

**THE FUTURE OF THE COMMISSION GUIDELINES ON THE APPLICATION OF ARTICLE 101 TFEU TO
MARITIME TRANSPORT SERVICES**

Submission to DG Competition, European Commission

By the Freight Transport Association

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INTRODUCTION AND SUMMARY

- 1 This submission is made on behalf of the Freight Transport Association (FTA). The FTA is one of Europe's largest transport user and logistics organisations representing over 14,000 companies with operations and interests throughout the EU. The FTA has maintained a permanent office and staff in Brussels since 1990.
- 2 The submission first summarises the historical background and then the context in which the Maritime Guidelines were adopted. It then outlines the contents of the Maritime Guidelines and highlights the reasons given by the Commission Staff Working Document for allowing the Maritime Guidelines to lapse which the FTA endorses.
- 3 Finally, the submission considers the commercial implications for shippers if the Commission does not assess liner shipping information exchanges in the light of the oligopolistic market structure maintained by the Consortia Block Exemption and of the nature of the information exchanged. The Commission must take the necessary steps to prohibit exchange of information such as future investment capacity and the use of trade associations to discuss price information, albeit in the public domain, when unjustified in view of the general availability of price indices. Further, the Commission should no longer permit consortia to exchange information to maintain tacit collusion through the networks of links across trades and within a trade. The Consortia Block Exemption Regulation should be repealed at the next review. Instead, the Commission should investigate individual trades to ensure consortia and alliances are not resulting in tacit collusion

BACKGROUND

- 4 The liner conference system goes back 130 years. In an attempt to protect themselves from the new steamships on trades to India and the Far East the traditional liner shipping companies established cartels to control the important trades with Europe. In 1986, the Council of Ministers adopted Regulation 4056 to bring the industry into line with EU Competition Law.
- 5 Between 1992 and 2000, shippers made complaints against liner conferences such as the TAA, the TACA and FEFC. FTA lodged a formal complaint against the TAA to the European Commission on 23rd December 1992. The shippers argued that these conferences fell outside the scope of the Conference Block Exemption either because they attempted to eliminate competition in the trade as a whole, extended price fixing to inland transport or prohibited individual service contracts.
- 6 In 1994 the European Commission adopted a decision against the TAA upholding the legal challenge brought by the shippers. In 1995, the Consortia Regulation (now, Regulation 906/2009) was introduced with the support of the shippers and saw Consortia as a positive form of commercial co-operation between shipping lines without the fixing of prices involved in liner conferences. As the Commission recognised in the recent review of the Consortia Block Exemption, even consortia must be carefully scrutinised from the competition law point of view to

prevent the web of links that exist in individual trades and across trades which facilitate tacit collusion in the oligopolistic structure of the markets.

- 7 In 1999, the European Commission formally adopted its original decision against TACA which had allowed the lines to prohibit individual service contracts. This was immediately appealed by the member lines. A so-called Revised TACA was created by the remaining conference lines in 1998 and ultimately accepted by the European Commission in 2002, although never by the shippers.
- 8 In the USA, shippers arguments against liner conferences resulted first, in 1996, in the USA Federal Maritime Commission insisting that the then member lines of TACA allow Individual Service Contracts (ISCs). Second, in 1998 this was formalised by the Ocean Shipping Reform Act, an Act that introduced a right to independent action and confidential individual service contracts on trades to and from the USA.
- 9 In 2002, some 10 years after the first complaints had been submitted, the then Court of First Instance (now the General Court) ruled in favour of the European Commission's decisions against the TAA and FEFC, followed by a further ruling by the Court upholding the principal decisions of the European Commission against the TACA.
- 10 Following a recommendation by the OECD in 2002, the European Commission began in 2003 to review Regulation 4056/86. This led to the Council's decision in September 2006 to repeal the Regulation by 18 October 2008.

