Community and controlled by nationals of Member States, if their ships are registered in a Member State in accordance with its legislation;

Whereas such unfair practices consist of continuous charging of freight rates for the transport of selected commodities which are lower than the lowest freight rates charged for the same commodities by established and representative shipowners;

Whereas such pricing practices are made possible by non-commercial advantages granted by a State which is not a member of the Community;

Whereas the Community should be able to take redressive action against such pricing practices;

Whereas there are no internationally agreed rules as to what constitutes an unfair price in the maritime transport field;

Whereas, in order to determine the existence of unfair pricing practices, provision should therefore be made for an

appropriate method of calculation; whereas when calculating the 'normal freight rate' account should be taken of the comparable rate actually charged by established and representative companies operating within or outside conferences or otherwise of a constructed rate based on the costs of comparable companies plus a reasonable margin of profit;

Whereas appropriate factors relevant for the determination of injury should be laid down;

Whereas it is necessary to lay down the procedures for those acting on behalf of the Community shipping industry who consider themselves injured or threatened by unfair pricing practices to lodge a complaint; whereas it seems appropriate to make it clear that in the case of withdrawal of a complaint, proceedings may, but need not necessarily, be terminated;

Whereas there should be cooperation between the Member States and the Commission both as regards information about the existence of unfair pricing practices and injury resulting therefrom, and as regards the subsequent examination of the matter at Community level; whereas, to this end, consultations should take place within an Advisory Committee;

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the investigation, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the principal facts and considerations on the basis of which it is intended to propose the introduction of a redressive duty;

Whereas, in order to discourage unfair pricing practices, but without preventing, restricting or distorting price competition by non-conference lines, providing that they are working on a fair and commercial basis, it is appropriate to provide, in cases where the facts as finally established show that there is an unfair pricing practice and injury, for the possibility of imposing redressive duties on particular grounds;

Whereas it is essential, in order to ensure that redressive duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties;

Whereas open and fair procedures should be provided for the review of measures taken and for the investigation to be reopened when circumstances so require;

<sup>(1)</sup> OJ No C 255, 15. 10. 1986, p. 169.

<sup>(2)</sup> OJ No C 344, 31. 12. 1985, p. 31.

<sup>(3)</sup> OJ No L 258, 21. 9. 1978, p. 35.

Whereas appropriate procedures should be established for examining applications for refund of redressive duties,

HAS ADOPTED THIS REGULATION:

*Article 1*

**Objective**

This Regulation lays down the procedure to be followed in order to respond to unfair pricing practices by certain third country shipowners engaged in international cargo liner shipping, which cause serious disruption of the freight pattern on a particular route to, from or within the Community and cause or threaten to cause major injury to Community shipowners operating on that route and to Community interests.

*Article 2*

In response to unfair pricing practices as described in Article 1 which cause major injury, a redressive duty may be applied by the Community.

A threat of major injury may only give rise to an examination within the meaning of Article 4.

*Article 3*

For the purposes of this Regulation:

- (a) 'third country shipowner' means cargo liner shipping companies other than those mentioned under (d);
- (b) 'unfair pricing practices' means the continuous charging on a particular shipping route to, from or within the Community of freight rates for selected or all commodities which are lower than the normal freight rates charged during a period of at least six months, when such lower freight rates are made possible by the fact that the shipowner concerned enjoys non-commercial advantages which are granted by a State which is not a member of the Community;
- (c) the 'normal freight rate' shall be determined taking into account:
  - (i) the comparable rate actually charged in the ordinary course of shipping business for the like service on the same or comparable route by established and representative companies not enjoying the advantages in (b);
  - (ii) or otherwise the constructed rate which is determined by taking the costs of comparable companies not enjoying the advantages in (b) plus a reasonable margin of profit. This cost shall be computed on the

basis of all costs incurred in the ordinary course of shipping business, both fixed and variable, plus a reasonable amount for overhead expenses.

(d) 'Community shipowners' means:

- all cargo shipping companies established under the Treaty in a Member State of the Community;
- nationals of Member States established outside the Community or cargo shipping companies established outside the Community and controlled by nationals of Member States, if their ships are registered in a Member State in accordance with its legislation.

*Article 4*

**Examination of injury**

1. Examination of injury shall cover the following factors:

- (a) the freight rates offered by Community shipowners' competitors on the route in question, in particular in order to determine whether they have been significantly lower than the normal freight rate offered by Community shipowners, taking into account the level of service offered by all the companies concerned;
- (b) the effect of the above factor on Community shipowners as indicated by trends in a number of economic indicators such as:
  - sailings,
  - utilization of capacity,
  - cargo bookings,
  - market share,
  - freight rates (that is depression of freight rates or prevention of freight rate increases which would normally have occurred),
  - profits,
  - return of capital,
  - investment,
  - employment.

