

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 05.10.1994

REPORT FROM THE COMMISSION

ON

**IMPLEMENTATION OF COUNCIL REGULATION (EEC) No. 4055/86 OF 22
DECEMBER 1986 APPLYING THE PRINCIPLE OF FREEDOM TO PROVIDE
SERVICES TO MARITIME TRANSPORT BETWEEN MEMBER STATES AND
BETWEEN MEMBER STATES AND THIRD COUNTRIES.**

Introduction.

1. On 22 December 1986 the Council of Ministers adopted four regulations which completed the first foundations for a European shipping policy. Of these Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L378 of 31.12.1986) entered into force on 1 January 1987. The Regulation is binding in its entirety and is directly applicable in all Member States.

The Regulation was adopted at the same time as the three other Regulations (4056, 4057, 4058 of 1986) which form the cornerstones of maritime transport policy, and together provide an essential base for subsequent positive measures to promote and safeguard a Community flag fleet.

A first Report on the implementation of all four Regulations was made in 1990. (SEC (90) 1594 final - 1990). A further Report on the Implementation of Regulation 4055/86 was presented by the Commission to the Council in November 1992 (SEC (92) 2183 final - 1992). The present Report is prepared in response to the request of the Transport Working Group of the Council.

Implementation.

The outstanding problems are as follows:-

A. Unilateral restrictions on the carriage of goods. (Article 2).¹

2. Portugal abolished its outstanding unilateral restrictions by Decree Law of 28 October 1993, thus complying with the third and final phase of Article 2 of the Regulation.

Only one Member State, France, still has restrictions which are subject to the provisions of Articles 1 and 2 of the Regulation. These restrictions concern:-

(a) legislation on coal imports:

A law of 18 August 1936 states that at least 40% of coal imports must be carried on French flag vessels. Some derogations are allowed in the case of a French flag vessel not being available. The Commission is of the opinion that the law needs to be modified in order to conform with Article 2 of Regulation 4055/86, and wrote to the French authorities expressing this view. The French Government however did not agree and the Commission therefore decided to open infringement procedures against France. A Letter of formal notice was sent to the French authorities on 27 July 1993. A Reasoned opinion is in preparation.

(b) oil imports:

A new French law was passed on 31 December 1992 reforming the old regime on crude oil imports, which contained measures of cargo reservation in favour of the French flag. The new law contains measures which impose an obligation on refinery owners to have at their disposal, either by charter or ownership, a certain capacity of oil tankers under the French flag, proportional to the quantities of crude oil entering the refineries. The Commission was concerned that these measures could impinge on the freedom to provide services, and a letter of formal notice was sent to the French authorities on 27 July 1993. A reply was received dated 11 November 1993. The Commission is studying this reply and will shortly deliberate on the matter.

The Commission received a complaint from a Community oil company that, following enactment of the above French law obliging refiners to have a certain capacity of oil tankers under French flag, it would be obliged to re-flag its existing vessels, or charter one or more on a long-term charter. The Commission is investigating this complaint.

¹ See also Annex I

(c) COFACE

(Compagnie française d'Assurance pour le Commerce Extérieur and/or Protocol rules on exports from France).

The rules governing export credits of certain goods from France contain restrictions on the flag of the vessel which may be used to transport the goods. In effect, there is an obligation to use a French flag vessel, or alternatively purchase a French vessel's Bill of Lading from a French authorising body. In reality COFACE-contract transport would seem to be virtually closed to non-French flag vessels. The Commission is of the opinion that these rules may infringe Regulation 4055/86. A letter of formal notice has been sent to the French authorities outlining the Commission's concerns.

The Commission received a complaint from a Community operator that it was unable to participate freely in the trade between France and Morocco for shipments under the COFACE and Protocol rules applying to export credit shipments from France. The Commission is investigating the complaint and has taken the matter up with the French authorities.