THE CONTEXT OF THE MARITIME GUIDELINES

- 11 The background to the guidelines was the repeal of Regulation 4056/86 decided by the Council in October 2006 but with a transitional period of two years postponing repeal to October 2008. By that time, the Commission thought it would be helpful to adopt some guidelines to assist those who would find themselves in a different place following repeal: the liner shipping sector because they had lost the block exemption for liner conferences, and the international tramp shipping sector, including cabotage, where there is an effect on trade between member states.
- 12 The reason for the focus on tramp shipping is a very technical one. Regulation 4056 was both a substantive and procedural regulation for competition law enforcement in the shipping sector. Tramp shipping was left out of the procedural enforcement. That meant that there was no enforcement procedure regulation applicable to tramp shipping. Council Regulation 1419/2006 by repealing Regulation 4056 exposed tramp shipping, including cabotage, to the general procedural regulation, Regulation 1/2003, just as any other area of business. The substantive change was that there was no longer a block exemption or any exemption for liner conferences, and in particular for conference price fixing.
- 13 This was the context in which the Commission adopted its guidelines. There are two dates to bear in mind. The first date is that the guidelines were adopted on 28 September 2008 and the second

date is that they will expire on 26 September 2013. Paragraph 8 of the guidelines states: "These guidelines will apply for five years". This is why the Commission says these guidelines should effectively be allowed to lapse after the five year period. The FTA agrees.

PURPOSE OF THE GUIDELINES

- 14 The Commission rightfully explains that the purpose of the guidelines was, first, to assist with the transition from life for liner shipping services with a block exemption, to life without it, so that they could become accustomed to carrying out their self-assessments of the cooperation agreements. In particular, the approach to market definition and the approach to exchanges of information are the two primary sections of the guidelines which were relevant for liner shipping services.
- 15 The second purpose was to deal with tramp shipping, because it had not been subject to any decisional practice in the past. In the section dealing with pooling of tramp shipping, the Commission sets out how it would apply the competition rules (the horizontal guidelines) to Pooling Agreements.
- 16 All the Maritime Guidelines do is to apply the general available guidelines that are relevant to those three or four issues as it covers:
- Market definition,
 - Effect on trade,
 - Exchange of information, and
 - Pooling Agreements.
- 17 The guidelines are simply a summary of the case law or a transcription of the general guidelines applied to the particular services: liner shipping services and tramp vessel services, including cabotage.
- 18 Consortia are playing outside the guidelines under the block exemption regulation where very generous allowances are made for exchange of information in consortia.
- 19 The Commission's 2008 guidelines are merely, in reality, a summary of the existing case law and, to a certain extent, drawing on the guidelines that are otherwise available or at least referring to them. There are a lot of footnotes citing the various relevant paragraphs.
- 20 The tramp shipping section is new – that deals with what the Commission says the approach to pools will be – but is not new in the sense that it is just simply applying the Horizontal Guidelines as existed at the time in 2008.

THE CONTENT OF THE MARITIME ANTI-TRUST GUIDELINES

- 21 The maritime competition guidelines themselves contain a summary of existing case law or a transposition of pre-existing general rules to the maritime transport sector. The guidelines set out the principles that the Commission follows when defining markets and assessing co-operation agreements in liner shipping services, cabotage and international tramp services. They expressly exclude abuse of dominance under Article 102.
- 22 The guidelines only cover three main topics:
- Market definition;
 - An analytical framework for assessing information exchanges between competitors in liner shipping; and
 - An analytical framework for assessing horizontal cooperation between tramp shipping operators in “pools”.

REASONS FOR REPEAL

- 23 The FTA supports the three reasons given by the Commission (see paragraphs 15 to 30 of the staff working paper) as to why the guidelines should be repealed or allowed to lapse.
- 24 The first is that their main purpose of providing a transitional period for liner shipping and in helping the tramp vessels sector to have some guidance is now over. The Commission is now in a position to apply the ordinary guidelines in the ordinary rules which in the two main areas covered by the Maritime Guidelines have been recently updated and improved significantly. In particular, the Commission cites the four general guidelines on market definition, effect on trade between member states, Article 101(3) and the new 2010 Horizontal Guidelines which have a detailed section on information exchange which is vastly more sophisticated than the Maritime Guidelines, although the basic nuts and bolts are still there. The guidelines still say: “Look at the structure of the market, look at the characteristics of the information; the starting point to assess whether the information exchange would be caught by Article 101(1).
- 25 The first reason, therefore, for allowing lapse is that the purpose of the guidelines is fulfilled and the Commission meant what is said in paragraph 8 that they were only to last for five years. By 26 September 2013, the interested parties will have had a period of seven years because of the two year transitional period prior to the repeal of Regulation 4056.
- 26 The second reason is the overlap with the four general competition guidelines, and in particular with the issue of information exchange in the new 2010 Horizontal Guidelines, and the application of the new Horizontal Guidelines on joint selling and joint production to Pooling Agreements. Pooling Agreements are defined by the Commission in the 2008 guidelines as being joint selling

