Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

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COMMENTS ON MARITIME GUIDELINES

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Comments on the draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

Holman Fenwick & Willan is grateful for the opportunity to comment on the draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services published on 14 September 2007.1

GENERAL COMMENTS

As a general rule, we feel that the draft Guidelines provide a useful summary of the legal framework within which operators in the maritime transport industry intending to collaborate at the horizontal level need to work and which they need to take account of. It accordingly provides a useful supplementary gloss on the existing general guidelines on horizontal cooperation agreements (paragraph 13 of which specifically excluded transport services as at the time they were subject to specific sectoral rules, as is no longer the case).

However, we believe that the draft Guidelines fall short in one fundamental respect in meeting the principal objective which they were intended to address, namely to provide guidance on an area of law which was uncertain.

As explained by the Commission in its Statement on Guidelines contained in the Minutes of the Council of 18 September 20062, the date of adoption of the Regulation repealing Regulation 4056/86, the purpose of guidelines was to fill the void created by the fact that the competition rules either had not previously been fully applied to or been enforced in the maritime sector. The Statement explained:

"Given that competition rules have never applied to the liner sector and in order to provide guidance to market participants, including in the tramp sector, the Commission will issue Guidelines, in consultation with all stakeholders, on application of the competition rules to maritime transport services. The Guidelines will be issued before the end of the transitional period of two years for existing liner shipping conferences."

This was repeated in the press release that the Commission issued on 25 September 2006 stating: "In order to ease the transition to a fully competitive regime, the Commission will, in line with a recommendation by the European Parliament, issue Guidelines on the application of the competition rules to maritime transport services, in consultation with all stakeholders."3

As they stand, however, the draft Guidelines are of unequal value to the liner and the tramp sectors. While the section on information exchanges in the liner sector is relatively helpful in terms of describing and interpreting relevant case law and decisional practice on the subject,4 the section on pool agreements5 is disappointingly brief and uninformative as a source of guidance to market participants, let alone the professionals advising them.

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1 We wish to express our thanks to Matthew Bennett of LECG for having read a draft of these comments and providing us with his comments on our section 2, in which we comment on Section 2.3.2 of the draft Guidelines dealing with market definition in tramp markets.
2 Statements to be entered in the Council Minutes, Brussels, 18 September 2006, 11389/06 ADD 1 REV 1.
3 IP/06/1249.
4 Section 3.2.
5 Section 3.3.
We are well aware that the Commission has felt itself constrained in its ability to state what the law is in the absence of any actual decisional experience in the tramp sector, but we had hoped that the Commission might have been more forthcoming in terms of indicating possible policy directions it was likely to take and discussion of some of the key issues that it knows are causing concern in industry circles. The very fact that it had undertaken to publish guidance indicates that it was well aware at the time of the probable difficulties that would be faced by the tramp sector in understanding and coming to terms with the competition rules in a substantially changed enforcement landscape.

Key terms such as "joint production" and "joint selling" are used without any further guidance on what they might entail in the context of maritime transport services. The implication is that pool members appointing a pool manager with the right to re-charter vessels on the market, including the negotiation of freight rates for the sub-charter with specific customers for specific voyages, charters or contracts of affreightment, are engaged in an agreement the object of which is joint selling. While the draft Guidelines stop short of stating categorically that this is necessarily the case, and make clear the need for a case by case analysis (including devoting almost a page to pools that do not have the object of restricting competition), it would certainly have been helpful to have clearer guidance on this. The four conditions laid down by Article 81(3) are mentioned, but with only the briefest of commentary on how to interpret those conditions and the general guidance on Article 81(3) when applying them to pools, and no practical suggestions as to the methodology to be used in a shipping context.

In sum, therefore, we are disappointed to see that the draft Guidelines have not proved as helpful as they might in providing guidance to market participants, as promised. They are particularly disappointing in terms of the guidance given on pools to enable pool members and managers to carry out an efficient self-assessment process.

