The new Guidelines on the application of Article 81 of the EC Treaty to the maritime sector

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On 1 July 2008, the European Commission adopted guidelines on the application of Article 81 of the EC Treaty to maritime transport services (‘the Guidelines’). This followed a public consultation in 2007.

In 2006, the Council adopted Regulation 1419/2006 (2), which repealed the liner conference block exemption contained in Regulation 4056/86 (3) with effect from 18 October 2008. Since 18 October 2008, liner companies have to assess whether all their business practices comply with Article 81. The Guidelines will help liner operators understand the implications of this change, and will provide details in particular on exchanges of information between carriers.

Regulation 1419/2006 also extended the procedural competition rules in Council Regulation 1/2003 (4) to tramp shipping services (unscheduled maritime transport of non-containerised bulk cargo). In this connection, the Guidelines provide details on the legal assessment of operational cooperation agreements between tramp operators (so-called ‘pool agreements’).

Background

The maritime transport sector essentially comprises two types of transport: liner shipping and tramp shipping. Liner shipping refers to the scheduled transport of containerised cargo. Tramp shipping (also called bulk shipping) refers to the unscheduled transport of bulk cargo (for example grain, iron ore, etc). Tramp shipping is usually unscheduled because the demand is more seasonal, irregular and geographically imbalanced than for liner services.

Since the 1870s, the liner sector has been organised in so-called ‘conferences’. Conferences are groups of shipping companies that collude on a particular ‘trade’ (i.e. a route) by fixing prices and capacity. In 1986, the Council adopted Regulation 4056/86, which block-exempted liner conferences on the assumption that they ‘have a stabilising effect, assuring shippers of reliable services’, and that ‘they contribute generally to providing adequate efficient scheduled maritime transport services’ (6).

In September 2006, following a four-year consultation process on the continued soundness of the liner conference block exemption, the Council unanimously adopted Regulation 1419/2006 repealing the block exemption with effect from 18 October 2008, on the grounds that the four conditions in Article 81(3) were no longer fulfilled.

During the consultation process, the liner industry made it clear that following the abolition of conferences it would put in place an information exchange scheme in order to have more visibility on prices and capacity. The Guidelines provide a framework for the legal assessment of this project.

The tramp sector differs from the liner sector in that (a) it is more fragmented and (b) the main cooperation mechanism between tramp shipowners is the so-called ‘pool’ agreement. Moreover, for many years, the tramp sector was not subject to the Commission’s normal investigation and enforcement powers (as set out in Regulation 17 (7) and then in Regulation 1/2003). Instead, the tramp sector was subject to the procedural rules in Article 85 of the EC Treaty (8). In 2006, Regulation

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(5) Recital 8 of Regulation 4056/86.


(7) ‘Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.’
1419/2006 — the same Regulation that repealed the liner conference block exemption — also brought tramp shipping within the scope of the Commission’s full investigation and enforcement powers under Regulation 1/2003.

As the liner and tramp sectors are now subject in full to Article 81 and Regulation 1/2003, the Commission undertook to issue guidelines on the maritime sector. A draft version of the Guidelines was published for an eight-week consultation in September 2007. The final version was adopted on 1 July 2008 and takes account of comments made by shipowners, shippers, Member States and other stakeholders (8).

This calls for two further comments. First, sector-specific guidelines are very rare. In recent years, guidelines have rather been of a general nature, dealing with substance (vertical agreements, horizontal mergers, fines) or with procedure (such as the notice on complaints). Guidelines have also been adopted for specific types of agreements (for example technology transfer agreements). The present Maritime Guidelines are therefore the only sector-specific guidelines adopted since the modernisation of EU competition law in 2004.

Second, the role of guidelines is to provide clarity and predictability to stakeholders as to how the Commission will apply the competition rules in practice. However, Commission Guidelines cannot in any way lead to endorsement of any hypothetical conduct that a firm might like to adopt on the market. Guidelines are not supposed to constitute a Commission decision on a particular case.

Guidelines are also normally based on accumulated experience in the relevant field. Here, the Commission agreed to issue Guidelines in two areas that it has never dealt with before (information exchange in the liner sector and tramp pools). Therefore, it is understandable that there should be some degree of generality, at least at this stage. The guidelines simply aim to provide a general analytical framework, which should be adapted to the particular circumstances in a given case. They are meant to provide indications regarding the reasoning and relevant factors. In the area of competition law, the legal assessment always depends on the particular circumstances of the case in question. So, by nature, guidelines will always contain a number of qualifiers and open-ended statements.

