

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 April 1999

relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty and Articles 53 and 54 of the EEA Agreement

(Cases No IV/D-1/30.373 — P & I Clubs, IGA and No IV/D-1/37.143 — P & I Clubs, Pooling Agreement)

(notified under document number C(1999) 221)

(Only the English text is authentic)

(Text with EEA relevance)

(1999/329/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 6 and 8 thereof,

Having regard to the formal notifications for negative clearance and exemption submitted pursuant to Article 4 of Regulation No 17 of the International Group Agreement on 18 June 1981 and 27 July 1984, the request of 20 February 1995 to renew the exemption granted on 16 December 1985 and the formal notifications for exemption of the International Group Pooling Agreement on 7 July 1998 and of the International Group Agreement on 21 October 1998,

Having regard to the publication pursuant to Article 19(3) of Regulation No 17 of a notice concerning the International Group Pooling Agreement on 14 August 1998 ⁽²⁾ and a similar notice regarding the International Group Agreement, published on 21 October 1998 ⁽³⁾,

After having consulted the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

(A) THE FACTS

1. INTRODUCTION

- (1) This case concerns the compatibility with the competition rules of the EC Treaty and the EEA Agreement of two arrangements concluded within the International Group of P & I Clubs (hereinafter referred to as 'the IG'), namely the International Group Pooling Agreement (hereinafter 'the Pooling Agreement') and the International Group Agreement (hereinafter 'the IGA').
- (2) The IGA had originally been notified to the Commission in 1981. The Commission granted to it a formal exemption for 10 years. This expired in February 1995 and the IG requested a renewal of the exemption.
- (3) In June 1997 the Commission addressed a Statement of Objections to the IG, considering that both the Pooling Agreement and the IGA were in breach of the competition rules of the EC Treaty.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ C 256, 14.8.1998, p. 2.

⁽³⁾ OJ C 322, 21.10.1998, p. 31.

This Statement of Objections had been preceded by a complaint against the Pooling Agreement submitted by the Greek Shipping Cooperation Committee ("GSCC"), a shipping organisation established in London, which deals with matters affecting ships ultimately owned by Greek interests.

- (4) After the adoption of the Statement of Objections, the IG decided to amend its arrangements in order to comply with EC and EEA competition rules. It notified an amended version of the Pooling Agreement in July 1998 and of the IGA in October 1998. They will enter into force in February 1999.

2. THE PARTIES

- (5) The Protection & Indemnity Clubs (P & I Clubs) are mutual non-profit-making associations that provide Protection & Indemnity (P & I) insurance to their members, the shipowners. Each of the P & I Clubs is governed by a Board that represents the members, but the day-to-day management is in the hands of professional managers appointed by the Board.
- (6) The International Group (IG) of P & I Clubs is a worldwide association of P & I Clubs. 19 P & I Clubs are members of the IG (seven from UK, four from Bermuda, three from Luxembourg, two from Norway, and one each from the United States of America, Japan and Sweden).

3. THE MARKET OF P&I INSURANCE

- (7) Direct marine insurance can be divided into two broad areas: one covers the risks of damage to the vessels (hull, machinery and suchlike) and is normally offered by commercial insurers. The other, called Protection & Indemnity (P & I) insurance, covers contractual and third-party liability and has been traditionally insured by shipowner mutual associations, the P & I Clubs.
- (8) Protection & Indemnity is a general concept which includes insurance for different types of risks: injury or death of crew, passengers and others; collision damage to vessels; other damage to third-party property (such as harbour equipment); pollu-

tion; cargo and other (such as expenses of wreck removal). Most P & I insurers provide all these types of cover under a single contract.

- (9) Around 89 % of worldwide tonnage, and almost 100 % of European (EU-EFTA) tonnage, is insured by the P & I Clubs which are members of the IG. At present, they offer cover up to around EUR 3,9 billion (USD 4,25 billion).
- (10) The worldwide market shares of the individual IG P & I Clubs range from 16,3 % (UK Mutual) to less than 1 % (American Club). A breakdown of these figures into each of the P & I Clubs for the 1998/99 policy year may be seen below⁽¹⁾.

P&I Club	Tonnage insured (million GRT)	Market share (%)
American	5,3	0,98
Britannia	58,6	10,78
Gard	52,9	9,73
Japan Club	41,7	7,67
Liverpool & London	6,5	1,2
London	25,9	4,77
North of England	21,8	4,01
Skuld	42,5	7,82
SMP	6,9	1,27
Standard	29,5	5,43
Steamship Mutual	52,8	9,72
Swedish Club	11	2,02
UK Mutual	88,8	16,34
West of England	39,5	7,27
Total IG	483,7	89

- (11) The remaining tonnage is insured by small independent P & I mutual associations or maritime commercial insurers, or it is not insured at all against P & I liabilities. Independent P & I mutual associations normally focus on specific types of vessels, such as dry-cargo or coastal or fishing vessels and offer low levels of P & I cover. The largest of these insurers are the Ocean Marine mutual associations.
- (12) Some P & I Clubs which are members of the IG independently offer insurance for specific types of vessels. For instance, the Shipowners Mutual Protection (SMP) removed all the fishing vessels from the IG's arrangements in 1996 and now provides cover to them up to USD 500 million.

⁽¹⁾ The Chart provides aggregated data for the Standard (London, Europe and Bermuda), the Steamship Mutual (London, Europe and Bermuda), and Skuld (Norway and Bermuda).

- (13) Some commercial insurers, such as Lloyd's Syndicates, Southern Seas (Chubb Insurance), Terra Nova or HIH also provide direct P&I insurance. Their market share, at present, is insignificant.

agreed collectively by the clubs with commercial insurers. Only one or two claims per year reach this layer.

4. THE AGREEMENTS

4.1. The Pooling Agreement

- (14) The Pooling Agreement is in essence a claim-sharing agreement between mutual associations. Its purpose is to share proportionately among all the P & I Clubs the claims made on one club in excess of a certain amount. It was signed for the first time in 1899 between six P & I Clubs incorporated in the United Kingdom. Since then it has been modified several times and new clubs have adhered to it.

- (d) The excess of any claim over the amount of the Excess Reinsurance and up to around EUR 3,9 billion (USD 4,25 billion) is again shared by the clubs under the Pooling Agreement. This is known as the 'Overspill'. So far, no claim has ever reached this layer.

- (15) Only 18 P & I Clubs are parties to the Pooling Agreement. The remaining member of the IG, the SMP (from Luxembourg) indirectly participates in it by being reinsured by one of the other clubs.

- (17) The qualification 'up to around' EUR 3,9 billion (USD 4,25 billion) for the ceiling set to the overspill needs to be explained: this ceiling is not a fixed figure. If an overspill claim arises, each Member will have to contribute up to 2,5 % of the maximum liability that it would have to face according to Article 6(1)(b) of the International Convention on Limitation of Liability for Maritime Claims of 1976 (Clause 14.2 of the Pooling Agreement). The Article sets a series of maximum amounts to be faced by a ship owner for any single catastrophe based on the tonnage of the ship concerned⁽¹⁾. The EUR 3,9 billion (USD 4,25 billion) figure is arrived at by adding the 2,5 % of the maximum liability figures for each of the ships insured by P & I Clubs participating in the Pooling Agreement.

4.1.1. The claim-sharing arrangement

- (16) The claim-sharing arrangement provides for different layers of insurance coverage:

- (18) At the retention layer, as has been said, the totality of the claim is borne by the club whose Member has incurred the liability. In each of the other layers, the claims are shared between the clubs according to different rules:

- (a) The first EUR 4,57 million (USD 5 million) of any claim is borne by the club whose Member has incurred the liability. This is known as the club's 'retention'. Most of the claims faced by the clubs fall in this layer (99 % in number and 82 % in value, for the period 1985 to 1995).

- (a) Between EUR 4,57 million (USD 5 million) up to EUR 27,42 million (USD 30 million). The claims are shared according to the percentage of each club in claims, tonnage and total calls. Each one of these three factors accounts for one-third of the final percentage (this is why this method is called the one-third formula). There are, however, two qualifications to this formula. First, there is a loss ratio adjustment that takes into account whether in the past the club in question has been receiving more or less in contributions than it has effectively contributed to other members. Secondly, between EUR 18,3 million (USD 20 million) up to EUR 27,42 million (USD 30 million), the club incurring the claim receives a 20 % penalty (Clause 10.1 and Appendix VI of the Pooling Agreement).

- (b) The excess of any claim over EUR 4,57 million (USD 5 million) up to EUR 27,42 million (USD 30 million) is shared by the clubs under the Pooling Agreement. Around 20 claims per year have fallen in this layer between 1985 and 1995.

