COMMISSION

COMMISSION DECISION

of 16 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.373 — P & I clubs)

(Only the English text is authentic)

(85/615/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Greece and in particular Articles 6 and 8 thereof,

Having regard to the notifications made on 18 June 1981, on 27 July 1984 and on 20 February 1985 by the 17 protection and indemnity clubs listed in the Annex, concerning the International Group Agreement,

Having regard to the summary of the application and notification published (2) pursuant to Article 19 (3) of Regulation No 17,

Whereas no further important facts have been drawn to the Commission's attention, following the said publication pursuant to Article 19 (3), nor any observation made that cause the Commission to modify its intention, in these circumstances, to accept the request for application of Article 85 (3) of the Treaty,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

1. On 18 June 1981, 17 protection and indemnity clubs (P & I clubs-mutual non-profit-making associations providing certain types of marine insurance), the names and addresses of which are listed in the Annex, notified to the Commission, in accordance with Article 4 of Regulation No 17, the text of an agreement which they intended to put into effect, with a view to obtaining negative clearance or alternatively an exemption under Article 85 (3) of the Treaty.

The agreement, known as the International Group Agreement (IGA), came into force on 8 December 1981.

2. After a preliminary examination, the Commission considered that the agreement contained a number of clauses that could not be exempted under Article 85 (3). On 18 February 1983 it therefore opened proceedings and on 24 February 1983 sent the applicants a statement of objections prior to a decision under Article 15 (6) of Regulation No 17.

3. Following discussions with the Commission, the clubs submitted on 1 November 1983 a memorandum setting out a number of proposals for amendment of the IGA. The clubs asked whether the Commission would be prepared to issue an Article 19 (3) notice in respect of the IGA if it was amended in accordance with the proposals set out in the memorandum.

4. On 1 December 1983, the Union of Greek Shipowners and the Greek Shipping Cooperation Committee, whose members are members of the P & I clubs, lodged a formal complaint pursuant to Article 3 of Regulation No 17 in relation to:

(i) an agreement in similar terms to the IGA which was operated by the P & I clubs prior to the adoption of the IGA;

(ii) the IGA as notified and as adopted;

(iii) the IGA as now proposed to be modified.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 09, 11. 1. 1985, p. 11.

5. On 12 July 1984 the Commission sent to the P & I clubs a statement of objections in which it stated that having examined the information available, it considered that there were grounds for finding that certain clauses of the IGA infringed the provisions of Article 85 (1) and did not satisfy the conditions for exemption contained in Article 85 (3).

6. On 27 July 1984 the P & I clubs notified the text of a modified IGA (IGA 1984) for which they requested negative clearance or alternatively an exemption under Article 85 (3) of the Treaty. That text came into force on 31 July 1984.

7. On 2 August 1984 the Commission informed the clubs that in the absence of an agreement on all the issues in the Statement of Objections which would enable the Commission to grant an exemption, the proceedings under Article 85 (1) had to be continued.

8. On 27 September 1984 the clubs informed the Commission that without prejudice to their position in the existing proceedings and in an attempt to settle the procedures under Article 85 (3), they were prepared to modify the IGA as notified in 1984.

A. The market and the undertakings concerned

9. P & I insurance is the traditional name for the insurance of third-party liabilities and certain contractual liabilities which arise in connection with the operation of ships. The first P & I clubs were formed in England in the middle of the 19th century. The principle upon which they are based is mutuality, that is to say that they are not commercial insurers but associations of shipowners, charterers, operators and managers of ships, who agree to share each other's liabilities on a non-profit-making basis. In the main, all P & I clubs cover the same types of risk, but there are differences in the franchise or recovery standards.

A shipowner normally places hull and machinery insurance with commercial insurers, whereas insurance of contractual and some third-party liabilities is almost invariably placed with P & I clubs.

10. Each association is operated on a mutual non-profit-making basis for the benefit of its members. Each association insures third-party and contractual liabilities which its members incur in the operation of their ships. In addition, the associations pool and collectively reinsure liabilities in excess of certain thresholds. This 'pool' is operated jointly by all the clubs which share the risk of any claim made against any member of any club which is in excess of the limit retained by each club. Thus any heavy claim that is made against a club is borne not only by the members of that club, but proportionately as to the excess by the members of all clubs within the pool. The pool itself also reinsures on the world market liabilities in excess of the limit retained by the pool.

11. The various P & I clubs which have subscribed to the IGA insured about 90 % of world shipping tonnage in 1979 and 1980. In 1980 the ocean-going merchant tonnage registered in EEC Member States was approximately 112,5 million tons and nearly all of this was insured by clubs in the international group. It can be estimated that premium income of the clubs amounted in 1983 to well over US $ 500 million.

B. The agreement as originally notified

12. Chapter C below sets out the essential elements of the Agreement in its present form following the modifications which were contained in the notification of 1984 and modifications made thereafter.