2. Where a threat of injury is alleged, the Commission may also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, account may also be taken of factors such as:

- (a) the increase in tonnage deployed on the shipping route where the competition with Community shipowners is taking place;
- (b) the capacity which is already available or is to become available in the foreseeable future in the country of the

foreign shipowners and the extent to which the tonnage resulting from that capacity is likely to be used on the shipping route referred to in (a).

3. Injury caused by other factors which, either individually or in combination, are also adversely affecting Community shipowners must not be attributed to the practices in question.

#### Article 5

##### Complaint

1. Any natural or legal person, or any association not having legal personality, acting on behalf of the Community shipping industry who consider themselves injured or threatened by unfair pricing practices may lodge a written complaint.

2. The complaint shall contain sufficient evidence of the existence of the unfair pricing practice and injury resulting therefrom.

3. The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.

4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.

5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of unfair pricing practices and of injury resulting therefrom for Community shipowners, it shall immediately communicate such evidence to the Commission.

#### Article 6

##### Consultations

1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as Chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission.

2. The Committee shall meet when convened by its Chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States

and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation.

4. Consultation shall in particular cover:

- (a) the existence of unfair pricing practices and the amount thereof;
- (b) the existence and extent of injury;
- (c) the causal link between the unfair pricing practices and injury;
- (d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by unfair pricing practices and the ways and means for putting such measures into effect.

#### Article 7

##### Initiation and subsequent investigation

1. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately:

- (a) announce the initiation of a proceeding in the *Official Journal of the European Communities*; such announcements shall indicate the foreign shipowner concerned and his country of origin, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;
- (b) so advise the shipowners, shippers and freight forwarders known to the Commission to be concerned and the complainants;
- (c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both unfair pricing practices and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; the investigation of unfair pricing practices shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding.

2. (a) Where appropriate the Commission shall seek all the information it deems necessary and attempt to check this information with the shipowners, agents, shippers, freight forwarders, conferences, associations and other organizations, provided that the undertakings or organizations concerned give their consent.

(b) Where necessary the Commission shall, after consultation, carry out investigations in third countries, provided that the firms concerned give their consent and the government of the country in question

has been officially notified and raises no objection. The Commission shall be assisted by officials of those Member States which so request.

3. (a) The Commission may request Member States:

- to supply information,
- to carry out all necessary checks and inspections, particularly amongst shippers, freight forwarders, Community shipowners and their agents,
- to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection.

(b) Member States shall take whatever steps are necessary in order to give effect to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out.

(c) Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States provided it is not confidential, in which case a non-confidential summary shall be forwarded.

(d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

4. (a) The complainant and the shippers and shipowners known to be concerned may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission, indicating the information required.

(b) Shipowners subject to investigation and the complainant may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of redressive duties.

(c) (i) Requests for information pursuant to (b) shall:

- be addressed to the Commission in writing,
- specify the particular issues on which information is sought.

(ii) The information may be given either orally or in writing, as considered appropriate by the

Commission. It shall not prejudice any subsequent decision which may be taken by the Council. Confidential information shall be treated in accordance with Article 8.

(iii) Information shall normally be given no later than 15 days prior to the submission by the Commission of any proposal for action pursuant to Article 11. Representations made after the information is given may be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

5. The Commission may hear the interested parties. It shall so hear them if they have, within the periods prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be given a hearing.

6. Furthermore, the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any argument put forward by way of rebuttal. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. (a) This Article shall not preclude the Council from reaching preliminary determinations or from applying measures expeditiously.

(b) In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, findings, affirmative or negative, may be made on the basis of the facts available.

8. Proceedings on unfair pricing practices shall not constitute a bar to customs clearance of the goods to which the freight rates concerned apply.

9. (a) An investigation shall be concluded either by its termination or by action pursuant to Article 11. Conclusion should normally take place within one year of the initiation of the proceeding.

(b) A proceeding shall be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings or by the expiry or repeal of such duties or by the lapse of undertakings in accordance with Articles 14 or 15.

### Article 8

#### Confidentiality

1. Information received in pursuance of this Regulation shall be used only for the purpose for which it was requested.
2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information received in pursuance of this Regulation of which confidential treatment has been requested by its supplier, without specific permission from the supplier.
- (b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.
3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.
4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted and where the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such summary.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken in pursuance of this Regulation are based, or disclosure of the evidence relied on by the Community authorities insofar as necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

### Article 9

#### Termination of proceedings where protective measures are unnecessary

1. If it becomes apparent after consultation that protective measures are unnecessary, then, where no objection is raised within the Advisory Committee referred to in Article 6 (1), the proceeding shall be terminated. In all other cases the Commission shall submit to the Council

forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

2. The Commission shall inform the parties known to be concerned and shall announce the termination in the *Official Journal of the European Communities* setting forth its basic conclusions and a summary of the reasons therefor.

### Article 10

#### Undertakings

1. Where, during the course of investigation, undertakings are offered which the Commission, after consultation, considers acceptable, the investigation may be terminated without the imposition of redressive duties.

Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made under Article 7 (4) (c) (iii). The termination shall be decided in conformity with the procedure laid down in Article 9 (1) and information shall be given and notice published in accordance with Article 9 (2).

2. The undertakings referred to under paragraph 1 are those under which rates are revised to an extent such that the Commission is satisfied that the unfair pricing practice, or the injurious effects thereof, are eliminated.
3. Undertakings may be suggested by the Commission, but the fact that such undertakings are not offered or an invitation to do so is not accepted, shall not prejudice consideration of the case. However, the continuation of unfair pricing practices may be taken as evidence that a threat of injury is more likely to be realized.
4. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation, so decides or if request is made by the Community shipowners concerned. In such a case, if the Commission, after consultation, makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no threat of injury is due mainly to the existence of an undertaking, the Commission may require that the undertaking be maintained.

5. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

*Article 11***Redressive duties**

Where investigation shows that there is an unfair pricing practice, that injury is caused by it and that the interests of the Community make Community intervention necessary, the Commission shall propose to the Council, after the consultations provided for in Article 6, that it introduce a redressive duty. The Council, acting by a qualified majority, shall take a Decision within two months.

*Article 12*

In deciding on the redressive duties, the Council shall also take due account of the external trade policy considerations as well as the port interests and the shipping policy considerations of the Member States concerned.

*Article 13***General provisions on duties**

1. Redressive duties shall be imposed on the foreign shipowners concerned by regulation.
2. Such regulation shall indicate in particular the amount and type of duty imposed, the commodity or commodities transported, the name and the country of origin of the foreign shipowner concerned and the reasons on which the Regulation is based.
3. The amount of the duties shall not exceed the difference between the freight rate charged and the normal freight rate referred to in Article 3 (c). It shall be less if such lesser duty would be adequate to remove the injury.
4. (a) Duties shall be neither imposed nor increased with retroactive effect and shall apply to the transport of commodities which, after entry into force of such duties, are loaded or discharged in a Community port.
- (b) However, where the Council determines that an undertaking has been violated or withdrawn, the redressive duties may be imposed, on a proposal from the Commission, on the transport of commodities which were loaded or discharged in a Community port not more than 90 days prior to the date of application of these duties, except that in the case of violation or withdrawal of an undertaking such retroactive assessment shall not apply to the transport of commodities which were loaded or discharged in a Community port before the violation or withdrawal. These duties may be calculated on the basis of the facts established before the acceptance of the undertaking.

5. Duties shall be collected by Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports of goods transported.

6. Permission to load or discharge cargo in a Community port may be made conditional upon the provision of security for the amount of the duties.

*Article 14***Review**

1. Regulations imposing redressive duties and decisions to accept undertakings shall be subject to review, in whole or in part, where warranted. Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation. Such requests shall be addressed to the Commission, which shall inform the Member States.
2. Where, after consultation, it becomes apparent that review is warranted, the investigation shall be re-opened in accordance with Article 7, where the circumstances so require. Such reopening shall not *per se* affect the measures in operation.
3. Where warranted by the review, carried out either with or without reopening of the investigation, the measures shall be amended, repealed or annulled by the Community institution competent for their adoption.

*Article 15*

1. Subject to paragraph 2, redressive duties and undertakings shall lapse after five years from the date on which they entered into force or were last amended or confirmed.
2. The Commission shall normally, after consultation and within six months prior to the expiry of the five year period, publish in the *Official Journal of the European Communities* a notice of the impending expiry of the measure in question and inform Community shipowners known to be concerned. This notice shall state the period within which interested parties may make known their views in writing and may apply to be given a hearing by the Commission in accordance with Article 7 (5).

Where an interested party shows that the expiry of the measure would again lead to injury or threat of injury, the Commission shall carry out a review of the measure. The measure shall remain in force pending the outcome of this review.

Where redressive duties and undertakings lapse under this Article the Commission shall publish a notice to that effect in the *Official Journal of the European Communities*.

#### *Article 16*

##### **Refund**

1. Where the shipowner concerned can show that the duty collected exceeds the difference between the freight rate charged and the normal freight rate referred to in Article 3 (c) the excess amount shall be reimbursed.

2. In order to request the reimbursement referred to in paragraph 1, the foreign shipowner may submit an application to the Commission. The application shall be submitted via the Member State within the territory of which the commodities transported were loaded or discharged and within three months of the date on which the amount of the redressive duties to be levied was duly determined by the competent authorities.

The Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits.

The Commission shall inform the other Member States forthwith and give its opinion on the matter. If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Commission may decide in accordance with the said opinion. In all other cases, the Commission shall, after consultation, decide whether and to what extent the application should be granted.

#### *Article 17*

##### **Final provisions**

This Regulation shall not preclude the application of any special rules laid down in agreements concluded between the Community and third countries.

#### *Article 18*

##### **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.

Done at Brussels, 22 December 1986.

*For the Council*

*The President*

G. SHAW