

## EU - Competition Law & Shipping

The maritime transport industry has been one of the last economic sectors to face the application of EC anti-trust rules which aim to promote the fair process of competition and catch cartel-like anti-competitive behaviour and activities. It is often said that the shipping industry has enjoyed a “special treatment” from both governments and national competition authorities, often justified through the industry’s importance for international trade and the world economy. The maritime transport industry is highly specialised, but can broadly be separated into two types of shipping services: tramp and liner services. It is in the latter sector, liner-shipping, that conferences have lived and survived until the repeal of Council Regulation 4056/86 through Regulation 1419/2006<sup>1</sup>, which came into effect in October 2008. The reform process aims to bring competition within the shipping industry in line with other sectors. The reform continued with the publication of the Commission’s *Guidelines on the Application of Article 81 (EC) to the Maritime Transport*<sup>2</sup> (the ‘Guidelines’) in July 2008, as a means of providing guidance to all market participants on how compliance with Article 81 can be ensured in both liner and tramp sectors. This is the European Commission’s final word and shipowners and other participants have no option but to comply with these rules. The Commission’s aim is to bring all cartel-like activities under the microscope. It is unsurprising that most of us get a chill down our spine when thinking of this new “competition regime”, mostly fearing the Commission’s extensive powers of investigations which include amongst others: raiding offices; seizing computers and documentation; searching homes and interviewing personnel, and imposing very large fines should the activity be found to infringe competition law.

### 1. The Introduction of EC Competition Law

Anti-conference views were mostly expressed through the Secretariat General and the Maritime Transport Committee of the United Nations Conference on Trade and Development (‘UNCTAD’). UNCTAD was thus the channel for introducing competition law into the maritime field towards the mid-end of the 20<sup>th</sup> century. The Commission’s first successful introduction of a Community competition policy into the shipping market was the Council’s agreement to adopt Regulation 954/79<sup>3</sup> concerning the ratification or accession by the Member States to UNCTAD (known as the Brussels Package). Whilst the Brussels Package recognised the need to avoid possible infringements on Community competition law by conferences, it also established that conferences ensure reliable services to shippers. Consequently, in 1986 Council Regulation 4056/86<sup>4</sup> was adopted. This Regulation was crucial because the Commission, for the first time, was granted the power to investigate alleged infringements and enforce competition rules, as it deemed appropriate. Regulation 4056/86 also granted, as matter of substantive law, a block exemption for cargo liner conferences.

The arguments in support of the exemption granted by Regulation 4056/86 have in short been: lowering fixed costs, diversifying investment risks and the need for market stability<sup>5</sup>. Further arguments were that the maritime sector differed considerably from all other sectors and, because of its nature and importance, could not be subject to the traditional competition rules. However, such practices too often exceeded their scope and the exercise of market power was found to be

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<sup>1</sup> Council Regulation 1419/2006 of 25/09/06, OJL264

<sup>2</sup> OJ/C/245/26.09.08, p.2-14

<sup>3</sup> OJ/L/121/17.05.1979

<sup>4</sup> Council Regulation (EEC) 4056/86, OJ 1986 L378/4, [1989] 4 CMLR 461

<sup>5</sup> Editorial Board, Shipping & Trade Law, EU competition law and maritime sector, April 2005, Vol.5, No.3

incompatible with EU competition law.

The Council's decision to repeal the Block Exemption Council Regulation 4056/86 thus came into effect in October 2008.

Changes brought by the European legislative system can be explained by looking at the overall evolution of the liner shipping market itself. The maritime industry has developed considerably since the adoption of the liner conference block exemption. There has been a general movement towards containerisation in the market, which meant greater demand for larger container-carrying vessels. The principal changes can also be seen through to the growing popularity of consortia and alliances as means of sharing costs<sup>6</sup>, liner joint ventures and the more popular long-term agreements between carriers and shippers. Traditional liner conferences imposing fixed-tariff agreements on parties were becoming unappealing, largely due to the preference for more flexible agreements through private contracts<sup>7</sup>. Transport users have forthwith actively condemned the liner conference system for failing to provide sufficiently competent and reliable services suitable to their needs.