Scope of the Guidelines

As regards the temporal scope, the Commission decided to limit the validity of the Guidelines to a period of five years. The five-year period runs from 18 October 2008, which marks the abolition of liner conferences in the EU, to 17 October 2013.

Tramp pools have of course been fully subject to the full force of Article 81 since 18 October 2006, so the analysis of pools in the Guidelines also applies to potential pool cases in the period between 18 October 2006 and 18 October 2008.

The reason for the five-year limitation is that (a) the aim of the Guidelines is merely to facilitate the transition, and (b) this will allow the Commission to review them in 2013 in view of future market developments and in order to reflect its growing experience of the sector. The Commission may also decide to let the Guidelines lapse.

In terms of substantive scope, the Guidelines cover the liner sector and the tramp sector. In the past, some Commission decisions have identified a third category known as specialised services (e.g. car carriers), which did not come within the scope of liner or tramp services (9). This categorisation is now devoid of purpose, as all three categories are subject to Article 81 and Regulation 1/2003. In any event, the Guidelines are relevant to ‘specialised’ services insofar as the issues discussed in the Guidelines apply to such services (information exchange and pool agreements).

Although the Guidelines do not specifically address cabotage services (maritime transport services within the same Member State), they nevertheless apply to these services insofar as they are provided either as liner or tramp shipping services.

The Guidelines do not apply to the transport of passengers or to any other economic sector.

Structure and contents of the Guidelines

The Guidelines first make a number of general points in relation to the end of the liner conference block exemption and about the interaction with other Commission Guidelines. The Guidelines then address the notion of effect on trade between Member States, market definition, information exchanges in the liner sector, and pool agreements in the tramp sector. We address each point in turn below.

(8) All the comments received are published on the website of the Competition DG. See also press release No IP/08/1063 and the frequently asked questions in MEMO/08/460.

General points

The Guidelines first address general points in connection with the abolition of the liner conference block exemption. The Guidelines recall that all liner conference activity must cease in relation to services to or from one or more EU ports (or non-EU ports serving the same catchment area as an EU port, including via trans-shipment; see paragraph 20 of the Guidelines) (14). The carriers are also reminded that their behaviour must be in compliance with Article 81 from day one of the new regime, i.e. 18 October 2008.

This is regardless of whether other jurisdictions allow, explicitly or tacitly, price-fixing by liner conferences or discussion agreements. The Commission's view is that the abolition of the liner conference block exemption on EU trades would only create an incompatibility with the laws of another jurisdiction if that jurisdiction actually required the formation of price-fixing conferences on EU trades. Although some jurisdictions still allow conferences, the Commission is not aware of any jurisdiction that currently requires the formation of conferences.

The Guidelines also recall that they do not affect the consortia block exemption (12). Finally, the Guidelines do not affect, do not replace and do not deviate from other existing Commission guidelines (13).

Effect on trade between Member States

The Guidelines recall that transport services are often international in nature, and that therefore in most cases there is likely to be an effect on trade between Member States, for example on account of the impact on the markets for the provision of transport and intermediary services. By contrast, cabotage cases may be less straightforward. In any event, in both types of cases, it is necessary to refer to the Commission's Guidelines on the 'effect on trade' concept in Articles 81 and 82 of the Treaty (13).

Market definition

In the liner sector, the Guidelines reflect past Commission decisions and court judgments defining markets on deep-sea trades. The relevant market includes container transport services between a range of substitutable ports at one end of the service and another range of ports at the other end. For short-sea trades, however, the Guidelines note that intermodal competition may be an additional consideration.

In the tramp sector, the Commission followed the principles expressed in the 1997 Notice on the definition of the relevant market (13) (i.e. mainly demand-side and supply-side substitutability). In the area of tramp shipping, demand-side substitutability is to be assessed among other things on the basis of vessel types, vessel sizes and contract types. Supply-side substitutability is to be assessed on the basis of e.g. vessel types and vessel sizes, although terminal and draught restrictions and environmental standards may exclude certain vessels from the relevant market. The geographic market is to be assessed on a case-by-case basis (i.e. port-to-port routes, regional market or global market, as the case may be).

Information exchanges in the liner sector

In general, the Guidelines acknowledge that exchanges of information lead to greater market transparency and may contribute to improving the way liner services are provided, in the interest of carriers and transport users (in particular where the information is shared with 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, with the result that competition between undertakings is restricted. This approach reflects the case-law of the Community courts.

A restriction of competition may occur if certain circumstances are present, namely a concentrated market structure and exchanges of commercially sensitive information.

