



EUROPEAN COMMISSION

**COMMISSION STAFF WORKING DOCUMENT**

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

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

#### **1. INTRODUCTION**

1. On 1 July 2008, the European Commission (the "Commission") adopted the Guidelines on the application of Article 81 of the EC Treaty (now 101 of the Treaty on the Functioning of the European Union – "TFEU")<sup>1</sup> to maritime transport services (the "Maritime Antitrust Guidelines" or "Guidelines"). They contain guidance for operators active in liner shipping and tramp vessel services on how to assess compliance of their business practices with EU competition rules following the 2006 review of the antitrust rules applicable to maritime transport services.<sup>2</sup> Liner shipping services involve notably the maritime transport of containerised cargo on a regular basis to ports of a particular geographic route, with timetables and sailing dates advertised in advance and services available to any transport user. Tramp vessel services refer mostly to unscheduled transport of non-containerised or "bulk" cargo (such as oil, grain, iron ore, etc.).
2. The Guidelines were published in the Official Journal on 26 September 2008<sup>3</sup> and provide that the Commission will apply them for a period of five years.<sup>4</sup> The present paper assesses the situation after such expiry.
3. This Staff Working Document first describes the background to the adoption of the Maritime Antitrust Guidelines in 2008 and their content. In its main part, it then focuses on whether there is still a need for sector specific guidelines in the maritime transport sector. In light of this analysis, this Staff Working Document proposes letting the Maritime Antitrust Guidelines lapse upon expiry in 2013.

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<sup>1</sup> With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become respectively Articles 101 and 102 TFEU.

<sup>2</sup> For details on the 2006 review of the antitrust rules applicable to maritime transport services, see below Section 2.

<sup>3</sup> OJ C 245, 26.9.2008, p. 2-14.

<sup>4</sup> See paragraph 8 of the Maritime Antitrust Guidelines.

## 2. BACKGROUND

### 2.1. From a sector specific to a general framework

4. The antitrust rules applicable to the maritime transport sector have changed significantly during the past years, procedurally as well as in substance. As for other modes of transport, bringing maritime transport within the generally applicable competition law framework has been in the last years a key objective of the Commission's competition policy.
5. On procedure, all transport activities are now covered by Council Regulation No 1/2003,<sup>5</sup> which notably sets the Commission's investigative powers. The former limitation of the Commission's enforcement powers in relation to international tramp vessel services and cabotage within a Member State were repealed as of 18 October 2006.<sup>6</sup>
6. On substance, Council Regulation No 1419/2006<sup>7</sup> repealed the long-standing antitrust block exemption for container shipping conferences contained in Regulation No 4056/86 (also known as "Liner Conference Block Exemption").<sup>8</sup> This regulation provided an exemption, subject to certain conditions and obligations, for shipping lines meeting in liner conferences to fix rates and other conditions of carriage. As set out by Council Regulation No 1419/2006, the liner shipping conference system no longer fulfilled the four cumulative conditions for exemption under Article 101(3) TFEU and therefore the block exemption was abolished. The Commission notably concluded (i) that conferences did not contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) that consumers were not compensated for the negative effects resulting from the restriction of competition, (iii) that restrictions imposed were not indispensable to the attainment of the objectives, and (iv) it was questionable whether conference members remained subject to effective competitive constraints.<sup>9</sup> The repeal of the exemption entered into

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<sup>5</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, p. 1-25.

<sup>6</sup> Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty [now Articles 101 and 102 TFEU] to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269, 28.9.2006, p. 1–3. Similarly, the exclusions in relation to air transport between EU airports and third countries have been repealed in May 2004, Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries, OJ L 68, 06.03.2004, p. 1-2.

<sup>7</sup> *Ibidem.*

<sup>8</sup> Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty [now Articles 101 and 102 TFEU] to maritime transport (Liner shipping conferences), OJ L 378, 31.12.1986, p. 4–13.

<sup>9</sup> Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty [now Articles 101 and 102 TFEU] to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269, 28.9.2006, p. 1–3, recitals 4-7.

force on 18 October 2008 after a two-year transition period. Thereafter, liner carriers had to cease all liner conference activity in relation to services to and/or from one or more ports in the European Union.