- (c) The excess of any claim over EUR 27,42 million (USD 30 million) up to EUR 1,8 billion (USD 2 billion) is covered by the Group General Excess Loss Reinsurance Contract,

⁽¹⁾ Article 6 (1)(b) establishes a table ranging from USD 50 000 for a ship of 500 gross tons up to USD 5,5 million for a ship of 170 000 gross tons.

- (b) The cost of the Group General Excess Loss Reinsurance Contract is shared between clubs according to the tonnage insured by each club. However, the rate to be paid per tonne depends on the type of vessel. Vessels that in the past have produced claims reaching this level have higher rates per ton. In fact, tankers have produced around 80 % of the claims that have reached this level and, therefore, their rates per ton are much higher.
- (c) An overspill claim would be apportioned among all the clubs in the proportion which the club limit of each of the clubs bears to the aggregate of all the club limits, which is calculated according to the method explained before (see recital 17).
- (19) It should be noted that in any event in the case of 'Overspill' claims, each club is entitled to deduct from its contribution the amounts not 'economically recoverable' from its members (Clause 14.3 of the Pooling Agreement). A panel of experts will determine the amounts not 'economically recoverable' in case of disagreement between the Clubs (Clause 15 of the Pooling Agreement). This clause limits the exposure of the clubs to a claim, and prevents clubs from paying sums that they could never collect in full.
- 4.1.2. *The minimum common level of cover***
- (20) As explained above (see point 16), all members of the P & I Clubs who participate in the pooling agreement are obliged to share claims up to mound EUR 3,9 billion (USD 4,25 billion).
- (21) Before 20 February 1998, this figure was set at around EUR 16,5 billion (USD 18 billion) (20 % of the maximum liability according to the International Convention on Limitation of Liability for Maritime Claims of 1976). In the Statement of Objections the Commission considered that this high minimum level of cover was contrary to Article 85 because it impeded clubs from competing by offering levels of cover lower than around EUR 16.5 billion (USD 18 billion), for which substantial demand existed. It also considered this agreement on a high common level of cover as an abuse pursuant to Article 86 of the collective dominant position held by the P & I Clubs, consisting in limiting the range of insurance cover available in the market to the prejudice of consumers.
- (22) In reaction to the Statement of Objections, the IG Clubs agreed to lower the minimum common level of cover from around EUR 16,5 billion (USD 18 billion) to EUR 3,9 billion (USD 4,25 billion).
- (23) The IG has also notified an amendment to the Pooling Agreement which makes it clear that the P & I Clubs are free outside the Pooling Agreement to offer higher levels of cover than the minimum common level and, therefore, to compete between themselves in providing such levels (amendment to Clause 5 of Appendix III of the Pooling Agreement). They are also free outside the Pooling Agreement to offer lower levels individually.
- 4.1.3. *Club rules approval***
- (24) The Pooling Agreement also includes some clauses that do not concern the method of sharing claims between P & I Clubs but are nevertheless directly related to it. The insurance policy conditions ('rules') of each club are subject to the approval of the other members of the Pooling Agreement (Clause 16 of the Pooling Agreement). At present, three-quarters of the P & I Clubs can decide to withhold the benefits of the Pool from any P & I Club whose rules and accounting practices are not approved by them.
- 4.1.4. *Re-insurance provisions***
- (25) The Pooling Agreement also includes the provisions that should be followed by any club that wants to provide re-insurance to a third insurer, be it a mutual insurer or a commercial one.
- (26) It originally included only objective conditions to be fulfilled by mutual insurers to which a P & I Club would provide re-insurance. No conditions were included for commercial insurers. This could have allowed the IG to discriminate between commercial insurers, by providing re-insurance to only some of them. In addition, the Pooling Agreement did not include any procedural rule to ensure that P & I clubs would comply with the objective conditions set forth for mutual insurers. Therefore, in the Statement of Objections the Commission had considered that there was a lack of objective criteria and appropriate procedures within the Pooling Agreement governing the possibility for a Club to provide re-insurance to a third insurer. This constituted an infringement of Article 86 of the Treaty.

(27) The IG has notified amendments to the relevant provisions (amendments to Appendix X of the Pooling Agreement). The amendments provide that any Club that wants to provide re-insurance to a third insurer will need to submit an application to the IG. The parties to the Pooling Agreement will have to decide whether the third insurer satisfies several conditions. Some of these conditions are general and some apply particularly to mutual or commercial insurers. As regards the general ones the insurer should be financially sound, the P & I cover offered by it should be similar to that offered by the IG Clubs, and it should make an equitable contribution to pool claims and to the Excess Loss Contract premiums. In addition to this, if the insurer is a mutual one (not favoured by laws in its country restricting freedom of choice of insurer for owners or vessels of that country), it should operate on a genuinely mutual non-profit making basis, its experience and policies with regard to claimshandling should be compatible with those of the P & I Clubs and it should abide by the terms of the IGA. If it is a commercial insurer (favoured by laws in its country restricting freedom of choice of insurer for owners or vessels of that country), the re-insuring Club will have to be responsible for claimshandling and for the rating on a mutual basis of shipowners on behalf of the insurer.

(28) As to the procedure, a subcommittee of the IG will have to make a recommendation on the application within 30 days of receipt of all the relevant information (this period may be extended by a further 30 days during the renewal period). The clubs will then vote on the basis of the recommendation. If the decision is negative, the insurer who is refused re-insurance should be given a written notice to that effect within 10 days of the vote being taken, such notice stating the reasons for the refusal. The insurer will have the right to appeal against any such refusal. The appeal will be considered by three arbitrators, who will decide whether the clubs have applied the conditions listed above in a reasonable manner. The parties will designate one arbitrator each within 14 days of the request for arbitration being submitted, and the third, to be designated by the two others within 10 days of their appointment, must be a senior lawyer experienced in commercial and insurance matters. The arbitrators will determine their own procedures and will act with due expedition. They have to give their decision in writing, stating their reasons. Their decision has a binding character.

4.2. The International Group Agreement (IGA)

(29) Originally, the IGA was a Gentlemen's Agreement reached between the clubs to establish some rules

on the methods for offering P & I cover to a shipowner who was already a member of another club. At the beginning of the 1980s it became a written agreement between all the members of the International Group. It establishes rules to be followed by the parties to the Pooling Agreement. Its main features are described in points 30 to 40.

4.2.1. *The quotation procedures*

(30) The IGA limits the freedom of the P & I Clubs to quote a rate to shipowners for vessels insured by other clubs in order to attract them. The rate is the contribution that a vessel makes to the different elements of the costs of claims borne by the P & I Club which insures it, namely cost of claims to be faced by the club under the retention level, cost of claims to be shared with other Clubs through the Pooling Agreement; cost of re-insurance and, in some cases, a specific charge for the club's administrative costs. This contribution is estimated at the beginning of the policy year and is normally paid in instalments: at the beginning of a policy year a shipowner pays for each vessel an initial share (advance call). The shipowner will have to pay further contributions (supplementary calls) at a later stage (typically, three years later) when its club's total liabilities, administrative costs and investment income for that year are known.

(31) The IGA prescribes that when quoting to insure a vessel from the following 20 February (the policy year starts on 20 February and therefore all movements from one club to another become effective on that date) no club can quote a lower rate than the one quoted by the club presently insuring the vessels in question (the 'holding club') unless an expert committee convened by the new club considers the holding club's rate unreasonably high. The committee is composed of three members: one for each club directly concerned and an independent expert appointed by the IG.

(32) A new procedure was introduced at the Commission's request in 1985: a club (the 'new club') can quote a lower rate than the one offered by the 'holding club' if it has reached a binding agreement with the shipowner before 30 September and the new club has notified the holding club within three days. If the holding club considers that the new club's rate is unreasonably low, it can appeal to an expert committee.

(33) The Statement of Objections issued on 2 June 1997 maintained that these procedures were contrary to Article 85 of the Treaty because they prevented the P & I Clubs from competing in relation to the rates quoted and were not indispensable for the proper functioning of the Pooling Agreement. It appeared that the new procedure introduced in 1985 had not increased competition satisfactorily. Indeed, in the early years several requests for quotations for vessels were made in September. Nevertheless, in only one case was the procedure effectively used to move from one club to another. In most recent years the procedure has been completely abandoned⁽¹⁾.

(34) The IG has now notified an amendment to the quotation procedures which reduces their scope. From 20 February 1999, the quotation procedures for the following policy year will no longer apply to all the elements of the cost borne by a P & I Club as they do at present, but will be limited to the costs of claims and re-insurance. This means that the club's internal administrative costs will be outside the quotation procedures.