The legal impact of this new regulatory system is rather broad. The changes adopted by the Council mean that any activity that has an effect or indeed impedes the fair process of competition within the maritime transport at a European level will be caught by EU competition rules. The Commission will investigate all trades to/from Europe and trades having an effect on Europe. It is also believed that other countries are likely to follow the Commission's footsteps and the application of the competition rules is likely to be spread on an international level<sup>8</sup>.

The consequences of the Council's decision to repeal the block exemption are that carriers have lost the safe-harbour provided by the block exemption. This means that, on the one hand, shipping companies must be on constant guard to avoid infringing competition rules such as entering into practices that are incompatible with EC competition law. On the other hand, the Commission has recognised the need for open discussions between itself and the market participants in order to ensure a smooth transition to a fully competitive regime. In light of this, the Commission has published various documents as guidance, including the *Guidelines on the Application of Article 81 EC to the Maritime Transport*. However, before publishing the Guidelines, the Commission has invited market participants including shipowners, shippers, the International Chamber of Shipping, shipping law firms, P&I Clubs etc to provide their comments on the Draft Guidelines.

## 2. Modernisation and Self-Assessment

One of the principle changes within the maritime field was the modernisation of the EC competition rules. "*Modernisation*" occurred through four main steps: the extension of Regulation 1/2003<sup>9</sup> to cabotage and tramp services; the repeal of the Block Exemption to Liner Conferences; the adoption of the Competition Guidelines to the maritime sector and finally the review of the Consortia Regulation, an exercise

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<sup>6</sup> Commission Proposal for a Council Regulation repealing Regulation 4056/86 laying down detailed rules for the application of Articles 81 and 82 to the maritime transport and amending Regulation 1/2003 regarding the extension of its scope to include cabotage and international tramp services, 14/12/2005, COM (2005) 651, final

<sup>7</sup> The decline in the popularity of the conference system can also be demonstrated by looking at the changes of the US antitrust laws, which have promoted individual service contracts at the expense of the carriage under the conference tariff. See the Commission's Proposal&para4.

<sup>8</sup> Giles, Senior Associate in Norton Rose LLP, lecture on "The EU's New Competition Regime for Maritime Transport", 25.04.09

<sup>9</sup> Council Regulation 1/2003 of 16.05.2002 on the [EU](#) OJ/L/1,04.01.2003,p.1-25

which is still ongoing. The modernisation package is aimed at decentralising the enforcement of EC competition law so that not only the Commission but also national courts and national competition authorities could apply EC competition law in full. The old system was known to be burdensome, slow, inefficient and bureaucratic and as such, it was replaced with the *Modernisation Package* and the new concept of “self-assessment”.

While self-assessment appears to be a simple concept, whereby each undertaking has the responsibility to evaluate whether their agreement complies with EC competition law, the exercise is rather difficult. Irrespective of whether the agreement falls within the scope of the block exemption or not, shipping companies must self-assess their agreements and ensure compliance<sup>10</sup>. Often, the Commission refers to it as being a box-ticking exercise<sup>11</sup>. But many leading competition experts will disagree as fulfilling the self-assessment criterion requires substantial work, including extended legal evidence, external lawyers, experts and economists<sup>12</sup>. The exercise of the former implies two steps in particular: does the agreement infringe competition rules by restricting competition? If yes, then can it be exempted by virtue of Article 81(3) EC i.e. are there pro-competitive benefits that outweigh the anticompetitive effects?

### **3. The Guidelines**

Thus, what can companies do to operate successfully in the market without infringing competition rules? Do the Commission Guidelines provide the required clarity?

The Guidelines were not adopted as a consolation, but rather as a “warning” as to the future application of Article 81 to the maritime sector. The now adopted Guidelines provide the Commission’s detailed guidance on information exchange allowed within trade associations and shipping pools which are the main focus on the tramp side of the market, both of which shall be considered hereafter. The Guidelines are not a Regulation and thus not legally binding. However, it is assumed that the Commission would generally not depart from what has been laid down in the Guidelines and would adhere to its analysis.

