

European Maritime Law Organisation

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The Guidelines on Maritime Transport Services

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

Olivier Guersent

Acting Director

Transport, Post and other services

DG Competition

European Commission

Mr Chairman,

Ladies and gentlemen,

A year ago, a colleague of mine from DG COMP spoke at the EMLO conference. Since then, the maritime world has changed a great deal. Of course there is the global financial crisis and the significant drop in liner rates. At the same time, the liner industry entered the post-conference age barely a week ago. And finally, the Commission recently published the Maritime Guidelines and a new consortia package. That is a lot of changes to absorb. Personally I think it requires a heightened level of attention from in-house counsel and competition lawyers – and also a high level of scrutiny by competition authorities. So I am grateful for this timely opportunity to talk about legal developments in the area of maritime competition policy.

I note with satisfaction that several liner conferences started winding down their activities a few months before the deadline. I also noticed the press coverage of conferences ceasing their activities on 17 October. So, from the point of view of the Commission – and hopefully from the point of view of the lines, conferences are already a thing of the past.

I would therefore like to move on to two topics of importance, which relate to the present, and even to the future. First, I want to come back to the recently adopted Maritime Guidelines. Second, I will give you an update on the new consortia package.

I. Maritime Guidelines

The Maritime Guidelines were published on our website in July. They were published in the Official Journal in all European languages on 26 September. And there will be an article on the Guidelines in the next issue of the Competition Policy Newsletter.

I am not going to miss this opportunity to tell you about the positive reception of the Guidelines.

I think it is fair to say that the key people who have been involved in the Maritime Guidelines on behalf of the carriers view the Guidelines as a positive outcome. They also concede that the Guidelines are fair and balanced. The ELAA's law firm also publicly stated that the Guidelines are the result of "an incredibly detailed review" launched by the Commission more than five years ago, and that the review process was "one of the most exhaustive of its kind". Actually I would say that the review process – the repeal of the liner block exemption and the Guidelines – was indeed the most thorough and the most dialogue-oriented that I have ever seen in DG COMP. I should also note that the ELAA is on record as expressing its gratitude to DG COMP for the thoroughness of the review process. According to the ELAA, the Guidelines are "fit for purpose" and will be an important help post-conference.

Unfortunately, I cannot claim that the Guidelines have been unanimously welcomed. The main criticism I hear is that the Guidelines do not provide enough guidance, or clarity, or "legal certainty". Let me address liner shipping first, and then the tramp sector.

1. Liner

In the area of liner shipping, there are two reasons that explain the level of detail – or, some would argue, of generality – in the text of the Guidelines.

The first reason is this. The Guidelines build on an intense dialogue with the carriers and the shippers over several years. This dialogue was very important to ensure that everyone fully understood the impact of the repeal of the conference system and the type of guidance that would be necessary in the post-conference world. But in any such exercise there is a tension between what industry or the legal profession want to see written in the Guidelines and what the shippers want. This is especially so in the shipping sector, where both the carriers and the shippers are represented by well-organised lobby groups. Sometimes the shippers would like to see a statement in the guidelines that the carriers do not want to see, or vice versa. It was the Commission's task to arbitrate over these competing claims – in a way that reflects the correct application of competition law, of course.

On top of this, the Commission is not prepared to make broad, absolute pronouncements. This is because guidelines are binding on the

Commission. So, generally speaking, by adopting guidelines, the Commission effectively restricts its own margin of discretion in future cases. As the Court has said, guidelines are rules from which the Commission may not depart in an individual case without giving adequate reasons.

So I am sure you will understand that in these circumstances we would rather err on the side of caution – rather than being too lenient and tolerant or, conversely, too strict and rigid. Still, we feel that the Guidelines are a useful compendium of the state of the case-law and of the Commission's position.

Since the modernisation of competition rules took effect in May 2004, all undertakings, as you know, have the responsibility of evaluating their conduct in the market and their agreements with other undertakings, in order to ensure that they comply with competition law. To carry out this evaluation they are assisted by an array of Commission notices and guidelines (for example on market definition, the conditions for the application of Article 81(3), etc). Similarly, the Maritime Guidelines are meant to assist companies in carrying out this self-assessment.

The Maritime Guidelines do not change what is permitted or forbidden – they merely explain the broad principles and the relevant factors that the Commission intends to consider on particular issues. In other words, the Guidelines simply aim to provide the general analytical framework that should be adapted to the particular circumstances in a given case.

