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Commission consultation

rules applicable to horizontal co-operation agreements

ECSA comments

ECSA – the trade association representing the interests of the national shipowners' associations of the EU and Norway – welcomes the opportunity to participate at the Commission's public consultation with regard to the Guidelines on horizontal co-operation agreements.

ECSA would first like to draw attention to the fact that the shipping industry has – since 2008 – its own Guidelines on the application of Article 81 EC Treaty to maritime transport (hereinafter called "Maritime Guidelines"). These Guidelines were issued as a follow up to the abolition of liner conferences on trades to/from the EU and they also aimed at providing guidance to tramp shipping (pool) operators in carrying out a self-assessment of cooperation agreements under Article 81 EC Treaty.

ECSA reads the Guidelines on horizontal co-operation agreements in addition to the Maritime Guidelines and the ECSA comments below should therefore be read against this background;

The ECSA comments with regard to the Guidelines on horizontal co-operation agreements are as follows:

- ECSA notes that the Guidelines on horizontal co-operation agreements have a section on information exchange. In this respect, ECSA would like to recall that the Maritime Guidelines also have a chapter on information exchange between competitors in liner shipping (chapter 3.2). In this respect, ECSA would like to reiterate the comments it made at the time of the making of these guidelines, notably that "*whilst recognising that the assessment of liner carrier cooperation in the shape of information exchanges ultimately will need to be assessed on a case-by-case basis, liner carriers need to have in place a clear and efficient system for the exchange of information, particularly if there is to be a competitive liner shipping industry that provides good services to its customers*".
- The Guidelines on horizontal co-operation agreements contain provisions with regard to standard agreements. In this respect, ECSA notes that the demand laid down therein in terms of all relevant parties must have access to participate in the drafting of such agreements, that the standard agreements must not be binding, and that they must not contain clauses as to price etc., has always existed.
- The Guidelines on horizontal co-operation agreements also include provisions with regard to benchmarking of costs, In this respect, ECSA would like to underline that in a very competitive market, such as shipping, where the ability to keep costs down is necessary to stay competitive and to offer customers the best service at the lowest price whilst attempting to make a profit at the same time, benchmarking of costs is a very powerful tool. An undertaking that knows that it is buying

products and services at too high a price is inclined to go out in the market and try to get a better price. If the undertaking thinks that the price it is paying is competitive, it is less inclined to do so. In point 94 the Commission generally states that exchange of individualised cost data would generally not be indispensable and that aggregation in e.g. some form of industry ranking could generate the same efficiencies. This is true, but may to a large extent complicate benchmarking of costs and make it very time consuming for the businesses. This again may result in the businesses giving up on benchmarking, even though the reduction of costs will in the end benefit the consumers. So the question basically is whether the aggregation described by the Commission serves the relevant purpose, i.e. whether exchange of individualised data is in any case dispensable. In this respect, ECSA suggests that the Commission considers the introduction of modifications to the statement in point 94 and example 4 in point 101, for example based on the share of the costs benchmarked out of the parties' total costs, the market share of the parties etc.

- Finally, ECSA would appreciate if the Guidelines on horizontal cooperation agreements could offer some additional guidance for defining the “centre of gravity”, which is an essential element in the Maritime Guidelines to allow a tramp pool operator to assess on a case-by-case basis whether its tramp pool falls under the prohibition of Article 81(1) and, if so, whether it fulfils the four cumulative conditions of Article 81(3). The Maritime Guidelines, however, do not provide any more guidance or more practical examples as to how a tramp pool operator has to ascertain this “centre of gravity”. Some more guidance on the “centre of gravity”, through the Guidelines on horizontal cooperation agreements, would increase the understanding of this concept and would therefore be appreciated.

ECSA looks forward to a further cooperation with DG COMP on this important issue and is available to address any additional question that may result from the above comments.

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