#### **A. Information Exchange**

In general, the Guidelines acknowledge that exchanges of information lead to greater market transparency and may enhance the way liner services are provided, especially to transport users where the information is available to its customers. However, under certain circumstances, information exchanges may also have the effect of reducing or removing uncertainty as to the future behaviour of the market players, consequently resulting in competition between undertakings being impeded. A restriction of competition may occur if certain factors are present, such as a concentrated market structure and exchanges of commercially sensitive information. First, the market structure is to be viewed in light of the level of concentration and the structure of supply and demand, the number of field players, the symmetry and stability of their market shares and the existence of structural connections between them.

Second, in order to establish whether information is sensitive, one would have to consider:

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<sup>10</sup> Giles, Senior Associate Norton Rose LLP, lecture on “The EU’s New Competition Regime for Maritime Transport”, 25.04.09

<sup>11</sup> London-Shipping-Centre, speaker: Lesley Davey.

<sup>12</sup> London-Shipping-Centre, speaker: Philip Wareham

- (i) Its age and the period to which it relates;
- (ii) Its aggregated or individualised nature; and
- (iii) The frequency of such exchanges as well as whether the information is available to the public.

The Guidelines state that in the past the Commission has considered information more than one year old as old/historic, whereas information less than one year old was regarded as recent. However, this is only a general rule and the information will be assessed on a case-by-case basis and in light of all other factors present in the relevant market. It should also be noted that the three main focuses (age, level of aggregation and frequency) will be assessed by the Commission as a whole, rather than separately, because these factors are inter-related.

The area under the Guidelines that requires improvement is the exchange of information between businesses at the same level in the supply chain side. Companies should not be intimidated by the Commission's approach to information exchange. A growing body of economic evidence has underlined the potential pro-competitive benefits of market transparency when managed accurately and in a pro-competitive way. The US antitrust courts and regulatory bodies such as the Federal Maritime Commission have acknowledged the potential benefits of this type of information exchange and so did the European Commission<sup>13</sup>. Such a system of transparency would encompass optional agreements so that guidelines for freight rates and levels of capacity can be monitored and, unlike the previous system of liner agreements, they do not set fixed tariffs. The results of such transparency would include increased output, greater efficiency and better prices for transport users and ultimately consumers. The Guidelines, although more detailed on the subject, have been criticised for remaining over-cautious as regards the issue of information exchange<sup>14</sup>. Providing information on an aggregated and/or historic level is one common way of avoiding competition concerns arising from the exchange of such information. The Guidelines suggest that information less than one year old is insufficiently historic to allay competition concerns<sup>15</sup>. The Commission has been reluctant to adopt the European Liner Affairs Association's proposal to insert additional liner-specific guidance and illustrative examples<sup>16</sup>, but instead preferred a more neutral approach to this issue. This area of the Guidelines could benefit from the Commission's further input since, in the absence of a more adequate guidance, the one-year benchmark may risk leaving companies feeling unnecessarily exposed and in fear of initiating and innovating, thereby creating the reverse result of a potentially less competitive market<sup>17</sup>.

## **B. Shipping Pools**

It is crucial to consider critically whether the Guidelines have provided any clearer guidance on how to assess pooling agreements. The Guidelines indicate that shipowners need to self-assess their shipping pools to ensure compliance with Article 81. The Guidelines provide the following information regarding which types of arrangements comply or breach Article 81(1) bearing in mind whether or not the element of "*object or effect of the prevention, restriction or distortion of competition*" is satisfied: First, pooling agreements between non-competitors will usually fall

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<sup>13</sup> White Paper, Review of Regulation 4056/86, Applying EC competition rules to maritime transport, 13/10/2004, 0675 paras.91-94

<sup>14</sup> *ibid*

<sup>15</sup> 'Guidelines' para.54

<sup>16</sup> European Liner Affairs Association.