- The market structure is to be assessed in view of the level of concentration and the structure of supply and demand, notably the number of competitors, the symmetry and stability of their market shares and the existence of structural links between them.
- Whether information is sensitive depends on (a) its age and the period to which it relates, (b) its aggregated or individualised nature and (c)

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(10) This means that liner conference activities, such as price-fixing or fixing capacity, on a route from e.g. the Far East to Morocco or to Turkey, with the aim of ultimately trans-shipping containers to the EU, falls foul of Article 81 provided all other conditions in Article 81 are met.


(12) For example, the Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2) and the Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).


the frequency of the exchange. It also depends on whether the information is public or not, although in some cases public information may be enhanced or combined or made more accessible in a way that makes it sensitive.

The Guidelines note that in the past the Commission considered information more than one year old as historical whereas information that was less than one year old was viewed as recent. However, this does not constitute an absolute rule. Accordingly, the historical or recent nature of the information will be assessed on a case-by-case basis with regard to all other factors in the relevant market.

It should also be noted that the three key factors (age, level of aggregation and frequency) will be assessed by the Commission as a whole rather than separately, because some factors may have an impact on others. For example, the moment when the information becomes historical is likely to be sooner if it is aggregated rather than individual.

**Pool agreements in the tramp sector**

A shipping pool brings together a number of similar vessels under different ownership in order to place these vessels under a single commercial management. A common feature of pools is joint selling, although they also contain elements of joint production. This section is based on the Commission’s market investigation. The various pool agreements that the Commission has seen in the course of its market investigation reveal a typical profile, which is referred to as the ‘standard’ shipping pool in the Guidelines.

The characterisation and analysis of the ‘standard’ shipping pool set out in the Guidelines may not extend to all pools. By necessity, there is a certain amount of generalisation in the text, although in practice the Commission will examine each case on its own merits, as is the rule in EC competition law.

Indeed, paragraph 12 of the Commission’s Guidelines on Horizontal Agreements states that ‘the centre of gravity of [an agreement] determines’ its categorisation as a joint selling agreement or a joint production agreement or one of the other types of agreement. This ‘centre of gravity’ test applies to tramp pools as well: if, on the basis of the centre of gravity test, a particular pool between competitors is found to be closer to joint selling than to joint production, it will be analysed as such.

Paragraphs 60 to 63 of the Guidelines contain a definition of the standard pool and provide some legal background. The rest of the section follows the familiar structure of the Guidelines on Horizontal Agreements and the Guidelines on Vertical Restraints: there are ‘pools that do not fall under Article 81(1)’, ‘pools that generally fall under Article 81(1)’, and ‘pools that may fall under Article 81(1)’.

- Pools between non-competitors and pools that benefit from the *De Minimis* Notice (15) do not fall under Article 81(1).
- The sub-section on pools ‘that generally fall under Article 81(1)’ refers to section 5 of the Guidelines on Horizontal Agreements.
- Pools ‘that may fall under Article 81(1)’ include pools that do not involve joint selling but nevertheless entail some degree of coordination on the parameters of competition (e.g. joint scheduling or joint purchasing).

Finally, the Guidelines make it clear that if the parties are indeed competitors and the agreement does fall under Article 81(1), there remains the possibility to apply the exemption in Article 81(3). The final version of the Guidelines contains a significantly expanded section on Article 81(3) compared to the draft version published in September 2007.

Generally, it should be kept in mind that other Commission guidelines are relevant and may provide additional guidance for the assessment of pools, with regard to both Article 81(1) and Article 81(3).

**Conclusion**

In a spirit of cooperation with the maritime sector, the Commission issued these Maritime Guidelines in order to help operators transition to a new era of competition and self-assessment. It was clear from the consultation process that there was some tension between the views of the industry and the views of the customers. This was especially so in the liner sector, where the carriers and shippers expressed conflicting views. We believe that the Guidelines arbitrate between these competing claims in a way that reflects the correct application of Article 81. As regards the level of detail in the Guidelines, we believe that the Guidelines strike the right balance between the necessary level of generality and the need to provide guidance to the industry on what would constitute a breach of Article 81.

The reform of competition rules applying to maritime transport services will be completed in the coming months by a public consultation on a

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preliminary draft regulation on the renewal of the Block Exemption Regulation for liner shipping consortia (Commission Regulation (EC) No 823/2000 of 19 April 2000, as amended). That regulation allows shipping lines to enter into extensive cooperation for the purpose of providing a joint service (so-called ‘consortia’). The Maritime Guidelines are an integral part of the Commission’s Action Plan to implement the Integrated Maritime Policy \(^{(16)}\).