This is especially so in the area of competition law, where the legal assessment always depends on the specific facts of the case. Therefore it would be difficult to draft guidelines that envisage *a priori* the myriad possible situations that could arise. So, by nature, guidelines would always contain a number of qualifiers like "may", "in general", "in principle", "normally", "could", "likely", "case by case", etc.

Finally, I should also point out that the liner industry is better treated than many other industries, and therefore it is a bit disingenuous to complain about the lack of detail in the Guidelines. In terms of face time with the maritime team in DG COMP, this industry certainly cannot complain. The liner industry is also the last transport industry to benefit from a block exemption – I am referring to the consortia block exemption. And this industry now has sector-specific guidelines. No other sector of the economy currently enjoys specific guidelines from DG COMP.

I want to stress this point. Sector-specific guidelines on antitrust are exceptional. In recent years, guidelines have rather been of a general nature, whether they deal with substance (vertical agreements; horizontal agreements; fines) or with procedure (for example on complaints or cooperation with national courts). Guidelines have also been adopted with regard to a specific type of agreements (for example IP licensing agreements), but not in respect of a particular sector. The maritime sector is privileged in this respect.

There is a second reason that explains why the liner section of the Guidelines, specifically addressing exchanges of information, is not more

detailed. It is that the assessment of an information exchange scheme is highly dependent on the market structure and on the characteristics of the information exchanged (public or not, recent or historical, individual or aggregated, frequently exchanged or not). Therefore it is difficult to provide illustrative examples. On some trades, the regular exchange of market data may not be problematic, while in other trades the information exchange may lead to a reduction of competition because of the high levels of concentration and the low volumes.

As you know, the liner industry (specifically the ELAA) made it clear during the review process that, in the new regime, it would put in place an information exchange scheme in order to have more visibility on prices and capacity.

The European Commission has spent a considerable amount of time discussing the ELAA proposal for an information exchange scheme. We are confident that those discussions and the guidance contained in the Guidelines will enable the liner industry to take an informed view on its information exchange schemes.

I however wish to clarify the following. The Guidelines do not "endorse" or "approve" or "green-light" the ELAA information exchange scheme. Press reports or ELAA statements along these lines are simply inaccurate. The Guidelines only provide the relevant principles and factors. The Guidelines do not take a position on the ELAA information exchange scheme. Indeed, the scheme was of course finalised after the Guidelines were published. The Commission has only recently read

public information on the information exchange scheme. So it is up to the ELAA and to the carriers to ensure that their system is in compliance with Article 81.

We will of course carefully monitor the effects of the information exchange system in the market, and we will ensure that we completely understand it.

2. Tramp

Turning to the alleged lack of detail in the section dealing with tramp pools, there are also several reasons for the relative brevity of that section in the Guidelines.

First, guidelines usually build on the Commission's accumulated experience in a particular sector or with a particular issue. Since the Commission has almost no practical experience in this sector, there is no case-law to describe and interpret. As many of you know, the tramp sector only came within the scope of the Commission's full investigation and enforcement powers in 2006. Therefore, the section on pools is necessarily shorter.

Second, we believe that many questions regarding tramp shipping pools are not novel. This does not mean that the replies are easy. But clearly the issues at stake have been considered previously and there is guidance issued by the Commission that is of direct relevance to assess these agreements. I refer in particular to the Horizontal Guidelines and to

the Guidelines on Article 81(3). The Maritime Guidelines do not replace and do not deviate from these other guidelines.

Third, the "categorisation" of a pool agreement as "joint production" or "joint selling" is highly case-specific, and therefore there was no reason to elaborate more on this in the Guidelines. As you know, the centre of gravity test determines whether a particular agreement is closer to joint production or closer to joint selling. This centre of gravity analysis will depend in particular on the degree of integration that is brought about by the agreement.

Fourth, it may be that in the future the Commission will acquire experience from actual cases, which will also provide more guidance to the industry. But I want to assure you that the Commission is not going to go after pool agreements for its own sake. There is no ideological bias against pools. We are not making threats. All we do is to apply the competition rules that already apply to all other sectors. We understand from our market investigation and from the comments received during the consultation that

- many pools bring together non-competitors;
- many pools are small;
- and pools often bring benefits to their customers.