<sup>17</sup> EU/Competition, Seeking Guidance, Reed Smith, 12.02.09

outside the scope of Article 81(1), so long as the pool members can demonstrate the pool's indispensability i.e. that neither of the shipowners could perform in the market without the creation of the pool, which is set to jointly tender for and perform a contract of affreightment ('CoA'); Secondly, agreements which are set by their object and effect to achieve technical improvements, cooperation or to establish environmental standards are considered to be pro-competitive<sup>18</sup>; However, pools which are limited to joint selling are considered to have the object and effect of fixing prices and are viewed as anti-competitive; But pools that are not involved in joint selling but rather in joint scheduling or joint purchasing will only be caught by Article 81(1) if the pool members' market power is excessive<sup>19</sup>.

Finally, other types of arrangements may infringe Article 81(1) if they are likely to have a negative effect on the parameters of competition such as costs, prices, service differentiation and quality, innovation and competitiveness<sup>20</sup>. The negative effect will also depend on the market structure including market concentration and market power, entry barriers and buyer power<sup>21</sup>. Additional consideration will be given to non-compete clauses, the amount and nature of information exchange between pool members and their capacity in neighbouring markets<sup>22</sup>. Should the undertakings find that their agreement is in breach of Article 81, could these restrictions benefit from any of the permissible comfort zones under Article 81(3)?

The metaphor of "roadmap"<sup>23</sup> is often used in this context of self-assessing a pool because companies can consider whether a 'safe harbour' is available. The checklist of safe harbours for pools consists of five options:

- The first option is whether the arrangement constitutes a Full-Function Joint Venture (FFJV)? If yes, then the EC Merger Regulation<sup>24</sup> (ECMR) would apply and the regulatory clearance system would be available by virtue of this Regulation.
- The second option is to ensure the agreement has no appreciable effect on competition i.e. if the undertaking's market share is below a certain threshold and the agreement does not contain a hard-core restriction.
- The third possibility would be if the Article 81(3) exemptions were satisfied, if the agreement was to fall within the scope of Article 81(1). The agreement would have to fulfil the four cumulative criteria of: efficiencies; consumer benefits; indispensability and no elimination of competition.
- The fourth 'safe harbour' is to check whether the arrangement falls within the scope of the Block Exemption for Liner Consortia.
- The final check is that the agreement does not contain a restriction by "object" or "effect". An example of a restriction by "object" would be an agreement between competitors limited to joint selling. For a restriction by "effect" one

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<sup>18</sup> Guidelines, para.37

<sup>19</sup> The Guidelines state that market share in liner shipping should be calculated by looking at volume and/or capacity data (para.31). For tramp shipping, the Guidelines are not specific how the market share should be calculated, they only suggest to consider: the number of voyages, volume/value share in the overall transport of a specialised carriage, capacity by vessel type and size, etc. (para.34).

<sup>20</sup> Guidelines, para.67

<sup>21</sup> Guidelines, paras.69-70

<sup>22</sup> Guidelines, para.71

<sup>23</sup> The London Shipping Centre, speaker: Philip Wareham.

<sup>24</sup> Council Regulation/139/2004, 10/07/1043

would have to look at the nature and characteristics of the pool within the market.

So, have the Guidelines provided adequate guidance as regards the self-assessment of shipping pools or are they causing even more confusion for undertakings? The practitioners', especially an in-house lawyer's point of view is that if a company exercises self-assessment at the material time i.e. before the Commission launches an investigation, this may be a positive step in demonstrating the will to comply<sup>25</sup>.

Even though the Commission has provided guidance in this respect, it is still believed that fulfilling the Commission's criteria is far from being straightforward. One of the pitfalls of this new system is that even if companies and their lawyers fulfil all the criteria of the self-assessment process, there is a possibility that the Commission may still find that the agreement is breaching competition rules<sup>26</sup>. While there is indeed much companies can do to minimise their exposure, there are circumstances under the current regime where undertakings have to operate knowing and fearing there is a possibility that their agreements may be found to be incompatible with competition law, with all the worries of legal costs, risk of agreements being found void and possible fines. The element of legal uncertainty therefore remains in place. When faced with the question how the Commission envisages to solve such fears, the Commission's response is that it welcomes undertakings and their legal advisors to request meetings in person with the Commission, whereby it will discuss with the parties and attempt to solve any issues which remain uncertain<sup>27</sup>. While this proposal seems to be a welcoming option, it is questionable how and whether it would work in practice.