However, the Agreement as originally notified in 1981 contained certain clauses which have been modified following the Commission's intervention. A summary of the main clauses which the Commission sought to modify is given below:

(a) The obligation on a club ('new club') not to offer, for a ship currently insured with another club ('holding club'), a lower premium than the holding club's rate (i.e. the rate at which the holding club is prepared to renew the insurance) unless the holding club's rate exceeds a bracket of 'going' rates.

This obligation had the effect of preventing or restricting competition on premiums, since the only possibility a new club had of gaining the business of an operator already insured with another club and of applying a new rate was to convince the expert committee set up by the IGA that the holding club's rate was unreasonable, i.e. that it exceeded the maximum amount considered to be reasonable in the particular case.

If both the holding club's rate and that of the new club were deemed reasonable, the new club was able to insure the operator only if for the first year it aligned its rate with that of the holding club.

(b) The clause applying the quotation rules referred to in (a) not only to ships currently insured, but also to new or newly acquired ships ('new ships rule').

The application of the quotation rules without more to new ships or those newly acquired by operators was a further restriction on the insured's freedom to choose his insurer.

(c) The clauses relating to release calls.

The Commission was of the opinion that the clauses relating to release calls, i.e. the amounts members withdrawing a vessel or a fleet from a club are charged to cover their share of liabilities incurred during their membership but not settled at the time of withdrawal, could be used to reinforce restrictions on transfers between clubs.

(d) The rules relating to a minimum 'estimated total cost' (ETC) for tankers.

These provisions constituted restrictions of competition in that the clubs agreed minimum basic rates which had to be observed in all their writing of tanker business.

(e) The clauses relating to the composition and procedure of the expert committee.

Although these rules did not give rise to clear-cut restrictions, the Commission was of the opinion that their object or effect was to reinforce the ties between the clubs and could have contributed to restrictions on movements between one club and another. That consideration applied on the one hand to the composition of the committee, which did not contain any independent member, and on the other hand to the committee's procedures, which did not make any provision for appeal and restricted access to the records of the committee's deliberations to 'persons authorized by the clubs'.

C. The agreement as amended following the Commission's intervention

13. The modified agreement communicated to the Commission at the end of the discussions seeks to meet the objections referred to in Section B above.

14. Quotations for vessels already insured

(a) A ship operator is in principle free to change clubs provided that the rate quoted by the new club is not considered unreasonably low by an expert committee.

(b) However, in particular to allow the holding club an interval between receiving notice of the operator's intention to leave it and deciding its own provisional rates for its members for the following year, it is provided that the freedom to change clubs is conditional on a contractually binding commitment at the quoted rate having been entered into between the operator and the new club by 30 September of the year preceding that for which the new insurance policy is to be effective. In addition, the holding club must be notified of this commitment within three days from the date on which it was entered into. Provided the binding commitment is made and notified in this way and the rate is not contested by the holding club or, if contested, is deemed reasonable by the expert committee, the operator can be insured with the new club as from 20 February of the following year, the date when new insurance policies come into effect.

(c) As the rates the new club will charge its members in the following year will not have been finalized in September when the contract with the operator changing clubs is concluded, the rate quoted in the contract must be adjusted to reflect:

(i) any general increase or reduction in rating adopted by the new club for the following year;

(ii) any change in the limit of claims retained by the pool; and

(iii) any variation in the cost of the reinsurance taken out by the pool.

This adjustment must be notified to the holding club.

(d) The holding club may apply to the expert committee:

(i) within 30 days after notification of the rate agreed with the new club to determine whether the agreed rate is reasonable;

(ii) within two working days after notification of the adjusted rate to determine whether the adjustment fairly reflects the factors referred to above.

If the Committee considers that the agreed rate is unreasonably low or that the adjustment does not fairly reflect the factors referred to above, the new club can still insure the operator but for two years it will enjoy only a reduced pooling facility.

If no contract is concluded by 30 September, the rules of the IGA as originally notified will apply, i.e. the new club can only quote the operator a lower rate than that charged by the holding club, if the rate charged by the holding club is unreasonable. If it does quote a lower rate, and the rate charged by the holding club is found not to have been unreasonably high, the new club will enjoy only a reduced pooling facility. However, the new club is free to conclude a contract with the operator at the same rate as the holding club.

15. New vessels

(a) An operator who has reached a binding commitment with a new club under the pre-30 September procedure (see paragraph 14 (b) above) for one or more vessels is free thereafter to insure a new (or newly acquired) vessel, benefiting immediately from the new club's rate, provided that that rate is not held by the Committee to be unreasonably low.

(b) Unless an operator whose vessels are presently insured by a club has already reached a binding commitment with a new club under the pre-30 September procedure for one or more vessels, any new (or newly acquired) vessel of that operator may not be insured by any club for the balance of the current year at less than the rate offered by the holding club unless that rate is held by the Committee to be unreasonably high.