(35) Under the amended quotation procedures, clubs will remain free either to charge specifically for their administrative costs by including them as a distinct cost element in the rate quoted at the beginning of the year, or to finance them out of their investment income. In the latter case, clubs' administrative costs will be taken into account when their supplementary calls are set. In either case the IGA quotation procedures will apply to the rate, exclusive of any element for internal administrative costs. In the first case, the amended quotation procedures will enable a new club with lower administrative costs to offer a lower rate, with an immediate effect on the level of advance call payable by the shipowner. In the second case, where the new club does not include in its rate a specific element for administrative costs, the amended quotation procedures will still be of benefit to shipowners because, by changing clubs, they will be able to benefit from any decrease in administrative costs that they expect the new club to enjoy in respect of the policy year in which they move. The IG expects that, in most cases, the latter situation will be the practical effect of the change in the quotation procedures, because most clubs

will in future choose to quote a rate that does not include a specific element for administrative costs.

(36) The amended quotation procedures will be supplemented by provisions aimed at increasing the transparency of the level of administrative costs for each P & I Club. Clubs will calculate yearly a five-year Average Expense Ratio which expresses the percentage that administrative costs represent of premium income plus investment income. This ratio will be included in the published accounts of each club and will be provided whenever a club quotes a rate on a vessel insured by another club both by the new club and the holding club.

(37) In calculating the average expense ratio, administrative costs and investment income will be defined in accordance with applicable Community accounting Directives, in particular with Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings⁽²⁾. Administrative costs means all expenditure incurred in operating a club (except expenditure incurred in dealing with claims and potential claims) and includes commissions, brokerage, other acquisition expenses and depreciation. Investment income means all capital and currency gains and losses, whether realised or not, earned during the financial year, less the related expenditure.

4.2.2. *Quotations for tankers*

(38) The IGA includes special rules for quotations for tankers. First, the IG recommends annually a reasonable minimum provision in respect of claims from tankers to be shared under the Pooling Agreement. Secondly, the IGA prescribes explicitly that quotations for tankers shall make fair and adequate provision for all relevant elements of cost (Clause 6(2)) and sets up a procedure which enables clubs to refer to an expert committee the acceptance of insurance of a tanker by any other club. In these cases, the committee will be entitled to decide whether the club insuring the tanker has made fair and adequate provision of all the elements of cost (Clause 12(4)). This referral to the expert committee has taken place only once since 1985.

(39) The IG has now notified an amendment to ensure the consistency of this rule with the amendments, proposed earlier, to the quotation procedures. From

⁽¹⁾ Use of the 30 September procedure: 1986: eight requests, no transfer. 1987: three requests, one transfer. 1988: no requests. 1989: no data available. 1990: 13 requests, no transfer. 1991: 34 requests, no transfer. 1992: 86 requests, no transfer. 1993: one request, no transfer. 1994: no request.

⁽²⁾ OJ L 374, 31.12.1991, p. 7.

the beginning of the next business year, the IGA will prescribe that quotations for tankers must make fair and adequate provision for all relevant elements of cost other than internal administrative costs.

4.2.3. Release calls

- (40) When a shipowner leaves his club he is obliged to cover a share of the liabilities incurred by this club during the years in which he was a member, even if, at the moment of leaving, these liabilities are still undetermined. Since 1985, the IGA has allowed the shipowner to choose between two options: to provide a bank guarantee or to pay a release call fixed by the club. If he considers this call unreasonably high, he can appeal to an expert committee, composed as explained above (see recital 31).

5. THE PROCEDURE

- (41) The IG of P & I Clubs submitted a notification of some of its arrangements to the Commission in June 1981. Only the IGA and some agreements ancillary to the Pooling Agreement, such as the re-insurance agreements (now included in Appendix X of the Pooling Agreement, see recital 25) were covered by it. The Pooling Agreement itself was not formally notified.
- (42) After a preliminary examination, the Commission concluded that the IGA contained a number of clauses that could not be exempted pursuant to Article 85(3). On February 1983 it therefore opened proceedings and sent the applicants a Statement of Objections prior to a decision pursuant to Article 15(6) of Regulation No 17 to withdraw the benefit of the exemption from fines. In December 1983, the Union of Greek Shipowners and the Greek Shipping Cooperation Committee (GSCC) entered the procedure, lodging a formal complaint against the IGA.
- (43) In July 1984 the Commission issued a Statement of Objections on the substance of the case, holding that some of the provisions of the IGA infringed Article 85(1) and did not satisfy the conditions for exemption contained in Article 85(3). After substantial modifications (for instance, the introduction of the 30 September procedure), a new

IGA was adopted, which came into force in February 1985. This new agreement was notified and an exemption for 10 years was granted by Commission Decision 85/615/EEC⁽¹⁾.

- (44) The IG of P & I Clubs requested a renewal of that exemption in February 1995. For the investigation of this case a notice was published in the *Official Journal of the European Communities* in July 1995⁽²⁾, inviting interested third parties to submit their observations. Some concerns were raised by the GSCC, which in December 1995 decided to transform its comments into a formal complaint. At a later date comments were also received from the Union of Greek Shipowners (UGS) and Ocean Marine, an independent P & I mutual.
- (45) On 2 June 1997 the Commission addressed a Statement of Objections to the IG, ruling that both the Pooling Agreement and the IGA were contrary to the Community competition rules. The IG replied on 14 September 1997 and an oral hearing was held on 27 April 1998. In addition to the IG, the GSCC, the UGS and Ocean Marine intervened.
- (46) On 7 July 1998 the IG formally notified the Pooling Agreement, amended as a result of negotiations with the Commission. On 14 August 1998 the Commission published a notice pursuant to Article 19(3) of Regulation No 17, which indicated that it intended to adopt a favourable position towards the notified Pooling Agreement.
- (47) On 24 September 1998 the IG formally advised the Commission that it intended to notify a number of amendments to be introduced into the International Group Agreement. In view of this, on 21 October 1998 the Commission published a notice pursuant to Article 19(3) of Regulation No 17 concerning the amended IGA. At that same date, the IG notified the amendments to the IGA.
- (48) It should be noted that the European Parliament has shown considerable interest in the present case. On 22 January 1996 MEP Bryan Cassidy introduced three written questions⁽³⁾. MEP Karl von Wogau asked an oral question (O-0053/96) in a session on 15 March 1996⁽⁴⁾ and finally, even a resolution was adopted on 27 March 1996⁽⁵⁾ stating that a USD 20 billion catastrophe 'would put at risk the P & I Clubs themselves' and urging the Commission 'to study various solutions to this problem which must fully respect the polluter-pays principle' as well as 'to consider the question of Article 85 exemption in the light of the conclusions of this study'. Finally, MEP Cassidy introduced another written question in January 1998 (E-0213/98)⁽⁶⁾ and an oral question (No 077) was asked in the session of 11 May 1998 by MEP Florus Wijsenbeek (H-0410/98).

⁽¹⁾ OJ L 376, 31.12.1985, p. 2.

⁽²⁾ OJ C 181, 15.7.1995, p. 16.

⁽³⁾ OJ C 122, 25.4.1990, p. 32.

⁽⁴⁾ Annex, OJ 4-478/300, 15.3.1996.

⁽⁵⁾ OJ C 117, 22.4.1996, p. 20.

⁽⁶⁾ OJ C 304, 2.10.1998, p. 54.

(B) LEGAL ASSESSMENT

1. ARTICLE 85

(49) Under Article 85(1) of the Treaty any agreement between undertakings which has as its object or effect the restriction of competition within the common market is prohibited in so far as it may affect trade between Member States. These agreements may, nevertheless, be exempted if they satisfy several conditions set out in Article 85(3).

1.1. Agreement between undertakings

(50) The Pooling Agreement and the IGA are agreements between the P & I Clubs. These must be considered non-profit-making undertakings performing an economic activity. In fact, they compete between themselves as well as with other mutuals and profit-making insurers in some segments of the P & I insurance business.

(51) The Court of Justice has already held in its FEDETAB judgment⁽¹⁾ of 29 October 1980 that non-profit-making entities engaged in economic activities may be considered as undertakings within the meaning of Article 85(1) (Joined Cases 209 to 215 and 218/75 Van Landewyck v. Commission, at paragraph 88).

1.2 Market definition

(52) Any restriction of competition within the meaning of Article 85(1) of the Treaty should be assessed in the context of a relevant market. The relevant markets for the assessment of this case, from a product as well as from a geographical point of view, are defined below.