A further problem from an in-house lawyer's perspective is the issue of decentralisation, whereby different competition authorities are applying different standards. The fact that very similar cases can have radically different outcomes provides further legal uncertainty. An illustration is the "recoupment of losses" issue. Whereas the French authorities believe that the possibility to recoup losses is a precondition for finding predatory pricing, the Commission disagrees<sup>28</sup>. It is therefore rather complex to bring a case in the one country if another country will have a radically different approach. There is nevertheless a significant effort by the Commission to find a common concept to solve this apparent problem<sup>29</sup>.

A final problem from the in-house lawyer's point of view is the issue of legal professional privilege (LPP). The CFI's judgment in *Akzo Nobel Chemicals & Akcros Chemicals v Commission*<sup>30</sup> confirmed that communications between in-house lawyers and the company do not attract LPP in EU proceedings. Accordingly, the Commission may request for production of the communication - sensitive or not - between the company and its in-house lawyers during the investigation. Only communications with external EU-qualified lawyers are privileged. In the context of self-assessment this means that it is vital for an undertaking to hire external lawyers, which is a lengthy and costly procedure, but it would at least ensure that LLP is available.

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<sup>25</sup> London-Shipping-Centre, Paulo Palmigiano, Op Cit

<sup>26</sup> EU/Competition, Seeking Guidance, Reed Smith, 12.02.2009

<sup>27</sup> London-Shipping-Centre, response given by Deputy Head of Commission's Unit for Transport and Post sectors in DG Competition Hubert de Broca, Op Cit

<sup>28</sup> [judgment C-202/07 P. France Télécom SA v. Commission.](#)

<sup>29</sup> London-Shipping-Centre, Paulo Palmigiano, Op Cit

<sup>30</sup> Joined Cases T-125/03&T-253/03

#### 4. Reform of the Block Exemption Consortia

The future of the liner shipping market is bringing different opportunities to shipowners who must comply with the new competitive regime. It is recognised that viable options do exist for those who wish to continue to cooperate. The most attractive options, which are currently reflecting the shipping market's structure, have been: mergers and concentrations; joint ventures; pools; independent competition; alliances; and consortia.

Consortia agreements, as means of cooperation, are permitted under the Consortia Block Exemption, Regulation 823/2000<sup>31</sup>. The consortia exemption, being one of the last remaining legal maritime exemptions, allows liner carriers to engage in operational cooperation such as vessel sharing and coordination of routes and schedules for the purpose of providing joint liner services, but not to fix prices. The consortia exemption has evolved through three Commission Regulations: Regulation 870/95<sup>32</sup>, which is the "original block exemption" and included eleven consortia that were exempted under the opposition procedure; Regulation 823/2000 where two consortia are exempted under the opposition procedure; and Regulations 463/2004<sup>33</sup> and 611/2005<sup>34</sup>, which updated Regulation 823/2000 to take account of Regulation 1/2003 and extend the Commission's power to enforce competition rules to all national competition authorities. Regulation 611/2005 aimed at adjusting the Consortia Regulation to the current practices of the liner industry. After these amendments in 2004 and 2005 respectively, the Commission confirmed that, in light of its experience in applying the Consortia Regulation and having sought both the liner carriers' and transport users' views, it finds that the retention of this block exemption is justified and on this basis extended Regulation 823/2000 until 2010<sup>35</sup>. The current review of this Regulation proposes to extend the Consortia exemption until 2015 with more substantial alterations, which are detailed in the Commission's Technical Paper<sup>36</sup>.