16. Release calls

(a) Where a release call is demanded from an operator by a club which he is leaving to cover the operator's share of the club's outstanding liabilities in respect of those years in which he was a member, but in respect of which accounts are not closed, the operator has the option of paying the release call or providing a bank guarantee for his share of outstanding liabilities.

(b) In the event of the operator considering the amount of the release call demanded to be inappropriate, he may, within 20 working days, apply to the expert committee to determine whether the release call is in accordance with a rate or formula fixed by the holding club's directors and applicable to all its members in similar circumstances and, if not, whether the release call is reasonable.

(c) However, the holding club may make it a condition of the operator's right to request a determination that the operator deposits in escrow the amount of the release call demanded or provides a bank guarantee for that amount. The deposit or guarantee will be refunded or released so far as the expert committee finds in the operator's favour.

17. Minimum estimated total cost for tankers

The minimum rate provided for in the agreement as originally notified has been deleted. Instead it is provided that:

(a) all quotations for tankers must make fair and adequate provision for the following elements of cost:

(i) claims within the club's retention;

(ii) contributions to pool claims;

(iii) reinsurance cost;

(iv) administration costs;

(b) the clubs will recommend annually a reasonable minimum provision in respect of pool claims.

18. Composition and procedure of the expert committee

The committee now contains an independent element which it did not contain before. Apart from two members, one for each club directly concerned, (i.e. the holding club and the new club) chosen from a list A, the committee will comprise a third member, chosen from a list B (persons who are not party to the dispute and are accepted as independent persons qualified by their experience).

List A shall comprise one or more directors, employees or partners of each club or its managers, nominated by that club. A person on List A may not be appointed to the committee by the club which nominated him to that list or by a club which reinsures or is reinsured by that club. The two members chosen from List A shall jointly

appoint a third member from List B, but if they cannot agree within three working days, the appointment shall be made by the secretary of the committee.

The committee, which shall act as arbitrators pursuant to the English Arbitration Acts 1950 and 1979, shall give reasoned decisions in writing.

19. The clubs, in accordance with their letter of 27 September 1984 (see paragraph 8 above), have concluded a modified IGA (IGA 1985) which came into force on 20 February 1985.

20. In response to publication of the notice pursuant to Article 19 (3) of Regulation No 17, the Commission received comments from the Union of Greek Shipowners and the Greek Shipping Cooperation Committee, each of which had on 1 December 1983 already lodged a formal complaint pursuant to Article 3 of that Regulation.

The following general objections were raised to granting an exemption in relation to the IGA:

— in general, the four conditions for the applicability of Article 85 (3) are not satisfied,

— in particular, the cut-off date of 30 September is an impractical and unworkable date. The complainants suggest the date of 30 November, arguing that in practice all the information and details required would not be received and processed before 30 November,

— the combination of a cut-off date of 30 September with the application of the quotation rules to new vessels is unworkable. Therefore the complainants suggest either that the quotation rules should not apply to new vessels, or alternatively that the cut-off date should be 30 November.

These objections are not considered valid by the Commission for reasons that will be explained in detail in this Decision. However, the main reason for rejecting these objections is that the criticisms made are purely speculative and the complainants failed to provide evidence supporting their contentions.

However, in addition it is important to stress that, prior to dispatching the statement of objections on 12 July 1984 (see paragraph 5 above), the Commission received from several individual shipowners and associations of shipowners, all of which are members of the P & I clubs, like the complainants, approximately 15 letters in support of the IGA.

These shipowners, who can be considered as constituting the majority of shipowners in the Community, dissociated themselves entirely from the position taken by the Union of Greek Shipowners and the Greek Shipping Cooperation Committee.

They pointed out in particular that the existing P & I clubs' system is beneficial to shipowners both in the services it provides and because it affords vital coverage on an 'at cost' basis, and that any threat to the stability of that system is detrimental not only to the interest of the shipowners but also to all transport users. A weakening of the pooling arrangement would have two deleterious effects: firstly, the clubs generally would no longer be able to meet the claims made against them in the event of serious mishap, and secondly, significant claims for damages submitted by third parties might go unsatisfied and the cost of the industry's inability to discharge its liabilities might consequently fall on the world community at large.

II. LEGAL ASSESSMENT

A. Article 85 (1)

21. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Article 85 is equally applicable to agreements for services as it is to agreements for goods.

22. The clubs which notified the IGA are undertakings within the meaning of Article 85 (1).

While mutual insurance agreements in themselves do not constitute a restriction of competition, the agreement in question goes further because the system which it establishes has as its effect the reduction of competition between the clubs by imposing limitations on the rights of each club to quote both for vessels already insured with another club and for new or newly acquired vessels. At the same time, as a result of these limitations, the insured's freedom to choose his insurer is restricted.

23. The effect of this restriction on the premiums the clubs may quote is appreciable since the insurance market in question is dominated by the P & I clubs, which between them insure nearly all the ocean-going merchant tonnage registered in the Member States of the EEC.