7. More generally, all liner shipping carriers should, like in any other industry, ensure that their agreements comply with Article 101 TFEU, in particular their cooperation agreements that are a common feature of maritime transport markets.
8. After the repeal of the Liner Conference Block Exemption, the only remaining block exemption in the liner shipping sector is Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the EC Treaty (now 101(3) TFEU) to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (the "Consortia Block Exemption Regulation"). This block exemption regulation sets out the conditions, pursuant to Article 101(3) TFEU, under which the prohibition in Article 101(1) TFEU does not apply to consortia, i.e. horizontal agreements between two or more vessel operating carriers for the provision of a joint liner shipping service. Unlike the former Liner Conference Block Exemption, the Consortia Block Exemption Regulation does not exempt price fixing. Neither this Staff Working Document nor the Maritime Antitrust Guidelines deal with this type of consortium agreements.

## **2.2. The need for Maritime Antitrust Guidelines to accompany the transition to the new competition framework applicable to the maritime transport sector**

9. The Maritime Antitrust Guidelines were adopted by the Commission to ensure a smooth transition towards the full application of competition rules to the sector following the repeal of the Liner Conference Block Exemption in 2006.
10. The purpose of the Guidelines was to facilitate the operators' transition to a new era of competition and self-assessment in the liner shipping sector. In this respect the Guidelines focus in substance notably on information exchanges between competitors in liner shipping. They provided for the first time an indication of the analytical framework how to assess such information exchanges. This issue was of importance for the industry which aimed at establishing an industry wide information exchange system after the repeal. At the time of the adoption of the Guidelines, no comprehensive general Commission guidance existed in this field apart from previous case law.
11. With regard to tramp vessel services, the Guidelines aimed at providing a first indication of the possible reasoning and the relevant factors in the field of tramp pools as the Commission had – due to the previously limited enforcement powers in this field – not dealt with this sector in detail before.

12. The Guidelines were not meant to replace but merely to complement the guidance already issued by the Commission in other notices.<sup>10</sup>

### 3. THE CONTENT OF THE MARITIME ANTITRUST GUIDELINES

13. The Maritime Antitrust Guidelines set out the principles the Commission follows when defining markets and assessing cooperation agreements in liner shipping services, cabotage and international tramp services.<sup>11</sup> They are explicitly limited to the application of Article 101 TFEU (and not Article 102 TFEU) to the maritime transport sector. The Guidelines 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".<sup>12</sup>

14. To a very large extent, the text of the Maritime Antitrust Guidelines is a summary of existing case law or a transposition of pre-existing general rules to the maritime transport sector. In sum, the Maritime Antitrust Guidelines do not create new rights or obligations for the Commission or for maritime operators.

### 4. THE FUTURE OF THE MARITIME ANTITRUST GUIDELINES POST SEPTEMBER 2013

15. The Maritime Antitrust Guidelines will expire on 26 September 2013. DG Competition proposes to let the Guidelines lapse rather than extending or overhauling them, for the three main reasons described below.

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<sup>10</sup> See paragraph 5 of the Maritime Antitrust Guidelines.

<sup>11</sup> Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user (Maritime Antitrust Guidelines, paragraph 10). Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State (Maritime Antitrust Guidelines, paragraph 12). Tramp vessel services take the form of a transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand. It is mostly the unscheduled transport of one single commodity which fills a vessel (Maritime Antitrust Guidelines, paragraph 11).

<sup>12</sup> A "pool" is a type of cooperation among bulk shipping operators whereby they bring several ships together under a single management in order to gain economies of scale; it is a type of joint production and/or joint selling, with potential efficiencies.

#### 4.1. Main purpose of facilitating transition has been achieved

16. The main rationale for adopting the Maritime Antitrust Guidelines was to facilitate the transition towards a full implementation of general EU competition rules in the maritime transport sector, following the repeal of sector specific procedural rules and exemption of maritime conferences.
17. Unlike other competition law guidelines, the Maritime antitrust Guidelines contain a built-in expiry clause. Since the inclusion of such an expiry clause in the Maritime Antitrust Guidelines is exceptional, this indicates not only that the Maritime Antitrust Guidelines were aimed at facilitating the transitional period following the repeal of the Liner Conference Block Exemption, but also that the Commission then considered that a period of 5 years was of sufficient duration to ensure such a transition. DG Competition sees no reason today to depart from the original time-limitation. A five-year period, which followed a two-year transition period for the full effect of the repeal of the exemption for conferences, appear to be a sufficiently long period to self-assess the compatibility of market conduct with Article 101 TFEU.