1.2.1. *Product market**Demand side analysis*

(53) From the demand side, direct marine insurance can be clearly divided into two different product markets: hull and P & I insurance. They cover different needs and have traditionally been considered separately by shipowners: the latter obtain hull insurance from commercial insurers but create mutual associations in order to share their P & I risks. Maritime hull insurance has already been considered a separate market by Commission Decision 93/3/EEC (Lloyd's Underwriters' Association and the Institute of London Underwriters)⁽²⁾.

(54) P & I insurance, also seen from the demand side, could be theoretically divided into very specific segments, according to the type of vessels insured (tankers, fishing-vessels, dry-cargoes, etc.), the type of cover (property damage, pollution, crew injury, etc.) or even the level of this cover (unlimited, limited to a certain level, etc.). In fact, non-standardised insurance, like this one, is a tailor-made product adapted to the characteristics of the insured.

(55) Direct hull and P & I insurance must be distinguished from marine re-insurance. The demand for each type of insurance is different: in the first two cases the demand comes from shipowners while in the third one comes from professional insurers. Marine re-insurance is normally provided by specialist re-insurers. In some cases, however, it can also be provided by P & I insurers. In fact, the P & I Clubs offer re-insurance to small independent P & I mutuals.

Supply-side analysis

(56) From the supply side it should first be analysed whether the conditions on which P & I insurance is offered are similar to those for other types of insurance and whether, therefore, other insurers could start to provide P & I insurance at short notice. If this were the case, the product market should be widened to include those other types of insurer. Regulatory barriers to entering the P & I market for firms already providing non-life insurance are not significant. However, two other types of barrier are more relevant.

(57) First, P & I insurance requires some features that other insurance companies cannot develop in a short period of time. These features basically are technical knowledge on P & I risks and large networks of representatives in the most important world harbours that may solve efficiently P & I claims and a sophisticated claims handling unit.

(58) Secondly, and much more importantly, there are very large economies of scale in the provision of high levels of P & I insurance. In general, insurance is always a matter of scale. In order to be able to provide insurance for a specific type of risk, an insurer must cover a minimum number of units. This minimum number of units will allow it to have a spread of risks large enough to reduce the volatility of claims — that is, to ensure that claims will follow a regular pattern (which can normally be established from the observation of the past). In other words, if it insures this minimum number of units, there will be a high probability that it will not face unforeseen claims, because the frequency and intensity of the claims received will reproduce past patterns.

⁽¹⁾ [1980] ECR, p. 3125.

⁽²⁾ OJ L 4, 8.1.1993, p. 26.

Normally, the minimum dimension is relatively higher for catastrophic risks (i.e. risks which have a large intensity but a low frequency) than for normal ones.

(59) In the field of P & I insurance, the minimum scale required to offer cover is high in relation to the whole market dimension. In other words, economies of scale represent important barriers to entry. Indeed, to reach the minimum scale any insurer would have to face important costs that could not be recovered if the entry were to fail (sunk costs). Once it had entered the market, an insurer would be obliged to satisfy all the claims derived from the policies it had underwritten. The sunk costs would equal the difference between the premiums received, which would be calculated according to past patterns, and the claims satisfied. If the minimum scale is not reached (if entry fails), this difference may be very significant because claims would be very volatile (that is, estimated patterns would not be reproduced). This general proposition about economies of scale in P & I insurance remains valid even though obviously these economies decrease when the level of cover offered diminishes.

(60) The combination of these two barriers restrain most non-life insurance companies as well as specialist re-insurers from operating in the P & I insurance markets. Marine hull insurers, however, can probably develop their expertise and claims facilities in order to cover P & I risks more easily than other types of insurer. For lower levels of P & I cover, where economies of scale are small, they could operate in the market. In fact, as has been explained, a minority of them provide P & I insurance up to around EUR 459 million (USD 500 million).

(61) With regard to the market of re-insurance to P & I direct insurers, economies of scale are the main barrier to entry. Regulatory or technical barriers do not play a significant role. In consequence, not only are the P & I Clubs able to provide re-insurance to other P & I insurers, but also marine re-insurers which are able to reach a minimum dimension can provide it. In practice, marine re-insurers provide re-insurance for low levels of cover to independent P & I mutuals as well as re-insurance to the P & I Clubs up to EUR 1,8 billion (USD 2 billion). Re-insurance for higher levels of cover can only be provided at present by the P & I Clubs.

1.2.2. *Geographic market*

(62) The market for contractual and third party maritime damages insurance has a worldwide scope. Shipowners generally ensure that their fleets are placed on the best possible terms to be offered by any P & I Club, no matter where this club is located. At present, the International Group of P & I Clubs as well as most of the small P & I independent insurers cover vessels registered around the world. The market for P & I re-insurance has also a worldwide scope.

1.2.3. *Conclusion*

(63) It can be concluded that P & I insurance represents a single worldwide product market. Its substitutability by other marine insurance products, from the demand as well as from the supply point of view, is weak. There is only a limited degree of supply side substitutability with marine hull insurers in relation to low levels of P & I insurance (up to EUR 459 million (USD 500 million)), where independent P & I mutuals or commercial insurers are also able to operate.

(64) With regard to P & I re-insurance, a distinction must be made according to the level of cover offered. Up to around USD 2 billion, P & I re-insurance can be considered as part of the wider worldwide market of marine re-insurance. Nevertheless, for higher levels marine re-insurers do not reach at present the minimum dimension necessary to offer P & I re-insurance and, in consequence, P & I re-insurance for levels higher than around EUR 1,8 billion (USD 2 billion) should be considered a distinct market.

1.3. *Restriction of competition*

1.3.1. *The Pooling Agreement*

(65) A claim-sharing agreement such as the Pooling Agreement entails an agreement between the parties on a number of aspects of their insurance activity. Indeed, it is inherent in any claim-sharing agreement that its members decide in common at least the policy conditions and the level of cover offered. Such agreement prevents them from offering different insurance products through the claim-sharing agreement.

- (66) Such an agreement cannot be considered anti-competitive, at least when the claim sharing is necessary to allow its members to provide a type of insurance that they could not provide alone. Indeed, there cannot be a restriction of competition when the members of the pool are not actual or potential competitors, because they are unable to insure alone the risks covered by the pool. If anything, such claim sharing indeed strengthens competition since it allows several insurers which are not able to provide such cover to put their resources in common and create a new player.
- (67) To the extent that the claim sharing does not violate Article 85(1), the restrictions imposed on the parties to the claim-sharing agreement which are indispensable to the proper functioning of that claim sharing are not covered by Article 85(1). They must be considered ancillary to, or inherent in, the claim sharing (see for instance the judgment of the Court of 15 December 1994 in Case C-250/92, *Gøttrup-Klim v. Dansk Landbrugs Grovareselskab* ⁽¹⁾), where the restrictions necessary for the proper functioning of a cooperative were considered not to be covered by Article 85(1).
- 1.3.1.1. *Indispensability of claim sharing within the IG of P & I Clubs*
- (68) It is analysed below whether claim sharing within the IG of P & I Clubs, which covers around 89 % of the worldwide vessel tonnage, is necessary to allow the P & I Clubs to provide P & I insurance up to EUR 3,9 billion (USD 4,25 billion), as they do at present. The conclusion will be that the IG's claim-sharing arrangements are indeed necessary to offer the present level of cover, because the minimum dimension required to offer such a cover can only be attained by insuring more than 50 % of worldwide tonnage. Therefore, there is no room for a second viable supplier of such cover.
- (69) As explained above (see recitals 58 and 59), insurance normally presents economies of scale. A minimum number of units must be insured to offer insurance for a specific type of risk. This minimum number of units can be reached either by a single insurer or by different insurers who agree to insure some type of risks in common. This is the case of co-insurance or co-reinsurance pools between commercial insurers but also of claim-sharing agreements between mutuals such as the one at issue in this case.
- (70) Normally, the minimum dimension necessary to provide a specific type of insurance can be directly estimated by analysing the market shares held by the insurers effectively providing alone this type of insurance. In the P & I insurance market, as has already been explained (see recitals 11 to 13), there are very few insurers not taking part in the IG. Moreover, these independent insurers (of whom Ocean Marine, with a market share of around 2 % of the market is the largest) provide relatively low levels of P & I cover, normally up to EUR 459 million (USD 500 million). Consequently, they do not constitute a useful element of comparison in determining the minimum dimension necessary to provide P & I cover up to around EUR 3,9 billion (USD 4,25 billion).
- (71) In cases when the minimum dimension to provide one specific level of insurance cannot be directly estimated because there are no insurers offering this insurance independently, indirect methods must be used. The minimum dimension could be indirectly estimated by analysing the availability of re-insurance to insurers holding different market shares. Indeed, the maximum level of re-insurance available to a P & I Club will normally determine the maximum level of cover that this club is able to offer independently.
- (72) With regard to the maximum level of re-insurance available to independent P & I insurers, information was requested from leading London maritime brokers as well as from the main IG re-insurers. All their replies coincided in indicating that 30 % of worldwide tonnage would be enough to obtain re-insurance of up to EUR 1,38 billion (USD 1,5 billion), 45 % to EUR 1,8 billion (USD 2 billion) but that more than 50 % is required for amounts higher than EUR 2,75 billion (USD 3 billion) and thus there is only room for one market player offering such a cover. This indicates that, at present, the claim sharing among P & I Clubs is, as such, pro-competitive.
- (73) It could theoretically be argued that re-insurance should be available for higher levels of cover in relation to vessels bearing lower risks. In this connection, brokers and re-insurers were requested to determine the maximum re-insurance available to a hypothetical club not insuring tankers or passenger vessels, which are the two types of vessels which have produced larger claims in the past.