**Specific Comments**

We set out below a few more detailed remarks on aspects of the draft Guidelines that we consider could benefit from clarification and amendment.

1. **Comments on paragraphs 6 and 38: Consortium Bloc Exemption**

It is perhaps unfortunate that as a result of the timing of this draft of the Guidelines the Commission cannot say more about the existing Regulation on consortia and the amendments that may be contemplated as a result of the changes introduced by Regulation 1419/2006. The Guidelines merely refer to the Consortium bloc exemption (at paragraph 6) to confirm that a review "will be" taking place. They also refer (at paragraph 38) to the provision in the Regulation that automatically exempts certain information exchanges between consortium members where they are ancillary to and necessary to the joint operation of liner transport services.

The Regulation is admittedly limited to containerised services and therefore cannot apply as such to tramp services. That could, in principle, be changed at a stroke by replacing the word "liner" by "maritime" in Article 1 and deleting the words "chiefly by container" in Article 2(1), subject always to a case being made out to the Council for an appropriate extension of Council Regulation 479/92. One of the effects of the abolition of Regulation 4056/86 is to remove the distinction between liner and non-liner shipping services for legal purposes: all shipping services are now in principle subject to the same framework of competition rules and where the economic justification for a similar treatment in law exists that treatment should apply regardless of the legal category to which the service belonged under the old regime.

We consider that there are strong arguments for allowing the tramp industry (as previously defined) to benefit from a bloc exemption for pooling arrangements that have the
characteristics of a consortium where the relevant conditions for exemption can be assumed to exist. We have in mind particularly those tramp trades that operate on a regular basis on regular routes, a feature of many of the specialised trades such as conventional reefer vessels, timber trades and specialised car carriers and ro-ros. At this stage, we would urge the Commission to consider an extension of the *bloc* exemption to non-containerised services and not just limit itself to a tidying-up drafting exercise when reviewing the existing Regulation. Or at least the Commission could start preparing the ground for such a broader review of the scope of the Regulation to coincide with its expiry date of 25 April 2010.

2. **Comments on Section 2.3.2: Market definition of tramp services**

While this section of the draft Guidelines is helpful in setting out most of the key factors one would expect to take into account in determining the relevant market(s) for the purpose of analysing horizontal cooperation agreements in the tramp sector, the section could benefit from a fuller description of the overall market context in which tramp shipping services are provided.

As an obvious starting point, the Guidelines could mention the basic premise that demand for tramp shipping is closely, but not exclusively, dependent on the underlying physical trade flows. There is therefore a close interdependency between the various shipping markets and the underlying markets for the different raw materials, semi-refined products, and finished goods.

Tramp shipping markets are complex in terms of the interplay between the underlying product markets (and related FFA and other non-physical markets) and the transport service markets themselves. This leads to significant upward and downward swings in supply and demand and the well-known phenomenon of the "shipping cycle" that results in time lags between shifts in demand and supply.

With such lags, and resulting mismatches between supply and demand, any market conditions of extra- or under-capacity may be relatively transient. It follows that a short-term view of market definition may not always be appropriate.

The underlying demand for physical products is equally important as a factor in determining the geographical scope of the relevant market. Where the demand characteristics for a given uniform product or set of related products across a number of geographical regions are similar, then this will point to a broader geographical market whereas where there are different demand characteristics for the product(s) in different geographical regions this may lead to the determination of different geographical markets.

It would be helpful, in any event, to have a clear statement that demand for bulk transport services results from and largely depends on the demand for shipments of the relevant commodities. Fluctuations in demand for different commodities, seasonal variations in the production or consumption of specific manufactured commodities, general economic conditions affecting demand for or consumption of manufactured products and foodstuffs, and many other economic and trading conditions, all have an impact on demand for transport services which those providing the services strive to meet.

In addition, it is surely relevant to take account of the scale of the demand for the relevant transport services and the size and economic strength of the producers and receivers involved in the supply chain in assessing how much market power service providers enjoy.