#### 4.2. Overlap with general antitrust guidelines

18. The Maritime Antitrust Guidelines overlap with general guidelines, notably the new Horizontal Guidelines,<sup>13</sup> the Market Definition Notice of 1997,<sup>14</sup> the 2001 De Minimis Notice,<sup>15</sup> and the Article 101(3) Guidelines.<sup>16</sup>
19. Consequently, all the legal materials necessary to conduct antitrust self-assessments in the maritime transport sector today can be found in those general guidelines.
20. These general antitrust guidelines are regularly updated. In particular, the former Horizontal Guidelines<sup>17</sup> were revised in December 2010. Revising the Maritime Antitrust Guidelines to reflect the recent developments in the general guidelines would therefore cause unnecessary duplication. In order for the maritime transport sector to rely on the most updated antitrust guidance,<sup>18</sup> DG Competition considers that it would

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<sup>13</sup> Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ C11, 14.1.2011, p. 1-72 (the "New Horizontal Guidelines").

<sup>14</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13.

<sup>15</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community [now Article 101(1) TFEU], (*de minimis*) OJ C 368, 22.12.2001, p. 13-15.

<sup>16</sup> Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ C 101, 27.04.2004, p. 97-118.

<sup>17</sup> Currently the New Horizontal Guidelines do not apply to the maritime transport sector to the extent that there are sector specific rules on a particular topic in the Maritime Antitrust Guidelines (i.e. notably for information exchanges, cf. paragraph 18 of the Guidelines). The other general guidelines do not address their interaction with sector specific guidelines and thus can be considered to complement the Maritime Antitrust Guidelines.

<sup>18</sup> For example, the new chapters on information exchange and the "centre of gravity test" in the New Horizontal Guidelines.

be best to let the Maritime Antitrust Guidelines lapse and to apply the general antitrust guidelines to the maritime transport sector.

21. By the same token, applying the general antitrust guidelines to maritime transport would increase clarity and legal certainty for maritime transport operators as it would eliminate potential discrepancies between the Maritime Antitrust Guidelines and the general antitrust guidelines. Notably the Maritime Antitrust Guidelines contain a number of references to guidelines which are no longer in force (i.e. to the former Horizontal Guidelines). This potentially causes difficulties and interpretation problems when applying the Maritime Antitrust Guidelines. To that extent, letting the Maritime Antitrust Guidelines lapse would lead to legislative simplification for the benefit of all stakeholders.
22. This Staff Working Document shows below in more detail that the guidance provided in the Maritime Antitrust Guidelines now seems redundant and largely covered by general antitrust guidance.

#### 4.2.1 Exchange of information

23. The Maritime Antitrust Guidelines for the first time intended to assist providers of liner shipping services in assessing when information exchanges are likely to breach competition rules. At the time of the adoption of the Maritime Antitrust Guidelines, no general Commission guidance existed in this field. This was one of the main reasons why the industry was keen to have guidelines. The Guidelines compiled the elements that according to the case law of the European Court of Justice potentially made an exchange of information likely to infringe 101 TFEU.
24. Since the adoption of the New Horizontal Guidelines and the introduction of the new chapter on the "General Principles of the Competitive Assessment of Information Exchanges" there exists general antitrust guidance in this area.<sup>19</sup> The chapter in the New Horizontal Guidelines reflects the most recent thinking and assessment of the Commission. However, currently, the New Horizontal Guidelines do not apply to the maritime transport sector. Paragraph 18 thereof explicitly provides that the New Horizontal Guidelines "*do not apply to the extent that sector specific rules apply as is the case for certain agreements with regard to ... transport.*" This might create difficulties for the maritime transport sector as the analytical framework for information exchanges in the Maritime Antitrust Guidelines does not present the same level of thoroughness as the comprehensive analysis of information exchanges in the New Horizontal Guidelines. These difficulties will disappear with the expiry of the Maritime Antitrust Guidelines as, in the absence of sector specific rules for maritime transport, the New Horizontal Guidelines will entirely apply to the maritime transport sector.

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<sup>19</sup> See Commission press release of 14.12.2010 (IP/10/1702), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1702>.

25. The review process that led to the adoption of the New Horizontal Guidelines was widely publicised and open to public consultation. It constituted the first time the Commission gave clear and comprehensive general guidance on how to assess the compatibility of information exchanges, reflecting the most recent criteria both in terms of legal and economic standards. The New Horizontal Guidelines develop the analysis and concepts presented in the Maritime Antitrust Guidelines further and in more detail and can cater for all the sector specific circumstances.

#### 4.2.2. *Pool agreements in tramp shipping*

26. The most recurrent form of horizontal cooperation in the tramp shipping sector is the shipping pool.<sup>20</sup> The key feature of a standard pool is joint selling, although they may also contain elements of joint production.