3. European Court of Justice.

The Court gave judgement on 17 May 1994 in Case C-18-93 Corsica Ferries Italia Srl c/Corporazione dei piloti del porto di Genova. The judgement is as follows:-

1. Article 1(1) of Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries precludes the application in a Member State of different tariffs for identical piloting services, depending on whether or not the undertaking which provides maritime transport services between two Member States operates a vessel authorized to engage in maritime cabotage, which is reserved to vessels flying the flag of that State.
2. Article 90(1) and Article 86 of the EEC Treaty prohibit a national authority, by approving the tariffs adopted by an undertaking which has been granted the exclusive right of providing compulsory piloting services in a substantial part of the common market, from inducing it to apply different tariffs to maritime transport undertakings, depending on whether they operate transport services between Member States or between ports situated on national territory, in so far as trade between Member States is affected.

The judgment contains a number of important points concerning transport services. First of all, the entire line pursued by the Court confirms that the concept of the freedom to provide services is the same under Article 59 and in the sector of transport (cf. Judgment of 22 May 1985 - Parliament/Council, 13/83, ECR 1513). The Court then states that the freedom to provide services may be invoked by a company in respect of the country in which it is established where it operates liner services between Member States: the very nature of these services prevent them from being purely domestic. Finally, the Court finds that discrimination based on the flags of the ships used amounts to indirect discrimination by virtue of nationality, even if nationals of other Member States can obtain national flags under the same conditions as nationals and even if certain national operators use ships not registered in their countries.

B. Cargo-sharing arrangements in bilateral agreements.²

4. A number of problems concerning these agreements have been solved as follows:-

France has an agreement with Tunisia which was adjusted in 1992 to comply with the Regulation.

France also has agreements with Côte d'Ivoire, Niger, Burkina Fasso, Djibouti and Brazil. Following detailed examination by the Commission, and a statement to that effect from the French authorities, it was found that there were no cargo-sharing arrangements subject to the provisions of the Regulation. The files on these agreements were therefore closed.

Spain has an agreement with Morocco which was adjusted to comply with the Regulation in January 1994. The cargo shares due to Spain are now open to all entitled Community shipowners.

Spain also had an agreement with Mexico. Mexico denounced the agreement on 6 May 1992: the agreement subsequently lapsed.

Federal Republic of Germany has an agreement with Brazil which was adjusted to comply with the Regulation in 1993.

² See also Annex II.

5. **Outstanding bilateral agreements containing cargo-sharing arrangements.**

The Commission has decided to open formal infringement procedures for all cases not yet adapted to comply with the Regulation, but for the time being to withhold the letters of formal notice for those agreements with Central and West African countries (CMEAOC countries), for the reasons outlined in paragraph 7 below. However, the Commission's view remains that the agreements are contrary to the provisions of Regulation 4055/86 and must be brought into compliance with Community legislation. The Commission is aware that the Member States concerned have tried unsuccessfully to adjust most of their agreements with third countries.

However, the Member States must comply with the provisions of Regulation 4055/86, and should unilaterally phase out the agreements, as foreseen in Article 3 of the Regulation, if action under Article 4 (adjustment) fails.

The agreements are separated into two groups - CMEAOC and other countries - for the purposes of this report.

Bilateral Agreements with countries of the CMEAOC (Ministerial Conference of West and Central Africa for Maritime Transport).

6. On 29/30 November 1993 the Council invited the Commission to conduct fact finding missions to West African countries in an effort to find a satisfactory solution to the existing restrictions in the maritime trade with these countries. In April and May 1994 respectively, representatives of the Commission visited the Côte d'Ivoire, Ghana, Senegal and Cameroon in order to explore the possibilities of achieving the liberalisation of the maritime transport sectors of the countries concerned, taking into account their development interests while at the same time trying to bring about a maximum degree of free and fair competition.

During these missions the Commission also discussed with the authorities of the Côte d'Ivoire, Senegal and Cameroon, the necessity of the adjustment of the cargo-sharing arrangements in the existing bilateral agreements concluded between these countries and the Member States concerned, so as to make the agreements compatible with Council Regulation 4055/86. The Commission was aware that the Member States concerned had tried, and failed, to achieve adjustment of the agreements in bilateral contacts with the African countries concerned.

The authorities of all three countries stated that they would agree with an adjustment of the bilateral agreements and that representatives of the Member States would be welcome to discuss the necessary action. The Member States have been informed of this development, orally in the Transport Working Group of the Council, and by letter. The Commission has urged them to take the necessary steps to follow up this development and have the agreements adjusted as quickly as possible, and to keep the Commission informed.