I also want to remind you that the Commission will be open to the possibility of finding countervailing efficiencies under Article 81(3). It is possible that a pool agreement with joint selling will be redeemed by its

efficiencies. Of course it is up to the pool members to show the Commission that the pool produces economies of scale and scope that are passed on to customers in the form of lower prices than would otherwise be the case.

One recurrent comment from the industry on this point is that the Guidelines should contain more guidance on Article 81(3). The final version of the Guidelines expanded a bit on Article 81(3) compared to the draft version of September 2007. But it is a fact that that section is still fairly short. The Commission's view was simply that a more detailed notice is already devoted to that question, which therefore did not deserve any specific treatment.

Finally, I also want to warn the industry that in an antitrust assessment, non-compete clauses, lock-in periods and exit clauses may well attract a particular interest from competition enforcement authorities. For example, it may be that a pool member feels that he could operate his vessels more efficiently outside the pool. Pool members constantly benchmark their earnings *via the pool* versus their potential earnings *on their own*. So let's say a member wants to leave the pool or he wants a more limited non-compete clause. Between competitors, an unduly restrictive exit clause or non-compete clause may be anti-competitive. For example, in the consortia block exemption, it is stated that the members must be able to leave the consortium without penalty and with a maximum six-month notice period. The same reasoning could be applied by analogy to tramp pools, with some possible adjustments.

We chose to flag these issues in the Guidelines even though we do not yet have enough experience to lay down precise rules on these types of clauses. As I said, further guidance may come from cases.

Having spoken so far about the aftermath of the repeal of the liner conference block exemption and the new Maritime Guidelines, let me focus now on the third part of our comprehensive revision of the competition rules applicable to maritime transport: the review of the consortia block exemption regulation. This review will complete our reform of the maritime competition rules.

II. Consortia BER

The consortia block exemption Regulation 823/2000 allows shipping lines to enter into operational co-operation for the purpose of providing a joint service, but does not permit price fixing as it was the case for liner conferences. The block exemption regulation will expire in 2010. It has been in force since 1995 and renewed every 5 years after careful examination, as it has proven to be a useful framework for both carriers and transport users.

But now, after the repeal of the conference system, there is a need to do away with the links to the price fixing heritage of the liner conferences. Furthermore DG COMP is keen to ensure that the conditions that liner carriers have to fulfil in order to benefit from the block exemption are actually in line with present day market conditions.

1. Objectives

To this end, the Commission adopted on 29 July 2008 a preliminary draft regulation in order to prolong the current block exemption and to propose certain changes to the current text of the regulation. The proposed changes are put forward in the light of three main objectives:

1. First, we take account of the repeal of the liner conference block exemption regulation. This first objective relates to all provisions in the current text that reflect the price fixing element previously allowed by the repealed liner conferences block exemption regulation. These provisions made of course only sense when consortia could operate within price fixing conferences. There is a legal obligation for the Commission to bring the current text in conformity with existing law and we have therefore engaged ourselves in a "cleaning" procedure to delete or adapt the provisions in question. This "cleaning" exercise concerned also more generally the recitals of the regulation.
2. Second, we want to ensure a greater convergence between the consortia block exemption regulation and other horizontal block exemption regulations, such as the block exemption regulation on specialisation agreements, on research and development agreements or on technology transfer.

It is the aim of the Commission to have consistent rules in the horizontal legislation as well as in the sector specific legislation

such as the consortia block exemption regulation. Although maritime transport still benefits from a preferential sectoral treatment compared to other industry sectors, it is the general policy of the Commission to move towards applying the same rules in the transport sector than in all other sectors.

3. And last but not least with some of the proposed amendments we want to take into account current market practices in liner shipping. Markets change and evolve constantly and therefore block exemption regulations have to be reviewed periodically. It has to be ensured that the scope of the regulation and the conditions under which undertakings may benefit from the block exemption still reflect the current market practice.

2. Content of the draft BER

I will not go into detail of all the minor changes that have been proposed to the text but focus on three main issues: The provisions that have not been amended in the text so far, the market share threshold and the aggregation of market shares

There are some provisions in the text of the draft regulation that have always been in the consortia block exemption regulation and that are at this stage simply proposed to be kept in the text. These provisions are for example the consultation obligation, according to which the carriers have to consult the transport users, and the provisions concerning the notice periods and lock-in periods. We have been surprised to hear

through press that the industry sees the Commission to "place strict limitations" with regard to these provisions. As I just explained, these provisions are not new. So far the Commission has not seen an immediate need to delete them. The Commission is for instance not aware of any difficulty resulting in practice from the notice or lock-in period rules; no-one ever complained to us on their inadequacy. Of course, we are now in the process of a public consultation. We will be open to the comments raised and to any convincing supporting evidence provided to us in that respect. If it is established that these rules, which have not resulted in any specific concern in the last few years, are inappropriate, we will consider amending them.