24. The following provisions appear to the Commission to fall within Article 85 (1):

— quotation, rules for vessels already insured (see paragraph 25 below),

— quotation rules for new vessels (see paragraph 26 below),

— rules relating to 'release calls' (see paragraph 27 below),

— rules relating to estimated total cost for tankers (see paragraph 28 below).

25. Quotation rules for vessels already insured

Under the agreement, a large number of insurers who, but for the operation of the IGA, would be in full competition with one another in particular as regards rate setting, have established machinery under which the freedom of a new club to insure a vessel already insured with a holding club is restricted.

This restriction is twofold:

— first, the freedom for an insured operator to change clubs is conditional on a contractually binding commitment at a quoted rate being entered into between the operator and the new club by 30 September of any year and the holding club being notified within three days of the commitment.

In the absence of such a binding commitment the operator is free to move to a new club only if the latter applies the same rate as the holding club, except where the holding club's rate is unreasonably high (see paragraph 48 below),

— secondly, the mechanism described above presupposes that the rate offered by the new club is either accepted by the holding club as being reasonable or if contested is subsequently considered reasonable by the expert committee.

The result of this stipulation is that the insurer's freedom to conclude agreements with a new client is restricted, with the result that the insured party's freedom to take advantage of competitive forces is reduced.

26. Quotation rules for new vessels

In spite of the modifications to the originally notified IGA agreement which resulted from the Commission's intervention, the 1985 IGA still contains restrictions of competition on the quotation rules for new vessels.

Thus an operator who acquires an extra ship for his fleet in the course of a new policy year is not entirely free to seek a quotation for such a vessel with an insurer of his own choice.

The present rules oblige the insured first to go to the club or clubs which already insure all or part of his fleet.

An operator with a new or newly acquired vessel can benefit immediately from a better rate offered by a new club only if he has reached a binding commitment with the new club under the pre-30 September procedure (see paragraph 14 (b) above) in respect of one or more vessels, which were already insured. However, this advantage of being able to benefit immediately from the rate offered by a new club, if challenged by the holding club, is only available if it is not held by the committee to be unreasonably low.

In no other case may any new or newly acquired vessel of that operator be insured by any club for the balance of the current year at less than the rate offered by the holding club unless that rate is held by the committee to be unreasonably high. The result of this stipulation is to limit the possibilities for an operator to choose an insurer for new or newly acquired vessels who can offer a rate more financially advantageous than that which is presently available to the operator from his holding club.

27. Rules relating to release calls

Although these rules do not in themselves give rise to clear-cut restrictions, the Commission is of the opinion that the rules on release calls, i.e. the amounts which members withdrawing a vessel or a fleet from a club are charged to cover their share of liabilities incurred during their membership but not settled at the time of withdrawal, 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.

28. Rules related to the estimated total cost for tankers

As a result of the Commission's intervention, the clubs agreed to delete the minimum rate provided for in the agreement as originally notified. However, the text which is at present in force still contains clauses which restrict competition within the meaning of Article 85 (1).

In the absence of an agreement the various insurers would be free to fix quotations for tankers according to their own evaluation of the risk involved.

The present text of the agreement on the other hand provides that the various clubs must insert in their quotation adequate provisions for the following cost elements:

(i) claims within the club's retention;

(ii) contributions to pool claims;

(iii) reinsurance cost;

(iv) administration costs.

Furthermore, the clubs will recommend annually a reasonable minimum provision in respect of pool claims.

Thus, even though the obligation uniformly to apply a minimum tariff is no longer present, the freedom for the insurers to fix their tariffs for tankers is restricted.

29. The notified agreement is capable of having an appreciable effect on trade between Member States, because its effect extends to the whole of the common market as well as third countries. Nearly the entire EEC merchant fleet is insured by the clubs, in such a way that ships from one Member State are commonly insured by a club established in another Member State. In addition, clubs established in more than one Member State are party to the agreement.

B. Article 85 (3)

30. Article 85 (3) of the EEC Treaty states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production of distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

31. The IGA as amended following the Commission's intervention satisfies all the requirements of Article 85 (3).

Improvement in production or distribution

32. The IGA was designed to maintain the system of mutual insurance offered by the P & I clubs. The advantages of such a system of mutual insurance can be summarized briefly in the following way:

— the reduction of insurance premiums. This advantage stems from the fact that the clubs operate on a non-profit making basis and each member merely contributes to the amount of claims made against club members and the cost of reinsurance and administration,

— a better claims-handling system and a speedier assistance for shipowners. This advantage arises from the fact that in principle the insured and the insurer have mutual interests which do not conflict,

— elasticity of cover. The discretionary power that the clubs' directors enjoy means that a claim that is not specifically covered by the policy can be met. This sort of cover is a particular feature of mutual insurance where the members of a given club feel sufficiently confident in the judgment of the club's directors to accept their decisions outside the bounds of the policy cover,

— unlimited cover. As a result of the clubs' participation in the pool and in the clubs' collective excess reinsurance, they are able to offer shipowners unlimited cover in respect of all liability except oil pollution risks,

— rapid settlement of claims. This advantage of the mutual insurance system can also be of benefit to persons with legitimate claims against shipowners, such as employees of shipowners or stevedores injured in the course of their employment and other individuals suffering personal injury.