Hence what does the current Consortia Block Exemption teach undertakings? There are a few appreciable aspects to be taken into account regarding the self-assessment of consortia. It is questionable whether the legal assessment can be done retrospectively. It is vital for this exercise to be done at the material time, especially since the undertaking will have one month to produce the evidence to the Commission. The consortia service should therefore be assessed as soon as it is entered into. Also, a detailed analysis of market shares is required. However, bearing in mind the issue of LPP, the agreement should not be kept in-house. The Consortia Regulation provides, additionally, guidance on exchange of information i.e. what is necessary for the operation of the consortium service. As discussed previously, self-assessment is not an easy exercise and requires a detailed analysis including extensive legal advice and a proper economic analysis.

The reason the Consortia Block Exemption is still alive is owing to its well-recognised benefits: Consortia are said to facilitate the improvement of the quality and productivity of available liner shipping services by rationalising shipowners' activities; they achieve economies of scale and they use their vessels in such a way as to bring better port coverage. Additionally, they help to promote technical and economic development by improving and promoting better utilisation of containers and a more

<sup>31</sup> Commission Regulation (EC) OJL100 20/04/2000,

<sup>32</sup> Commission Regulation (EC) OJL89 20/04/1995

<sup>33</sup> Commission Regulation (EC) OJL77/23 12/03/2004

<sup>34</sup> Commission Regulation (EC) OJL101/10 20/03/2005

<sup>35</sup> Regulation 611/2005, para.2

<sup>36</sup> October2008

efficient usage of vessel capacity<sup>37</sup>. The EC Shipowners' Association believe that the Consortia Exemption is crucial for safeguarding regular liner services, which are the "backbone of European and global trade"<sup>38</sup>. Transport users also agree that the retention of the Consortia Block Exemption is justified. The European Shipper's Council view consortia and alliances as the most acceptable form of cooperation between owners, emphasising that cooperation which does not include price-fixing, can bring enhanced quality of services to its customers and provide genuine economies of scale<sup>39</sup>. The resulting benefits include: improvements in productivity and services, cost reduction resulting from better utilisation of the ship's capacity, better service quality due to improved ships and equipment, and pooling resources and cooperatively building the accurate number of vessels most suitable for the trade in question<sup>40</sup>.

It is therefore considered that Regulation 823/2000 provides a generous exemption option for those engaged in container liner shipping, that is, if the composite conditions for the exemption are satisfied. Besides the consortia exemption, this Regulation also exempts arrangements between consortia and transport users. Additionally, for those who are reluctant to seek a merger, it offers an inviting proposal for compliant cooperation. However, obtaining the exemption is not a clear-cut procedure for various reasons. The system of notification to the Commission for a clearance of a consortia is gone since 2004. As previously stated, each undertaking has to self-assess whether their consortia service falls within the scope of Regulation 823/2000 and meets its requirements<sup>41</sup>. The option for consortia members to obtain a regulatory 'stamp of approval' on their arrangement is a thing of the past. Shipowners will thus find themselves in a future world where, despite the survival of the last maritime block exemption, the only option where cooperation can benefit from an official system of clearance is through a merger.

Finally, self-assessing whether a consortium falls within the scope of Regulation 823/2000 is a complex and not straightforward procedure<sup>42</sup>. The consequential reservations and uncertainties that linger when compliance with EC competition law needs to be assessed are a drawback that a shipowner will need to weigh against the benefits, such as cost savings, which can be attained through cooperation.

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<sup>37</sup> Watson, Farley & Williams, August 08, p.33; Regulation 823/2000, preamble 4 and Competition Policy Newsletter, no.3, October 2000, Charles Williams, DGCOMP-D2: "Adoption of Regulation 823/2000 renewing the block exemption for liner consortia", p.44

<sup>38</sup> Consultation Paper on Commission Regulation 823/2000-Consortia-Comments of ECSA, 30/06/04

<sup>39</sup> European Shipper's Council, "What Shippers require from Liner Shipping in the Future and Why", September 04, p.4

<sup>40</sup> *ibid* p.5

<sup>41</sup> Regulation 463/2004, preamble 4/Article 1

<sup>42</sup> Watson, Farley & Williams, August 08, p.37