⁽¹⁾ [1994] ECR, p. I-5641.

- According to the replies received, the limits of re-insurance available to such a hypothetical club are the same as those valid for clubs including all types of vessels.
- (74) In view of the evidence described in recitals 72 and 73, it must be concluded that the IG's claim-sharing arrangement is the only available alternative to provide cover up to around EUR 3,9 billion (USD 4,25 billion). It is therefore beyond all doubt that all the restrictions indispensable to the proper functioning of the claim-sharing agreement (inherent restrictions) must be considered compatible with Article 85(1) of the EC Treaty.
- 1.3.1.2. *Restrictions inherent in the Pooling Agreement*
- 1.3.1.2.1. *The minimum common level of cover*
- (75) Both the GSCC's complaint and the Statement of Objections considered that the clause of the previous version of the Pooling Agreement that provided for a single level of cover to be offered by all clubs (up to EUR 16,5 billion (USD 18 billion)) was not indispensable to the proper functioning of the Pooling Agreement and restrictive of competition. Indeed, it prevented Clubs from offering to shipowners different levels of cover. In other words, it prevented individual shipowners from negotiating the level of cover which they actually wanted or needed, given the nature of the risk which their fleet represented.
- (76) At present, the Pooling Agreement has been amended to clarify that the P & I Clubs are free to offer levels of cover higher than the level commonly agreed, around EUR 3,9 billion (USD 4,25 billion). The amended version of the Pooling Agreement, therefore, no longer provides for a single level of cover but merely for a minimum level of cover to be offered in common by all the parties to the agreement. Accordingly, Clubs are not impeded any longer from offering higher levels of cover. Nor are they impeded from offering lower levels of cover individually.
- (77) Actually, a claim-sharing arrangement cannot function properly without at least one level of cover to be offered being agreed by all its members. The reason is that no member would be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool. This can happen in a commercial pool because all members pay pure premiums to the pool, and those vary on the level of cover provided. In a claim-sharing agreement between mutuals which do not charge premiums, however, there is no workable method available to force the members which would bring larger claims to compensate the others.
- (78) This does not mean that the IG member clubs have deprived themselves of the possibility of offering collectively, other levels of cover. All members, or only those wishing to share claims at higher levels, could conclude additional special agreements to offer higher cover in addition to agreeing on the lowest level of cover to be provided through the claim-sharing arrangement. The Statement of Objections referred to documentary evidence that showed that the IG had discussed the feasibility of several of these systems in the past. In addition to this evidence, in their replies to requests for information, several P & I Clubs acknowledged the technical feasibility of implementing such systems.
- (79) It must be concluded that the clause providing for a common level of cover does not include a restriction of competition within the meaning of Article 85(1). Indeed, Clubs have only agreed to offer a minimum level of cover through their claim-sharing agreement, which is a necessary agreement for the functioning of such a system. They remain free to offer, either on their own or together with other Clubs, any level of cover that they consider appropriate.
- 1.3.1.2.2. *Common approval of rules and accounting practices*
- (80) The Pooling Agreement includes a clause providing that the rules applicable to insurance policies of each Club, are subject to the approval of three-quarters of the members of the Pooling Agreement. This clause impedes P & I Clubs from offering different policy conditions through the claim-sharing agreement.

- (81) Nevertheless, like any coinsurance or co-reinsurance pool, a claim-sharing agreement can only function properly if all members agree on the conditions that each of them includes in its policies. Indeed, no member should be forced to contribute to the provision of insurance cover under policy conditions that it has not agreed. Therefore, the clause of the Pooling Agreement stipulating that insurance policies ('rules') of each Club are subject to approval of the other members of the pool can be regarded as necessary for the functioning of the IG's claim-sharing arrangements.

1.3.1.2.3. The joint purchase of re-insurance

- (82) As explained above (see point 16), the excess of any claim over EUR 27,4 million (USD 30 million) up to EUR 1,8 billion (USD 2 billion) is covered by the Group General Excess Loss Reinsurance Contract. This re-insurance contract is agreed collectively by the clubs with commercial insurers pursuant to Clause 12 of the Pooling Agreement. This represents an agreement of joint purchasing of re-insurance.
- (83) Common purchase of supplies could be considered contrary to Article 85(1). In Decision 80/917/EEC (National Sulphuric Acid Association)⁽¹⁾, the Commission found that a joint buying pool for the purchase of sulphur, set up by an association grouping all manufacturers of sulphuric acid in the United Kingdom, was restrictive of competition. In that case the joint purchasing agreement was exempted, *inter alia*, because it ensured a steady supply of sulphur in times of shortages and because the members of the pool were not obliged to purchase their full requirements of sulphur through the pool.
- (84) The joint purchase of re-insurance is normally not inherent in the functioning of a claim-sharing agreement because each member of such an agreement could independently re-insure its own share of the claims. Nevertheless, in this particular case it has been proved (see recitals 72 to 74) that without joint purchase most of the P & I Clubs would not have been able to obtain re-insurance up to the level obtained at present. Indeed, a minimum dimension of more than 50 % of the worldwide tonnage is required before such a cover can be offered, and the largest P & I Club, at present, only covers 16,34 % of it (see recital 10). It should be

concluded, then, that the joint purchase of re-insurance is necessary for the IG to offer cover at the present conditions. It does not fall, therefore, under the prohibition of Article 85(1).

1.3.2. *The International Group Agreement*

1.3.2.1. *Rules related to release calls*

- (85) The methods of calculation of release calls, as was stated in point 27 of Decision 85/615/EEC, 'do not in themselves give rise to clear-cut restrictions (...) but could be used to reinforce restrictions on transfers between clubs. These rules could indeed be used to further restrict the ability of an operator to avail himself of the opportunity of seeking better rates offered by another club. The level of a release call claimed by the holding club in the event of a withdrawal could in fact constitute a deterrent to transfers between one club and another'.
- (86) In any event, rules relating to release calls are inherent in the proper functioning of the Pooling Agreement. Indeed, they are needed to prevent a shipowner who has left a club to avoid paying the sums that he still owes to his former club to cover the liabilities incurred during his membership but not settled at the time of withdrawal. These rules are not disproportionate to this objective: they only require a bank guarantee (an actual payment is not needed until the liabilities are determined) and there is always the right to challenge the amount of the release call before an independent expert committee.

1.3.2.2. *Rules for making quotations for vessels*

- (87) The procedures for making quotations for vessels restrict the freedom of the P & I Clubs to compete on the rates to be quoted to vessels joining them. Before the IGA was amended they restricted Clubs to determining the full extent of the rate. After the amendments are introduced to the IGA, clubs will be free to quote the part of the rate covering the administrative costs, but they will still be restricted to determining the remaining elements of the rate. Indeed, the 20 February procedure impedes any P & I Club from offering a lower quotation than the holding club for the elements of the rate other than the administrative costs, unless an expert committee considers the holding club's quotation for such elements of the rate to be unreasonably high.

⁽¹⁾ OJ L 260, 3.10.1980, p. 24.

(88) The elements of the rate for which club's quotations are restricted are those that reflect the costs of the claims that will have to be paid by the clubs. Indeed, the quotation procedures apply both to the costs of claims which are shared between Clubs (namely claims between EUR 4,57 million (USD 5 million) and EUR 27,4 million (USD 30 million), plus the re-insurance) and to costs which are supported individually by each Club (claims up to EUR 4,57 million (USD 5 million); the so-called retention level).