33. The rules contained in the IGA are designed to secure four objectives crucial to the operation of the mutual P & I clubs system, namely:

— continuity of membership,

— preserving the principle of mutuality,

— stability of premiums,

— continuation of the pool arrangements.

34. Continuity of membership is of great importance for two reasons:

— the necessary experience to assess the members' proper rating could not be acquired by the underwriters of any one club if members were constantly moving from club to club,

— 'long-tail' liabilities would be very difficult to handle equitably if membership were to change constantly.

35. Preserving the principle of mutuality

The quotation rules are designed to avoid application of discriminatory rates. This situation could arise if the rate offered by a new club to attract an operator already insured with a holding club is not based wholly upon an underwriting assessment of the risk but is otherwise set to persuade the member to change his club. Such a rate could discriminate against the existing members of the new club.

To prevent the possibility of such discriminatory ratings the IGA contains a rule referred to in paragraph 14 (a) above. This rule provides that an operator may move from club to club if the new club's rate is not considered unreasonably low by an expert committee.

36. Stability of premiums

In order to enable shipowners to forecast their real insurance costs, stability of premiums is essential. A system whereby a general reduction on quoted rates on the basis of over optimistic estimations of the total cost of insurance would have to be corrected by the imposition of high supplementary calls, would be contrary to the accepted principles of insurance underwriting and would therefore be disadvantageous to the shipowners.

37. Continuation of the pool arrangements

Quotation of discriminatory rates would destroy the trust between clubs which is an important factor in the operation of the pool arrangements. Indeed, it is hard to see how the acceptance of the pooling system by the clubs could possibly continue in the absence of a high degree of mutual trust between the clubs.

38. The estimated total cost for a tanker gives rise to particular considerations. In this respect the 1985 version of the IGA contains stipulations which restrict competition (see paragraph 28 above).

However, at this point it is important to take into account the particular nature of the transport of petroleum and gas products by tanker. Such transport represents approximately 50 % of the tonnage insured with the clubs. While the insurance of dry-cargo fleet gives rise to a number of claims which occur with reasonable regularity, the situation for tankers and in particular the tankers carrying dirty or heavy oils is different. Tanker claims tend to occur rarely but involve massive liabilities when they do occur.

To avoid the risks of quotations which are systematically below a premium sufficient to meet a serious incident of this nature, the clubs have decided to pool the collective experience of their underwriting experts in this particular field. While the version of the agreement which was originally notified contained a minimum estimated total cost (ETC) for tankers, the 1985 IGA version envisages that the clubs shall be free to fix tanker premiums on condition that the premium quoted makes fair and adequate provision for certain constant elements of total cost. Bearing in mind the need for a level of premiums sufficient to meet liabilities arising from serious incidents and the fact that the clubs now must have confidence in the premium levels of other clubs if the pooling arrangements are to work, the rule in respect of tankers is regarded by the Commission as contributing to the improvement of the insurance services in that sector.

39. An examination of the arguments put forward by the clubs has led the Commission to the conclusion that the advantages resulting from the notified agreement outweigh the disadvantages stemming from the fact that an operator is not totally free to move from one club to another and that tanker quotations are subject to the restrictions set out in the formula described above.

In such a context the setting up and functioning of the IGA can be considered to be a means of improving the production and the distribution of insurance services.

Benefit to the consumer

40. The abovementioned advantages for production and distribution of insurance services are of immediate benefit to the shipowner. As far as they are concerned, it goes without saying that the IGA permits them to benefit from all the advantages of the mutual insurance system (see paragraph 32 above).

41. However, in the context of mutual insurance the Commission is of the opinion that it is not sufficient to argue that the notified agreement benefits consumers merely because the insured shipowners are themselves consumers of the service in question.

Thus, it must be shown that persons other than the insured themselves, namely transport users who

are their customers, and the final consumers, also benefit from the agreement in question.

42. As far as the customers of the insured are concerned, it is appropriate to take into consideration the competitive situation in the shipping industry. This industry is characterized by a division between liner operations on the one hand and non-liner services which involve a very active charter market on the other hand.

43. In so far as the non-liner shipping services are concerned, the competitive nature of this market permits the assumption that any cost savings achieved from cheaper insurance will be passed on and result in lower freight charges with consequent effects on the prices charged to the final consumers for the goods in question.