Further, the Commission's statement at paragraph 24 that in normal market conditions "a service with a significant mismatch between cargo volume and vessel size does not appear to be able to offer a competitive freight rate" misses three points.
First, shippers may often be able to adapt their demands to match available capacity. Thus shippers’ chartering departments or brokers acting for them may be able to combine smaller parcels into larger parcels where there is spare capacity in larger ships, and vice versa can divide larger parcels into smaller ones to deal with lack of capacity in larger vessels or avoid congestion at larger ports by using smaller vessels that can berth at ports with less draught.

The Commission’s guidance in paragraph 24 also requires qualification as, the way it is written, it seems to be at odds with the statement in paragraph 22, unless one takes it as meaning that paragraph 24 holds only if paragraph 22 does not. If this is the case, we would suggest that the Commission could be more explicit in stating that the relevant question is first, whether a package can be broken up at a small cost; and then secondly, only if the package cannot be broken up, should one conclude that the use of smaller shipping sizes for that package are not substitutes. Note that, regardless of whether the particular package can be broken up, one may still consider all shipping sizes above the size of the package as substitutable.

Secondly, the statement does not deal with the situation with backhaul routes (or ballast voyages) where it will generally be worthwhile for an operator to half-fill the vessel at whatever price it can get on the market to contribute to costs, despite the fact that there may be a significant mismatch: any price above zero will have a positive effect on the overall average daily rate the vessel will earn from the return voyage. The incremental cost of taking on the ballast is nearly nil given that the vessel will already be returning to its next destination port. It may even be economic to deviate from the direct route on the backhaul voyage in order to carry extra cargo either to an intermediate port or for loading at an intermediate port and discharge at the ultimate return port. This is highly relevant in terms of the justification for pooling, as the additional fleet sizes make such "triangulation" easier.

Thirdly, an idle or an empty vessel is an unproductive asset and there is always huge pressure on operators to maximise the utilisation of their vessels by adapting to demand.

Consequently supply-side substitution may be much more important as a determinant of the relevant market than it would be for many other goods or services.

In addition it is worth recalling that the shipping industry is one that by definition has assets that can be moved from place to place and that mobility must make supply-side substitutability (both in terms of the use of different sizes and types of ships and, geographically, implying the use of different sizes and types of ships from different locations) more than a mere hypothesis. The phenomenon of chain substitution, noted by the Commission at paragraph 25, is an example of this.

The Commission appears basically to have followed its standard practice in giving some weight to supply-side substitutability, subject to cost and time-frame, but apart from the acknowledgment given to chains of substitution between vessel sizes the argument is little developed. The two criteria mentioned are taken from the general guidelines on market definition.

However, it would be welcome if the Commission were able to give clearer guidance on the relative weight which should be attached to both demand and supply-side substitutability in a shipping context.

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6 See paragraph 22 and footnote 32. Note also our comment above on the need to clarify the exact hierarchy between paragraphs 22 and 24. We suggest making it clear that the rule in paragraph 24 should come into play only if the principal rule in paragraph 22 does not.
One final point relates to paragraph 26 on captive capacity. It is not clear exactly what the Commission has in mind here. In some cases the captive capacity will consist of fleets owned or bareboat chartered by cargo owners for their own needs, of which there are examples throughout the tramp sector.

In general, whether any such capacity should be excluded is, however, surely dependent on the facts. In some cases a significant and non-transient increase in price will result in this "captive" capacity no longer becoming captive. This would happen where owners or charterers had an incentive to rent it out to other parties.

In summary, the draft Guidelines fail to provide a sufficient background account of the economics of the industry that in our view would better help explain the processes of supply and demand; and it underestimates the role played by supply-side substitutability compared with many other industry sectors.