With regard to the three West African countries which have cargo-sharing arrangements in bilateral agreements with Member States which formally entered into force after 1 January 1987, i.e. Gabon, Togo and Zaire, the Commission has recently taken up this matter with the ambassadors of the three countries in Brussels. The bilateral agreements in question are those between Spain and Gabon, and Belgium and Togo and Zaire (signed on behalf of the BLEU). Infringement procedures are already opened for these cases. The Commission, in the light of the diplomatic efforts now being undertaken, has decided to treat these three cases in parallel with the other CMEAOC agreements to optimize the chances of overall success.

7. Six Member States have agreements with countries of the CMEAOC, as follows:-

Member State	CMEAOC country
Federal Republic of Germany	Côte d'Ivoire
Belgium	Côte d'Ivoire, Senegal, Mali, Togo, Zaire
Luxembourg	Côte d'Ivoire, Senegal, Mali
Spain	Côte d'Ivoire, Equatorial Guinea, Senegal; Cameroon, Congo, Gabon
Italy	Côte d'Ivoire, Senegal
Portugal	Cape Verde, Sao Tomé and Principe, Angola and Senegal

Infringement procedures were opened for all these cases. Those for Belgium/Togo/Zaire, Spain/Gabon were started some time ago (see paragraph 6). The letters of formal notice for all the other cases are being withheld for the time being in order not to jeopardise the outcome of discussions between the Commission and individual West African countries.

The Commission emphasizes that the holding back of these letters is only temporary and that it intends in the near future to take the necessary procedural steps for ensuring that the cargo-sharing agreements existing between the Member States and the CMEAOC countries are adjusted or phased out in accordance with Regulation No. 4055/86.

Agreements with other third countries:

8. Five Member States have agreements with other third countries, as follows:-

Member State	Third country
Belgium	Malaysia
Luxembourg	Malaysia
Spain	Russian Federation, Tunisia
Italy	Morocco
Portugal	Poland, Hungary, Brazil, Russian Federation, Romania, Bulgaria, Yugoslavia

The Commission has sent letters of formal notice, in accordance with Article 169 of the Treaty, to the Member States concerned.

C. Complaints on bilateral agreements/access to trade.

9. The Commission received a number of complaints concerning different Member States and problems of participation in trade with third countries. They concerned the following areas:-

Spain/Morocco: A Community company complained that it was being prevented from participating in the trade between Morocco and Spain and that, according to them, this represented a breach of Regulation 4055/86. The Commission investigated the complaint in accordance with the procedures laid down, and took up the matter with the Spanish authorities. The Commission addressed a letter, under Article 169 of the Treaty, to Spain setting out its point of view of a possible infringement of the Regulation.

Portugal/Brazil: A Community company complained that it was being prevented from participating in the trade between Portugal and Brazil because of the provisions of the bilateral agreement between the two countries on maritime transport. The Commission investigated the complaint and took up the matter with the Portuguese authorities. The Commission addressed a letter, under Article 169 of the Treaty, to Portugal, setting out its point of view of a possible infringement of the Regulation.

D. Negotiation of shipping agreements and Community competence (Article 113).

10. The Commission's approach has already been outlined in the previous reports. For the record this approach is that Article 113 has to be regarded as the legal basis for any Community action on commercial policy relating to services. The competence conferred by Article 113 is an exclusive competence and means that the Member States may not, unless specifically authorized, conclude or negotiate agreements falling within the scope of the common commercial policy. Consequently, any agreement with third countries in matters of maritime transport having a commercial aspect, should be negotiated by the Community, or with Community approval by the Member State concerned. The Member States have a different view in respect of the scope of Article 113. Solutions ensuring that essential Community interests are safeguarded are under consideration and the Commission will address this question in a separate Communication on External Relations in Maritime Transport.

E. Other issues.

11. **Ratification of United Nations Code of Conduct for Liner Conferences:** Spain informed the Commission by letter dated 28 April 1994 that on 3 February 1994 the ratification instruments had been deposited by Spain in the Secretariat of the UN in New York.

Greece, Luxembourg and Ireland have yet to ratify the Code.