What are the changes proposed to the market share threshold?

We propose to reduce the market share threshold necessary to benefit from the block exemption from 35% to 30%. This modification would be a first step towards bringing the consortia block exemption regulation into line with market share thresholds currently in force in other horizontal block exemption regulations. At the same time we consider this threshold to be necessary to guarantee that only consortia subject to effective external competition can benefit from the block exemption.

As the general threshold in the block exemption regulations for horizontal cooperation is 20% (or 25% for R&D), the maritime transport will still benefit from a preferential sectoral treatment with a threshold of 30% compared to other industry sectors. And not only the higher market share threshold is a preferential treatment but also the fact, that the

consortia block exemption regulation is one of the very few remaining sectoral block exemption regulations.

What is the practical implication of a lower threshold? Even if a consortium is above the 30% threshold, this will not automatically mean that such consortium is illegal. The members of the consortium will then – just like any other undertaking - need to self assess if their cooperation restricts competition and if so, satisfies the conditions of Article 81(3) of the Treaty.

Since the modernisation of competition rules took effect in May 2004, all undertakings, as you very well know, have the responsibility of evaluating their conduct in the market and, the agreements they may enter into with other undertakings, to ensure that they comply with competition law. To carry out this evaluation they are assisted by an array of Commission notices and Guidelines on the various aspects of that assessment. Our new Maritime Guidelines will complement this assistance by putting into context the general guidance already provided in relation to the market in question.

Finally let me get to the last point: the so-called aggregation rule.

In order to assess the scope of the block-exemption, the draft regulation proposes to aggregate the market shares under certain circumstances. The criteria for aggregating the market shares concern mainly two situations:

- First, the parallel activity. In this situation the carrier provides services both individually and within a consortium on the same relevant market.
- And secondly, the interlinked activity. In this scenario the carrier is a party to various agreements on the same relevant market and thereby interlinks these agreements.

These criteria have always been taken into account in the assessment of whether the consortium members are subject to effective external competition and are therefore not new as such. In view of the proposal to delete the current Article 5 (which stipulates effective competition as a basic condition for the grant of exemption) it seems necessary to spell out this safeguard and integrate it into the market share condition. Moreover, we have seen that many carriers are linked with each other by agreements and that there is a whole network of agreements on some of the trades. This fact cannot be ignored, as a block exemption regulation can only give exemption to clear-cut situations. The calculation of the market shares has therefore to be based on market reality, taking into account these interlinked agreements.

This aggregation rule has been the focus of most of the informal comments received so far. And I can understand why. Because of this rule, a number of consortia would not be block exempted. But I think it is worth reminding the very purpose of a BER. A BER provides legal certainty that some forms of agreements in certain market conditions are unproblematic in competition law terms. Such legal certainty can only be

provided in situations where it is safe to assume that no competition problem will arise. Some commentators have referred to routes where interlinked liners represent 80% of the trade. Well, to those commentators, I can only indicate that the Commission is precisely not ready to give a *blanc-seing* in such situations. I am not saying that there is for sure a competition problem in such a case. I am simply saying that it is not impossible that there is a competition problem. The Commission cannot a priori exempt such situations from the application of Article 81.

3. Next steps

Let me come to the follow-up of our review: what are the next procedural steps in the consortia review?

As you know, the procedure to revise the consortia block exemption regulation is set out in Council Regulation 479/92. The draft regulation has been presented to the Advisory Committee on Restrictive Practices and Dominant Positions on 24 September 2008. In this meeting we had a first exchange of views with the national competition authorities and the respective transport ministries. The draft was published only a few days ago (on 6 October on our website and on 21 October in the Official Journal). The package invites interested parties to comment during a one month period.

We look forward to receiving interesting comments both from the liner industry and their customers, the shippers – but also from this honourable audience!

After assessing the responses we will be submitting a new draft to the Member States in the Advisory Committee. After their views have been taken into account, the Commission will adopt the final text of the consortia block exemption regulation before the current regulation expires in April 2010.

Thank you for your attention.