27. Until 2006 the Commission had only limited enforcement powers in the field of tramp shipping. Given the lack of decisional practice as far as pools are concerned, the Maritime Antitrust Guidelines mainly summarise the general concepts for the assessment of joint selling and joint production agreements. They expressly refer to the former Horizontal Guidelines for further guidance on both joint selling, as a variant of a joint commercialisation agreement, and joint production.<sup>21</sup> These later guidelines have since then been replaced by the more up to date New Horizontal Guidelines.

28. Due to the lack of decisional practice with regard to tramp shipping pools prior to 2006, the analytical framework provided by the Maritime Antitrust Guidelines in this field does not bring any substantial added value compared to these general guidelines. After the expiry of the Maritime Antitrust Guidelines, all necessary elements to assess pools can be found in these general guidelines.

#### 4.2.3. *Market definition and effect on trade*

29. The section on market definition in the Maritime Antitrust Guidelines refers principally to the 1997 Market Definition Notice.<sup>22</sup> Similarly the section of the Maritime Antitrust Guidelines on effect on trade is brief and refers mainly to the general guidelines on effect on trade.<sup>23</sup> After the expiry of the Maritime Antitrust Guidelines, the criteria elaborated in these sections remain valid as neither the 1997 Market Definition Notice, nor the Guidelines on effect on trade have been modified.

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<sup>20</sup> Typically, a shipping pool brings together a number of similar vessels under different ownership in order to operate these vessels under a single commercial management (e.g. joint marketing, negotiation of freight rates, etc.). The technical operation of vessels is usually the responsibility of each owner.

<sup>21</sup> As far as guidance on full-function joint venture is concerned, this can be found in the Commission Consolidated Jurisdictional Notice under Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95, 14.4.2008, p. 1-48.

<sup>22</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5-13.

<sup>23</sup> Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [now 101 and 102 of the TFEU], OJ C 101, 27.04.2004, p. 81-96.



### 4.3. Removal of antitrust sector specific provisions in the transport sector

30. As for other modes of transport,<sup>24</sup> bringing maritime transport within the generally applicable competition law framework has been in the last years an objective of the Commission's competition policy. In view *inter alia* of the review of the general antitrust guidelines that now encompass an extensive section on exchange of information, there appear to be no reason to keep the Maritime Antitrust Guidelines.<sup>25</sup>

## 5. CONCLUSION

31. In sum, the Maritime Antitrust Guidelines bring no significant additional guidance compared to the existing Commission general guidelines, the EU Courts case law and the Commission's decisions. In fact, more recent guidance notices exist, which are more up to date in terms of legal and economic standards. The Maritime Antitrust Guidelines have fulfilled their goal of ensuring a smooth transition at the time of the reform of the antitrust rules applicable to maritime transport. DG Competition therefore proposes to let them lapse after their expiry. This would be in line with our general policy over the last years to remove sector specific provisions in the transport sector, unless absolutely necessary.

## 6. PUBLIC CONSULTATION

32. This Staff Working Document sets out the preliminary assessment of DG Competition. It does not represent an official position of the Commission on this issue, nor does it anticipate such a position. DG Competition invites all interested parties to make comments on this Staff Working Document. The public consultation seeks to elicit views from all interested parties on the future of the Maritime Antitrust Guidelines.
33. Comments should be sent to DG Competition not later than 12 weeks after the publication of this Staff Working Document on the Commission's website. Contributions to the consultation and any related enquiries should quote the reference HT.3274 and be sent by email to: [COMP-GREFFE-ANTITRUST@ec.europa.eu](mailto:COMP-GREFFE-ANTITRUST@ec.europa.eu). Received contributions will be published on the Internet, unless the author objects to being identified publicly. In this case, their contribution may be published in anonymous form. Otherwise the contribution will be neither published nor taken into account.
34. Organisations should use the Register of Interest Representatives<sup>26</sup> to provide the Commission and the public at large with information about their objectives, funding

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<sup>24</sup> No specific provisions exist in the aviation sector anymore.

<sup>25</sup> Apart from the Maritime Antitrust Guidelines, currently only one block exemption regulation - the Consortia Block Exemption Regulation – is currently in force in relation to the maritime transport sector. The present SWD concerns exclusively the Maritime Antitrust Guidelines and does not prejudge any future Commission position in relation to the Consortia Block Exemption Regulation.

<sup>26</sup> [www.ec.europa.eu/transparency/regrin](http://www.ec.europa.eu/transparency/regrin).

and structures. Submissions from organisations which have not registered in this register will be treated as individual contributions.