12. **Agreements between the former German Democratic Republic and third countries:**

Regulation 4055/86 was amended specifically to allow the Federal Republic of Germany up to 1 January 1995 to bring the agreements between the former German Democratic Republic and third countries into compliance. The Commission is in contact with the authorities of the Federal Republic in order to ensure that this is done and that the Commission is kept informed.

13. **Conclusion.**

1. The Commission, as foreseen in its Report of November 1992, has examined all the outstanding cases under Regulation 4055/86. The results of that examination show that:-

- (a) a number of outstanding cases have been resolved;
- (b) some cases, on detailed examination, were found to contain no direct problems vis-a-vis the Regulation and were thus closed;
- (c) there are still a significant number of cases, mostly cargo-sharing arrangements in bilateral agreements with third countries, which appear to the Commission to be in breach of Regulation 4055/86.

2. The Commission therefore has opened infringement procedures for all the outstanding cases. The letters of formal notice for the unilateral restrictions have been dispatched. The letters for the bilateral agreements fall into two groups: those for agreements with CMEAOC countries, and those for agreements with other third countries. The letters for the latter cases have been dispatched. The letters for CMEAOC agreements are being withheld in order not to jeopardise the outcome of discussions between the Commission and individual West African countries, as are further steps in the infringement procedures which have already gone beyond this stage (see paragraph 6). There are positive developments in those discussions and the Member States who have agreements with the Cote d'Ivoire, Senegal and Cameroon, have been urged to seize the opportunity presented by this development and to make contact with these countries in order to have their agreements adjusted.

3. Finally, the Member States are reminded of the basic principle of Regulation 4055/86 that: "Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply...", and must fulfill the obligations imposed by the Regulation. These obligations, in brief, are that all unilateral restrictions must be abolished and all cargo-sharing arrangements must be phased out or adjusted. The deadlines for compliance with these obligations are well past. The provisions of Article 3 of the Regulation explicitly state that phasing out of the cargo-sharing arrangements is to be considered as one means of satisfying the requirements of the Regulation, and the Member States are reminded of this as an ultimate alternative to adjustment of the cargo-sharing arrangements. The Commission, for its part, will continue to implement the Regulation and impose compliance, where necessary, through the formal procedures established to this end.

UNILATERAL RESTRICTIONS, 30 JUNE 1994.

Member State	Description	Status at 30.6.1994
FRANCE	Oil Imports - new law.	Formal Notice sent and reply recvd. Reply being studied by Commission.
	Coal Imports - restriction of 40% to French flag	Formal Notice sent August 1993. Infringement procedure continuing.
	COFACE & Protocol rules.	Formal Notice sent.
PORTUGAL	Outstanding national restrictions mentioned in Nov. 1992 report.	Abolished by Decree Law on 28 October 1993

OUTSTANDING BILATERAL AGREEMENTS CONTAINING CARGO-SHARING ARRANGEMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES, 30 JUNE 1994.

<i>Member State</i>	<i>CMEAOC country</i>	<i>Other third country</i>
Federal Republic of Germany	Cote d'Ivoire	
Belgium BLEU agreement	Senegal, Cote d'Ivoire, Mali, Togo, Zaire,	Malaysia
Luxembourg BLEU agreement	Senegal, Cote d'Ivoire, Mali	Malaysia
Spain	Cote d'Ivoire, Senegal, Equatorial Guinea, Cameroon, Congo, Gabon	Russian Federation, Tunisia
Italy	Senegal, Cote d'Ivoire	Morocco
Portugal	Cape Verde, Sao Tomé and Principe, Angola, Senegal	Poland, Hungary, Brazil, Russian Federation, Romania, Bulgaria, Yugoslavia

BILATERAL AGREEMENTS LAPSED OR ADJUSTED TO COMPLY WITH 4055/86 SINCE 1992 REPORT, 30 JUNE 1994.

MEMBER STATE	THIRD COUNTRY
France	Tunisia (adjusted) Mauritania, Djibouti, Brazil, Cote d'Ivoire, Niger, Burkina Fasso (files closed)
Federal Republic of Germany	Brazil (adjusted)
Spain	Morocco (adjusted) Mexico (lapsed)