1.3.2.2.1. Inherence of the restriction

(89) Any claim-sharing agreement requires some degree of discipline between the participants in that agreement on the rates corresponding to the costs that they share. No club would be ready to share claims with another club that would be offering a lower rate for covering these same claims. No customer would remain with the first club because it would know that it could obtain from the second club exactly the same cover, covered also by all the P & I Clubs, but for a lower rate.

(90) In this case, the P & I Clubs share claims from EUR 4,57 million (USD 5 million) to EUR 27,4 million (USD 30 million), they purchase together re-insurance to face higher claims, up to EUR 1,8 billion (USD 2 billion), and should an even higher claim arise (overspill claim) they would share it up to EUR 3,9 billion (USD 4,25 billion). It appears necessary that they agree on a degree of discipline for setting the rates that correspond to these costs. This discipline is achieved through the quotation procedures and, for tankers, also through the recommendation on the costs of the claims to be shared under the pool.

(91) These rules are not disproportionate to the objectives they try to achieve. Indeed, the quotation procedures leave to the holding club the task of setting the appropriate rate, and merely aim at ensuring that club's quotation of the costs of claims will not be undercut by another club sharing claims with it. Only for tankers does the IG go one step further by recommending annually a non-binding rate for the costs of the claims to be shared

under the Pooling Agreement. This particular rule can be explained by the specific characteristics of tanker risks (they are normally of a catastrophic nature, tending to occur rarely but involving very large liabilities when they do occur).

(92) The amended quotation procedures, however, also apply to some costs which are not shared between the clubs, the retention costs, (meaning the costs of the claims up to EUR 4,57 million (USD 5 million)). For these costs the quotation procedures go beyond what is strictly necessary for keeping the claim-sharing arrangement in place. Indeed, for non-shared costs there is no need to ensure that clubs do not undercut each other. Clubs which could achieve a reduction of these costs below the level of their competitor's costs should be able to charge lower rates. Price competition on the retention cost component of the rates is not liable to endanger the claim-sharing arrangement.

(93) It can be concluded, therefore, that the quotation procedures, in so far as they extend to the element of the rate reflecting the claims falling under the retention, are not inherent in the claim-sharing arrangement.

1.3.2.2.2. Appreciability of the restriction

(94) Taking into account the fact that the P & I Clubs account for around 89 % of the worldwide market for P & I insurance and that there is very limited competition coming from outside the system, any restriction on rate competition between clubs has an appreciable impact in the world wide market for P & I insurance.

(95) After the amendment to the IGA, price competition will be possible in relation to that part of the rate corresponding to the administration costs. This does not mean, however, that a restriction on the elements of the rate reflecting the cost of claims falling under the retention does not have an appreciable impact on competition between the clubs. Indeed, the retention claims represent 82 % in value and 99 % in number of all claims supported by the IG (see recital 16).

- (96) It is true that the restriction only lasts for a year. Indeed, the year after a shipowner has moved to another club, the new club could offer lower rates than the ones it was obliged to offer in the first year. It cannot be inferred from this fact, however, that the restriction is not appreciable. It is at the moment that a shipowner contemplates moving to another club that this club can gain a competitive advantage by quoting a lower rate and has therefore an incentive to do so, not a year later.
- (97) Nor can it be argued that the 20 February procedure has no appreciable effect on competition because there is an alternative procedure, the 30 September one, which allows clubs to quote a lower rate than the rate of the holding club. Although this is what the Commission believed in 1985 when the 30 September procedure was adopted, experience has shown since then that this procedure did not have the expected effects. It has indeed only once been used successfully to change from one club to another (see recital 33).
- (98) As a matter of fact, it is not surprising that the 30 September procedure has revealed itself not to be an appropriate remedy. There are two reasons for this. First, it can be used only five months before the insurance renewal date. This is simply too early for a club to make an accurate quotation (it is too early, for example, to take into account the level of re-insurance premiums that will prevail at that date). Secondly, if the holding club requests the independent expert committee to investigate whether the rate quoted is unreasonably low and the committee considers that it is indeed too low, the penalty for the club's having quoted the rate is extremely severe: it loses re-insurance from other clubs for the vessel in question for two entire years.

1.3.2.3. *Rules on minimum cost for tankers*

- (99) The IG recommends annually the amount of the provision that clubs should include in their quotations to reflect the cost that claims from tankers would represent for the pool (see recitals 38 and 39). Even if the recommendation is not binding, the IGA enables clubs to refer to a committee any quotation for tankers from another club that they consider not to make adequate provision for all the

elements of the cost of claims. If the committee considers that this is the case, the club loses the benefit of the pool for two years. The serious sanction attached to the finding from the committee that a quotation does not make an adequate provision for all the elements of the cost of claims restrains clubs from actually diverging from the recommendation.

- (100) As far as the recommendation also covers the retention costs, for the same reasons as those explained above (see recitals 88 to 97) it should be regarded as an appreciable restriction of competition and not inherent in the proper functioning of the Pooling Agreement.

1.3.3. *Effects on trade between Member States*

- (101) The IG's arrangements have appreciable effects on trade between Member States. First, P & I Clubs' members of the IG are established in more than one Member State as well as in third countries. Secondly, the members of the IG provide insurance to vessels from any Member State as well as from third countries. As it is, almost the entire Community fleet is insured by the IG.

1.3.4. *Conclusion: restrictions of competition in the P & I insurance market*

- (102) In conclusion, both the quotation procedures as well as the recommendation on minimum costs for tankers, as far as they apply to the retention costs, represent restrictions on competition. Those restrictions have an appreciable negative impact in competition in the world wide market of P & I insurance and substantially affect trade between Member States. They fall therefore within the prohibition under pursuant to Article 85(l) of the Treaty.

1.4. *Exemption pursuant to Article 85(3)*

1.4.1. *Applicability of the insurance block-exemption*

- (103) It has been argued that the Pooling Agreement and the IGA are covered by the definition of co-reinsurance agreements within, the meaning of Article 10(2)(b) of Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector⁽¹⁾. The Article defines a co-reinsurance group as a group set up by insurance undertakings in order to reinsure mutually all or part of their liabilities in respect of a specified risk category.

⁽¹⁾ OJ L 398, 31.12.1992, p. 7.

- (104) In fact, it is not clear from Community case-law whether the insurance block-exemption also covers claim-sharing arrangements between insurance mutuals, but there is no need to resolve this issue in this case, because the IG's arrangements do not fulfil all of the conditions required for coverage by the block exemption. In particular, the market share of its members is substantially higher than the 15 % required.

1.4.2. *Individual exemption*

- (105) Even if the IG's arrangements are not covered by the definition of co-reinsurance group of Regulation (EEC) No 3932/92, an individual exemption can be granted to the provisions of these arrangements which are contrary to Article 85(1), namely the quotation procedures and the rules on minimum cost for tankers, as far as they apply to the retention costs.

1.4.2.1. *Promotion of economic progress*

- (106) As was explained above (see recital 72), to provide P & I insurance up to EUR 3,9 billion (USD 4,25 billion) at present costs, an insurer should cover a market share of more than 50 % in order not to be confronted with excessively volatile claims and to obtain sufficient re-insurance. No insurer alone covers such a large market share and, therefore, pooling risks among several insurers representing together a market share of more than 50 % is the only method available to the industry at present to provide such a cover. The IG's arrangements, therefore, contribute to economic progress by ensuring that P & I insurance cover of up to EUR 3,9 billion (USD 4,25 billion) is available in the market.
- (107) The availability of cover up to EUR 3,9 billion (USD 4,25 billion) is of immediate benefit to the shipowner. By providing such a cover, the IG satisfies most of the world wide demand for P & I insurance and allows maritime transport and other maritime activities to continue with an adequate coverage of contract and third party liabilities.
- (108) The final customers of the shipowner, be they passengers or goods carriers, also benefit from the provision of such a level of insurance. Indeed, in the absence of the pooling arrangement no insurance for such high levels would be generally avail-

able and, were claims of this amount to arise, it is likely that some of these customers would not be able to obtain compensation from the shipowner. The same could apply to any other third person that could suffer from extra-contractual damages produced by a shipowner (such as marine pollution).