44. This argument also applies to the liner sector, where certain rates are governed by the liner conferences. As far as these services are concerned, it must be borne in mind that in spite of the uniform fixing of rates, conferences are subjected to substantial competition from various quarters, such as outside liner operators. As a result, it can be assumed that is is unlikely that the conferences would be able to raise rates by more than enough to cover costs. In such circumstances any cost saving such as arises from mutual insurance will be passed on to the consumers.

45. For these reasons the Commission can agree with the argument of the clubs that in both the liner and non-liner sectors of the shipping industry cost savings accruing to the owners and operators of the ships as a result of the IGA can be expected to benefit consumers. This advantage arises because the pressure of competition amongst shipowners and operators is such that most if not all of the cost savings made available to them by the operation of the IGA will necessarily be passed on to the consumer.

46. The same positive conclusions may be reached in respect of the system according to which passengers and other customers of the shipowners who have suffered damage within the P & I system can obtain compensation. Thus the rapid settlement of claims made possible by the existence of a mutual system of assurance arising from the operation of the IGA undoubtedly constitutes a benefit for the consumer. This is also true of the unlimited cover, and the elasticity of cover, permitted by the IGA (see paragraph 32 above).

47. Indispensability of the restriction

The restrictions remaining in the 1985 version of the IGA appear to be indispensable to the attainment of the P & I clubs' objectives.

The first restriction to be considered is the rule on quotations for vessels already insured. This restriction is clearly designed to prevent the transfer of business from one club to another in response to a discriminatory quotation.

In a system of mutual insurance it is necessary to prevent discriminatory rates being applied. Without the rule on quotations, the mutual confidence necessary for the operating of the system would not exist.

48. The principal difference between the quotation system which was in force under the IGA notified in 1981 and the present (1985) version lies in the fact that a new club has the possibility of obtaining the business of an operator whenever its rate is a reasonable one.

Under the 1981 IGA a new club was obliged not to offer a lower premium than the holding club's rate unless the holding club's rate exceeded a bracket of going rates, i.e. it was unreasonably high. In the 1985 version on the other hand a ship operator is in principle free to change clubs provided that the rate quoted by the new club is not considered unreasonably low. This possibility is subject, nevertheless, to the condition that a binding agreement has been concluded before 30 September between the new club and the operator with effect from the beginning of the policy year which follows. It is further required that this binding agreement has been notified to the holding club within three days of the commitment being made. Otherwise, the 1981 IGA rules relating to reduced pooling facility will apply.

This cut-off date of 30 September is essential to the operation of the system, because of the insurers' need to make a sufficiently accurate estimate of the quantity and quality of its membership in the coming policy year. Such considerations are in fact indispensable to enable a correct rating of an owner's new premium to be made, given that such a rating is designed to establish an equitable relationship between the contributions of all the members of any club. The 30 September cut-off date furthermore coincides with the earliest date on which statistics are available relating to risks run by members both singly and collectively. Such statistics permit estimates of a provisional nature to be made by holding and new clubs in cases where the operator is contemplating a change. Such estimates are then adjusted as the need arises (see paragraph 14 (c) above).

The criticism raised by the complainants against the pre-30 September procedure appears to the Commission not to be supported by evidence. Firstly, it is incorrect to contrast that procedure with the 'old IGA', as if the latter had been abolished. A member wishing to change his club has the choice of either committing himself by 30 September under the new procedure or waiting until the normal renewal season, when the 'old' procedures still operate.

The Commission therefore cannot accept the contention of the objectors that the new mechanism is even worse than the 'old' IGA.

Secondly, an important advantage of the pre-30 September procedure is that it effectively enables a member to 'check' his holding club's rate against that of another club, even if, in the event, he decides to stay with his holding club. This is because the holding club is obliged to furnish to the new club, at its request, the shipowner's record. The objectors took great exception to their inability to do this under the old IGA. The new system therefore is an improvement to the extent that it meets this objection.

The objectors' fundamental contention is that the cut-off date of 30 September is an impractical and unworkable date. They argue that the pre-30 September procedure should be extended until a date on which there is available all the information that is used for the purpose of the 'traditional' type of renewal. The Commission does not share this view. During the discussions which took place between the services of the Commission and the clubs in order to cause the latter to modify the 1981 IGA, it was agreed to explore means of avoiding the IGA having the effect of binding an owner to his holding club's rate for a full year without disrupting the main structure of the system. The Commission agreed with the claim made by the clubs that giving a shipowner the complete freedom to change clubs at any time would jeopardize the functioning of the system as a whole, in particular in so far as the requirement of continuity of membership is concerned (see paragraph 34 above).

Initially the cut-off date was fixed at 20 August. However, following the submissions made by the complainants and notwithstanding the hesitations of the other shipowner members of the clubs, the latter agreed to defer the cut-off date until the 30 September. They refused any further postponement because that would have meant that the premiums of all (or nearly all) fleets could be renewed without regard to the holding club's rate. That would have wholly defeated the purpose of having a separate procedure as accepted by the clubs. There would be no scope for two procedures, and the position of the clubs of preserving stable membership by preventing transfers at any time at unreasonably low rates would not be taken into account. In effect, what had been devised as a 'safety valve' would have become the standard practice, and the system would have been de-stabilized.