and possibly joint production, and they say they apply the old Horizontal Guidelines applicable to joint selling and joint production in the 2008 guidelines. Then there are the guidelines on market definition and effect on trade.

- 27 The third reason, and final reason given is the Commission's policy to stop specific sectoral regulation. There is nothing in aviation and in maritime, only the consortia block exemption regulation.

COMMERCIAL IMPLICATIONS FOR SHIPPERS

- 28 While the General Guidelines are now readily available for the shipping sector, rendering the 2008 maritime competition guidelines redundant effectively, there are still major competition issues that the European Commission needs to address.

- 29 These would best be the subject of individual decisions which can establish a precedent for all concerned. In particular, the shippers will continue to be subjected to higher prices than are justified in the relevant trades until such time as the European Commission addresses the issue of tacit collusion arising from the oligopolistic structure of the markets and the contribution to that rigid structure made by the consortia block exemption regulation and all the interweaving alliances and networks of links across trades and within a specific trade.

- 30 No doubt these are issues that will be reviewed by the European Commission, when it comes to repeal the consortia block exemption regulation. In the meantime, the FTA urges the Commission to take the market structure into account when assessing the specifically restrictive nature of certain information exchanges such as those on future investment and capacity and where trade associations (or information exchanges) are used by shipping lines to discuss price information albeit in the public domain when that discussion is unjustified in view of the general availability of price indices.

- 31 There are 5 main indexes:

- SCFI- Shanghai Container Freight index (government oriented)
- WCI - World Container Index (commercial independent UK based)
- TSA- Transpacific Stabilization Agreement-Cartel based revenue index including contract rate information
- Drewry- commercial Independent index
- CTS- Container Trade Statistics index (essentially ex ELAA)¹.

¹ European Liner Affairs Association

- 32 Previously, there was concern that information exchanged would be too contemporaneous and not sufficiently historic. Now the difference is between those exchanges like the Shanghai and WCI using spot prices when derivative based indices give greater transparency. The motive for the exchanges such as the TSA is that , as the Journal of Commerce comments: " the carrier discussion group is launching the index as operators are moving to shore up sagging rates that have helped pull down profits at several carriers, and pushed some into the red this year"².
- 33 The TSA also includes individual contract price data which has always been considered confidential business secrets to the shippers. It can be seen that the impact on competition of the exchanges such as the TSA and potentially CTS, where fees unaffordable by shippers are demanded, require careful investigation by the Commission if they are not to be used as a substitute or link to price fixing.
- 34 In April 2012, the G6 Alliance was formed in response to the new Maersk daily Far Eastern service consisting of six large lines: Hapag Lloyd, MOL, Hyundai, NYK, OOCL and NOL. Similarly, the world's number 2 and 3 largest lines CMA/CGM and MSC lines joined forces (of their combined 53 vessels 38 are post-panamax container vessels of 13,800 to 14,000 teus) against Maersk, the world Number 1.
- 35 The degree of cooperation that exists through larger and more powerful alliances and the networks of alliances and consortia suffocate effective competition. While there may be no overt price fixing, the limited number of lines involved in a specific consortium means that everyone knows each other's business and competition is severely muted. Through the very generous allowances provided for exchange of information provided by the consortia block exemption consortia are being used to eliminate effective competition in a specific trade, just as in the past conference lines sought to cooperate with outsiders in an attempt to eliminate competition in a trade.
- 36 The FTA would be happy to meet the European Commission, DG Competition Directorate to discuss the matters raised in this submission and other relevant issues.

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² Journal of Commerce August 30 2011.