1.4.2.2. *Indispensability of the restriction*

- (109) As was explained above (see recitals 88 to 99) in so far as the quotation rules and the rules on a minimum cost for tankers apply to some costs which are not shared between the clubs, in particular to the retention costs, (the costs of the claims up to EUR 4,57 million (USD 5 million)), they are not inherent in the claim-sharing arrangement.
- (110) However, in this case the Commission acknowledges that it might be unworkable, or in any event very complex and burdensome, to devise an appropriate method which would ensure that the quotation rules and the rules on a minimum cost for tankers effectively apply only to the costs shared under the Pooling Agreement and not to the retention costs.
- (111) Indeed, when a club quotes a rate for a vessel, it makes a global assessment of the risk that this vessel bears. In other words, it assesses the frequency and intensity of the claims that the vessel in question could bring to the club. Should the quotation procedures or the rules on a minimum costs for tankers apply only to the elements of the rate that reflect the shared costs, the club would be obliged artificially to make a separate and different assessment for the possibility that the vessel in question would cause claims below EUR 4,57 million (USD 5 million). As risk assessment is based on subjective parameters (such as vessel safety measures and the training of the crew), it would be easy for a club to manipulate this assessment by decreasing the relative weight of the retention costs and increasing the weight of the shared costs. As the retention costs would remain outside the quotation procedures, the club could, by decreasing the weight of the retention costs,

reduce its rate accordingly and use this as a competitive tool to attract customers. As to tankers, as the weight of shared costs would have been artificially increased, the club would be able to adhere at the same time to the recommendation on the minimum cost.

- (112) Any policing system designed to avoid these manipulations would need to monitor carefully the risk assessments made by the clubs and, in particular, whether giving more or less weight to the possibility of claims arising below the retention level amounts to an unreasonable quotation. This exercise, in view of the subjectivity involved in risk assessment, would be very complex and time consuming. It would exceed the complexity of the tasks presently entrusted to the independent expert committee, which is only required to check that the risk assessment made by the clubs as a whole is reasonable, but not that each of its elements, independently, is such. Moreover, should the retention remain outside the quotation procedures, the number of controversial quotations and, therefore, of cases brought to the attention of the committee would increase dramatically. It does not appear to be feasible to entrust the existing independent expert committee or any new body created for this purpose with the task of monitoring a large number of controversial and largely subjective quotations in a coherent and expeditious manner.

1.4.2.3. *Non-elimination of competition*

- (113) The quotation procedures and the recommendation on a minimum cost for tankers do not eliminate competition in the market of P & I insurance. Despite the fact that the IG covers 89 % of the world wide market for P & I insurance, there is competition between the P & I clubs.
- (114) Competition among P & I clubs on the elements of the rate reflecting the cost of claims (the elements subject to the quotation procedures) is a very important parameter of competition, but it is not the only one. Clubs remain free to compete on non-price parameters (such as the level of claims-handling service) as well as on the part of the rate which reflects the administrative costs. Indeed, there is scope for reduction of administrative costs and therefore for competition on that part of the rate reflecting them. These reductions can be achieved through economies of scale, efficiency in the administration and pressure on managers to reduce profit margins (it should be remembered that club managers are in most cases independent

companies that do work for profit). Should clubs decide not to charge a specific part of the rate for administrative costs but to offset them against investment costs (see recital 35), competition would still play a part, because a reduction of the administrative costs would be reflected in lower supplementary calls for shipowners.

- (115) In addition, the incorporation of the transparency rules (see recital 36) in the amended IGA will contribute to an increase in competition in relation to administrative costs. By obliging all clubs to publish a five-year average expense ratio which expresses the percentage that administrative costs represent of premium income plus investment income, they enable shipowners to compare the efficiency of different clubs in relation to the part of the rate which clubs can freely set, and allow them to choose accordingly.

1.4.3. *Conclusion*

- (116) From what has been explained in the foregoing paragraphs, it can be concluded that both the quotation procedures and the recommendation on minimum costs for tankers, as far as they apply to retention costs, are contrary to Article 85(1) of the Treaty but fulfil all the conditions of Article 85(3) and therefore can be the subject of an individual exemption. Indeed, they can be considered necessary to achieve the economic advantages and benefits for consumers brought forward by the Pooling Agreement, and they do not eliminate competition in the P & I insurance market.
- (117) However, the quotation procedures and the recommendation on minimum costs for tankers, as far as they apply to retention costs, should only benefit from the exemption as long as the Pooling Agreement remains necessary in order to allow the P & I clubs to reach a minimum scale which enables them to provide a level of cover that they could not provide alone (see recital 72).

The Commission will intervene to revoke the exemption granted by this Decision, pursuant to Article 8(3) of Regulation No 17 if the members of the IG collectively hold a market share larger than twice the minimum scale economically required to provide the level of cover agreed at any moment within the IG. Indeed, in such a case, two market operators could be created and, therefore, the Pooling Agreement would no longer be considered necessary to achieve the minimum scale. It must

be made clear that the minimum scale corresponds to the market share necessary to reasonably ensure that cover can be provided at a cost of claims per ton which is similar to the cost of claims per ton incurred by the members of the IG.

2. ARTICLE 86

- (118) Under Article 86, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited in so far as it may affect trade between Member States.

2.1. Dominant position

- (119) The Court of Justice, in its judgment in Case 85/76, *Hoffmann-La Roche v. Commission* ⁽¹⁾, (paragraphs 38 and 39) described a dominant position as:

‘a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers. Such a position does not preclude some competition but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment’.

- (120) This dominant position can be held by a single company or by a group of them. The Court of First Instance defined a collective dominant position as ‘two or more independent economic entities being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position *vis-à-vis* the other operators on the same market’ (judgment in Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro v. Commission*) ⁽²⁾. This was recently repeated by that Court in its judgment of 8 October 1996 in Joined Cases T-24/93, T-25/93, T-26/93,

and T-28/93 (*Compagnie Maritime Belge v. Commission*) ⁽³⁾, which upheld Commission Decision 93/82/EEC (*Cewal*) ⁽⁴⁾ finding the existence of collective dominant positions in the case of shipping conferences: it had already found this in Decision 92/262/EEC (*French-West African Shipowners’ Committees*) ⁽⁵⁾.

- (121) The P & I Clubs which are members of the IG are independent entities united by strong economic links and that, by virtue of that fact, hold together a dominant position on the world market for P & I direct insurance as well as in the world market for P & I re-insurance for levels higher than around EUR 1,8 billion (USD 2 billion) (see recitals 52 to 64 for a description of the relevant market).

- (122) The P & I Clubs’ members of the IG have concluded a claim-sharing arrangement that creates strong economic links between them: they share the claims brought by their members up to a certain level, follow specific common procedures to offer insurance to members of other P & I Clubs, purchase re-insurance in common, agree on insurance conditions to be provided to their members, and cooperate in many other aspects of P & I insurance. Moreover, by agreeing to have common insurance conditions, and particularly to offer a single level of cover, they adopt a uniform line of action in the market.

- (123) This collective position held by the IG of P & I Clubs is clearly dominant. According to the Court of Justice (judgment in Case C-62/86, *AKZO Chemie BV v. Commission*) ⁽⁶⁾, at paragraph 60 and *Hoffmann-La Roche*, at paragraph 41): ‘although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position’.

- (124) In the *AKZO* case the Court added that: ‘This is so where the market share amounts to 50 %’. Therefore, on the strength of market-share figures alone it can be said that the IG of P & I Clubs, which insures around 89 % of the world fleet, holds a dominant position in all the world wide markets for P & I insurance where it is present.

- (125) In its judgment in *Hoffmann-La Roche* (at paragraph 42), the Court of Justice further held that a big disparity between a firm’s share and those of its next-largest competitors is also a relevant factor in measuring the degree of market power that the former possesses. It is clear that in this case the difference between IG’s market shares and those of its competitors is very significant.

⁽¹⁾ [1979] ECR, p. 461.

⁽²⁾ [1992] ECR, p. II-1403.

⁽³⁾ [1996] ECR, p. II-1201

⁽⁴⁾ OJ L 34, 10.2.1993, p. 20.

⁽⁵⁾ OJ L 134, 18.5.1992, p. 1.

⁽⁶⁾ [1991] ECR, p. I-3359.

(126) Moreover, in this case, other factors already identified in the Hoffmann-La Roche judgment (paragraph 42) give extra weight to the conclusion that the IG holds a significant amount of market power. First, it has the capacity to offer all levels of P&I cover, which its competitors do not have. Secondly, it has acquired a wide experience and reputation by offering P & I insurance for around one hundred years. And thirdly, it is present all over the world through a wide network of correspondents. All these strengths, in addition to its large market share, allow the IG of P & I clubs to hold a clear dominant position and to behave to a large extent independently of its competitors.

2.2 Abuse of dominant position

(127) The Statement of Objections maintained that the IG arrangements led to two different abuses of a dominant position, namely a limitation of the level of cover offered and a provision of re-insurance on discriminatory terms. It is explained in recitals 129 to 133 that, in view of the amendments to the Pooling Agreement it can no longer be argued that the IG arrangements give rise to an abuse of a dominant position. This does not exclude the possibility that the IG or its members acting together could indulge in abuses of its collective dominant position through its commercial behaviour. This, however, is not the object of this Decision, which is limited to the assessment of the notified arrangements.