49. The date of 30 September, combined with the obligation on the holding club to furnish information to the proposed new club in relation to the rate applicable to an operator wishing to change club, also takes into account the interests of the operators who need to be able to decide at the earliest opportunity whether to stay with the holding club in full knowledge of the premium which will be quoted by the clubs in question for the next policy year.

The mechanism which is thus set up appears to the Commission to constitute an acceptable compromise between the legitimate interests of the clubs in maintaining stable membership and the interests of the operators who can now take advantage of competition between clubs in respect of rates and services offered.

50. The pre-30 September procedure is therefore a key element in the 1985 version of the IGA and is indispensable to its operation. However the clubs must be required scrupulously to observe its conditions.

51. The second restriction to be considered is the rule for the quotation of new vessels. This rule is the result of intensive discussions between the Commission and the clubs. In the Commission's view, the rule brings about an acceptable compromise between the interests of the clubs and those of individual operators, notably of the shipowners who introduced a complaint. The clubs seek to insure fleets rather than single vessels and argue that where a new vessel is purchased the operator should be obliged to insure it with his holding club since a correct evaluation of the risk requires knowledge of the operator's personal record in respect of all his vessels.

However, the operators who made a formal complaint against the IGA assert that in relation to a new vessel operators should be free to choose a different club. In support of their argument that the 'new-ship' rule is not necessary, the complainants point to the existence of split fleets i.e. cases where operators' ships are insured in different clubs.

But, although the 'new-ship' rule requires operators who purchase new ships to refer the matter promptly to their holding clubs, it does allow an operator who has already decided to transfer one or more vessels to a new club to make such a transfer and immediately benefit from the new club's rate. This possibility is an application of the theory of 'split fleets'.

The objectors' basic criticism concerning the 'new-ship' rule is a development of their main argument that all renewals should be effected under an extended version of the pre-30 September procedure. Given that the Commission has accepted the arguments of the clubs that the quotation rules should apply to new ships, the 1985 version of the IGA relaxes them as soon as any part of the existing fleet has been committed to a pre-30 September renewal. The Commission agrees with the clubs that giving the new club the freedom of insuring a single new vessel in any case where its proposed rate is 'reasonable' could give rise to more acute dangers in the case of a new vessel than in the case of a renewal. It would be relatively safe and easy for the new club to quote a low rate for a single vessel as opposed to a low rate for an entire fleet. Meanwhile, a low quotation by a new club for a single additional vessel would put the holding club under pressure to match or under-cut that quotation, and thus to reduce its rates for the rest of the existing fleet to a level lower than the rate which it considered justified on proper underwriting grounds.

52. The 'new-ship' rule, which takes into account the divergent interests of the clubs and of certain operators, is essential to the operation of the IGA for the reasons explained in relation to vessels already insured (see paragraph 49 above). 'New' ships cannot be treated as if they existed in isolation from the rest of an operator's fleet. It is unrealistic to think in terms of insuring single vessels, rather than assessing the risks for a vessel in terms of the operator's record in relation to his old fleet, or at least part of his fleet (in the case of a split fleet). Accordingly, the application of the 30 September date to 'new' ships must be regarded as indispensable.

53. The same conclusion is appropriate in relation to the potentially restrictive effects of the release call provisions which apply when an operator leaves a club. The need for a release call stems from the necessity of preventing a shipowner who owes his former club money to cover liabilities incurred during his membership but not settled at the time of withdrawal, from avoiding his liabilities.

It is important to recognize that, once the last policy year within his period of membership has been closed (usually three years after the end of that year), a past member has the benefit of being protected against any further liability, notwithstanding the fact that up to 50 % by value of claims attributable to his last year of membership, and some proportion of those attributable to earlier years, are likely to be outstanding at that stage.

The release call provisions can in principle be considered as a means of preventing discrimination between members of the same club.

The modifications which were made as a result of the Commission's intervention, and which resulted in the provision for bank guarantees and the right to challenge the amount of the release call before the expert committee, means that release calls are unlikely to be used as a means of restricting transfers. This is particularly the case now that the composition and procedural rules of the expert committee have been amended in a manner acceptable to the Commission.

54. Finally, the rules on estimated total costs for tankers are indispensable in the operation of a system of mutual insurance, especially given the very large sums involved in any claim (see paragraph 38 above).

55. Elimination of competition

The IGA does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the insurance services in question. Each club is now free to determine autonomously the rates it applies to its members. Furthermore, competition in respect of services offered by the various clubs to their members can be expected to increase as a consequence of the new opportunities for changing clubs which the modified IGA rules permit.

56. For the reasons set out above, the Commission is of the opinion that the amendments agreed to by the clubs in the course of nearly three years of discussions have the consequence that the conditions laid down in Article 85 (3) are satisfied.

Moreover, the Commission is of the opinion that in the course of these discussions the points of view of the complainants have been duly taken

into account. Indeed, several meetings have taken place with the complainants who have had the opportunity fully to explain their concerns to the Commission's services. The 1985 version of the IGA is the result of intensive contacts between the Commission, the clubs and the complainants.

Under these circumstances, the Commission considers that the 1985 IGA represents a fair compromise between the different interests. There is a strong likelihood that prohibiting the IGA would have harmful effects on the mutual insurance system itself as operated for over a century by the clubs. Furthermore, it has been brought to the attention of the Commission that a prohibition of the IGA could have the effect that a large proportion of members of the clubs, at least those who are not established in the Community, would decide to leave the clubs and set up new P & I clubs outside the Community.

In the light of these considerations, and bearing in mind that undermining and putting at risk the functioning of the pooling arrangement would be detrimental not only to the interests of the shipowners but also to the interests of consumers and third parties (in view of oil-pollution risks in particular), the Commission is of the opinion that subject to a strict monitoring and scrutiny of the agreement, the IGA can be exempted.

C. **Articles 6 and 8 of Regulation No 17**

57. The present state of the market and the untested nature of the pre-30 September procedure justify the limitation of an exemption to 10 years as from the date of the last notification (20 February 1985).

58. To enable the Commission to check that the conditions which have justified the granting of the exemption continue to be fulfilled throughout the period of the exemption, the parties should be required to inform the Commission once a year of any amendment of the notified agreement or of the conclusion of any new agreement between them. This obligation however shall not dispense with the need to notify changes in the subject matter or membership of the exempted agreement under Article 4 (1) of Regulation No 17 should the parties wish to continue to enjoy the benefits of exemption. Furthermore, in order to enable the Commission to check the application of the pre-30 September procedure, the parties should also be required to send the Commission annually a report containing statistical information on:

— the number of occasions on which operators have officially requested a new club to implement the new procedure (individualized data for each club), and the number of occasions on which a dispute over quotations has been brought before the expert committee and the results of the awards,

— the number of transfers actually carried out in application of the procedure in question,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the International Group Agreement as last notified on 20 February 1985. This exemption shall be valid until 20 February 1995.

Article 2

The undertakings to which this Decision is addressed shall inform the Commission once a year of any amendment and/or addition to the notified agreement and of the conclusion of any new agreement between them or between them and another P & I club. The undertakings shall also send the Commission annually a report containing the statistical information necessary to enable the Commission to check the operation of the 'pre-30 September' procedure.

Article 3

This Decision is addressed to the undertakings listed in the Annex.

Done at Brussels, 16 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

BILAG — ANHANG — ΠΑΡΑΡΤΗΜΑ — ANNEX — ANNEXE — ALLEGATO — BIJLAGE

The Britannia Steamship Insurance Association Limited.

Southwark Towers,
32 London Bridge Street,
London SE1.

The London Steamship Owners' Mutual Insurance Association Limited.

17 Crosswall,
London EC3.

The Newcastle Protection and Indemnity Association.

Centro House,
3 Cloth Market,
Newcastle-upon-Tyne.

The North of England Protecting and Indemnity Association Limited.

Douglas House,
4 Neville Street,
Newcastle-upon-Tyne.

The Standard Steamship Owners' Protection and Indemnity Association Limited.

International House,
World Trade Centre,
1 St Katharine's Way,
London E1 9UN.

The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited.

Burnaby Building,
Burnaby Street,
Hamilton,
Bermuda.

The Steamship Mutual Underwriting Association Limited

Aquatical House,
201/211 Bishopsgate,
London EC2.

Sveriges Angfartys Assurans Forening.

Barlastgatan 2,
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Sweden.

The Shipowners' Mutual Protection and Indemnity Association (Luxembourg).

33 Boulevard Prince Henri,
Luxembourg.

The Steamship Mutual Underwriting Association (Bermuda) Limited.

Clarendon House,
Church Street West,
Hamilton,
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The Sunderland Steamship Protecting and Indemnity Association.

Tavistock House,
Borough Road,
Sunderland.

The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

Mercury House,
Front Street,
Hamilton,
Bermuda.

The West of England Shipowners' Mutual Protection and Indemnity Association (Luxembourg).

33 Boulevard Prince Henri,
Luxembourg.

Assuranceforeningen Gard (Gjensidig).

4801 Arendal,
Norway.

Assuranceforeningen Skuld (Gjensidig).

Stortingst. 18,
Oslo 1,
Norway.

The Japan Shipowners' Mutual Protection and Indemnity Association.

Yanagiya Building,
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Chuoh-Ku,
Tokyo, Japan.

The Liverpool and London Steamship Protection and Indemnity Association Limited.

Equity & Law House,
47 Castle Street,
Liverpool.