2.2.1. *Exploitative abuses: limitation of the products offered in the market*

(128) Through the agreement on a single level of cover, the IG exploited its customers by offering a single insurance product that left a very substantial share of the demand unsatisfied. This constituted an abuse within the meaning of Article 86(2)(b) of the Treaty. It should be recalled, however, that it is not for the Commission to decide which is the level of cover that should be provided by the IG. The Commission may only intervene in the matter if there is clear and uncontroversial evidence that a very substantial share of the demand is being deprived of a service that it manifestly needs and that, therefore, the IG is really exploiting its dominant position in an abusive way.

(129) This is not the case any more. First, as it has already been explained (recital 76), the Pooling Agreement has been clarified to indicate that P & I Clubs are free to offer individually lower or higher levels of cover as well as to conclude any cooper-

ative arrangement that they might find appropriate to this purpose.

(130) Secondly, since the IG adopted the new minimum common level of cover of around EUR 3,9 billion (USD 4,25 billion), no substantial share of the demand remains unsatisfied. Indeed, most shipowner's organisations around the world have submitted their views on this issue to the Commission and have not complained on the new level of cover. Only part of the Greek-controlled fleet, which as a whole accounts for around 15 % of world wide tonnage, remains dissatisfied with the new level of cover.

(131) This conclusion is reinforced by the fact that, from an objective point of view, the new level of cover cannot be considered incapable of meeting customer needs. It was argued that, should an overspill claim arise, a large share of the shipping industry would become bankrupt by trying to meet a call up to the previous level of cover of around EUR 16,5 billion (USD 18 billion) (it must be explained that the rates charged by the P & I Clubs do not take into account the cost of an overspill claim; members of the P & I Clubs would only have to share the cost of such a claim if it were to materialise). This cannot be the case with the new, lower limit of cover of around EUR 3,9 billion (USD 4.25 billion).

(132) Indeed, there is enough evidence to reasonably expect that the shipping industry would be able to face a claim up to EUR 3,9 billion (USD 4,25 billion). First, from the experience of past large claims, it can be inferred that the full claim will not have to be paid in a single year, but over a period of several years, depending on the pace of settlement of the claims. Secondly, some clubs hold important reserves that can be used to satisfy part of the share of an overspill claim (reserves on 20 February 1997 amounted to around EUR 0,9 billion) and would therefore reduce the burden on individual shipowners. Thirdly, in any case, on past occasions (such as the oil crisis of the 1970s) the industry has been able to cope with increases of costs of a similar magnitude to that of an overspill claim. And finally, such a claim would represent for most vessels a relatively minor share of their yearly operating costs (lower than 10 %), which is unlikely to force them into bankruptcy.

(133) In view of all this, it is considered that the rules on the minimum common level of cover do not give rise any more to an infringement of Article 86 of the Treaty.

2.2.2. Exclusionary abuses: provision of re-insurance on discriminatory terms

(134) The Pooling Agreement allows independent P & I insurers to obtain re-insurance from one of the members of the IG if certain conditions are fulfilled. The Statement of Objections considered that the Pooling Agreement did not include objective and non-discriminatory conditions for deciding which commercial P & I insurers could obtain re-insurance from its members (rather, these conditions were considered objective in relation to independent mutual P & I insurers). In addition, the Pooling Agreement did not include any procedural rule to allow the independent P & I insurers (both commercial and mutual) to check whether the IG rules on re-insurance were properly applied, such as the obligation to communicate the refusal to re-insure in writing and with reasons, or an appeal procedure.

(135) The absence of objective conditions and procedural safeguards in the Pooling Agreement was considered an abuse of the dominant position within the meaning of Article 86 of the Treaty. Indeed, as has been explained, at present the IG is the only entity in the market offering P & I cover up to around EUR 3,9 billion (USD 4,25 billion), and no independent insurer can reach alone the minimum dimension necessary to offer such a cover. Moreover, independent insurers are not able to obtain re-insurance for large P & I cover, owing to their limited market shares. In view of this, the IG could easily have distorted competition by not deciding, on the basis of objective conditions, to which independent insurers it would provide re-insurance.

(136) As was explained above (see recitals 27 and 28), the IG has now included objective conditions in relation to the provision of re-insurance to commercial insurers and has established an adequate procedure to allow any independent P & I insurer requesting re-insurance from the IG to ensure in a timely manner that the monitoring of compliance with the conditions is properly performed. Indeed, the IG will have to take up a position on the request within 30 days of receipt of all the relevant infor-

mation (this period may be extended by a further 30 days during the renewal period). If the decision is negative, the insurer refused re-insurance should be given a written notice stating the reasons for the refusal. The insurer will have the right to appeal against any such refusal. In view of this, it is considered that the rules on re-insurance of independent P & I insurers could no longer give rise to an infringement of Article 86 of the Treaty.

3. ARTICLES 53 AND 54 OF THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA

(137) According to Article 53 of the EEA Agreement, any agreement between undertakings which has as its object or effect the restriction of competition within the territory covered by this agreement is prohibited in so far as it may affect trade between the States parties to the Agreement.

(138) According to Article 56(l) of the EEA Agreement, the Commission has to decide on any case under Article 53 of that Agreement where the commercial agreement in question affects trade between Member States and the turnover of the undertakings concerned in the territory of the EFTA States is less than 33 % of the turnover in the EEA territory.

(139) In this case, the turnover obtained by the P & I Clubs in the EFTA territory is less than 33 % of the turnover in the EEA territory. Therefore, it is up to the Commission to assess whether the IG has infringed Article 53 of the EEA Agreement. To this end, all the arguments developed in this Decision in relation to Article 85 shall apply in this case also to Article 53 of the EEA Agreement.

(140) According to Article 54 of the EEA Agreement, any abuse by one or more undertakings of a dominant position within the territory covered by the Agreement or in a substantial part of it is to be prohibited.

(141) According to Article 56(2) of the EEA Agreement, the Commission has to decide on a case under Article 54 of that Agreement where dominance exists within the territories of the Community as well as of the EFTA States and where the turnover of the dominant undertaking in the territory of the EFTA States is less than 33 % of its turnover in the EEA territory.

(142) In this case, the P & I Clubs hold a world wide collective dominant position and their turnover in the EFTA States is less than 33 % of their turnover in the whole EEA area. Therefore, it is up to the Commission to decide if they have infringed Article 54 of the EEA Agreement. To this end, all the arguments set out in this Decision in relation to Article 86 apply in this case to Article 54 of the EEA Agreement as well,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85(1) of the Treaty or pursuant to Article 53(1) of the EEA Agreement in respect of the amended Pooling Agreement or the International Group Agreement ('IGA'), with the exception of the rules concerning the quotation procedures and the minimum costs for tankers, in so far as they apply to the retention costs.

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action under Article 86 of the EC Treaty or pursuant to Article 54 of the EEA Agreement in respect of the Pooling Agreement and the IGA, both as amended.

Article 3

Pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement are declared inapplicable to the rules concerning the quotation procedures and the minimum costs for tankers included in the IGA, as amended, in so far as they apply to the retention costs. This exemption shall be valid from 20 February 1999, being the date on which the latest notified amendments to the Pooling Agreement and the IGA will enter into force, until 20 February 2009.

Article 4

The International Group of P & I Clubs shall inform the Commission each year of any amendment and/or addition to the notified agreement as well as of the conclusion of any other agreement within the Group.

The IG shall also send to the Commission annually a report explaining whether the Pooling Agreement remains necessary to allow the P & I Clubs to provide the level of cover that they have agreed at that moment. This report shall include detailed explanations on the evolution of the markets of Protection and Indemnity ('P & I') direct insurance and re-insurance. With regard to P & I direct insurance, the report shall include market shares and levels of cover provided both by the IG and each of its members as well as estimates of market shares and levels of cover provided by third party providers. With regard to P & I re-insurance, the report shall explain the structure of the Group General Excess Loss Reinsurance Contract (layers of re-insurance; premiums paid; re-insurers taking part in it, with corresponding shares) and estimate levels of cover provided to other P & I operators.

The IG shall provide annually detailed statistical information on the functioning of the quotation procedures and the rules for providing quotations on tankers.

Article 5

The Decision is addressed to:

The International Group of P & I Clubs
78 Fenchurch Street
London EC3M 4BT
United Kingdom

Done at Brussels, 12 April 1999.

For the Commission

Karel VAN MIERT

Member of the Commission