Moreover, the draft Guidelines fail to address what is possibly a greater problem than the problem of market definition, namely the problem of finding sufficiently reliable publicly available data to measure market shares. The Commission does not discuss how parties are expected reliably to find the relevant data, but in practice this will pose considerable difficulties for the tramp sector. Admittedly the wide availability of information from independent brokers ensure that a high degree of market transparency in terms of overall rate trends, but does not provide the level of detail that may be required to perform the market share calculations envisaged by the Guidelines.

3. Comments on Section 3.3: Pool agreements in tramp shipping

The main area, to which we have already drawn attention, in which it would have been useful for the Commission to provide more detailed guidance, is in helping operators apply the existing guidelines on horizontal cooperation agreements to the principal characteristics of pool agreements. While the draft Guidelines go no further than clearly reiterating the basic established jurisprudence to the effect that agreements with the object of restricting competition to an appreciable extent by means of price fixing are automatically deemed to infringe the prohibition in Article 81(1), there is little focused guidance on how this applies in practice to shipping pools that operate openly on the market and have never been seen as potential cartels.

The words "joint selling" and "joint production", that are both key concepts in the analysis of horizontal cooperation agreements, do not sit easily when applied to maritime transport. This renders the Commission's conclusion at paragraph 63 that "the key feature of standard shipping pools is joint selling, coupled with some features of joint production" somewhat open to interpretation.

We question how useful it is to have Guidelines that only provide a generic synopsis of the law as already set out in the general horizontal cooperation guidelines.

The draft Guidelines follow the same format of considering pools that do not fall under Article 81(1), those that generally do and those that may or may not depending on their economic effects.

3.1 Pools which have the object of price fixing

Paragraph 67 states that if a pool agreement between competitors "has as its object the restriction of competition by means of price fixing….it will fall under Article 81(1) of the
There is, however, nothing further in the draft Guidelines to clarify what exactly the Commission understands is meant by pools having the "object" of price fixing or indeed how it would analyse the role of pools in the setting of the charter hire or freight rate for any specific contract.

Arguably a pool arrangement should never be characterisable as an agreement with the object of fixing prices to the extent that it increases the output of individual owners, creates a "product" with added value that those owners could not supply independently by themselves and increases consumer welfare by providing economies of scale and scope for both service supplier and customer.

The question whether the pool has an influence on prices is a question that can legitimately (and must) be asked in the context of applying Article 81(1) – but only in the context of an analysis of effects. As the Commission states, there is a category of pool agreements that do not have price fixing as their object but may fall under the prohibition in Article 81(1) if they are "likely to have an appreciable impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation" (paragraph 68). Why should not all pools be assessed in this way before being subjected to Article 81(3) analysis?

The only category of pools which clearly belong in the per se category of pools that generally fall under Article 81(1) of the Treaty might be hidden arrangements that are not transparent between ostensibly independent competing undertakings that agree to coordinate rates so as to gain a competitive advantage without any integration of their economic activities. This sort of arrangement can be said to have the object of fixing prices.

The further statement in the Horizontal Guidelines that "agreements between competitors involving price fixing will always fall under Article 81(1) irrespective of the market power of the parties" has the effect of broadening the test even more. We would, however, submit that this paraphrase of the law is misleading; a pool will always involve price fixing but may not have the object of fixing prices.

Paragraph 144 of the Horizontal Cooperation Guidelines express the rule thus: "agreements limited to joint selling have as a rule the object and effect of coordinating the pricing policy of competing manufacturers". However, is it correct to view pool agreements as "limited to joint selling"? The Commission itself admits in the draft Guidelines that standard pool agreements contain certain features of joint production. That may accordingly be a better formulation to apply to pools. Where, on the other hand, pools represent no more than a form of joint selling with no added value being provided over and above the activities of the owners then it ought to be right to view them as unlawful by object (subject to arguments under Article 81(3).

We submit that only those agreements that have the object of fixing prices should on a proper interpretation of Article 81(1) be presumed to infringe the basic prohibition and require any further individual self-assessment. The presumption should therefore be against agreements with price fixing as their object (which in our submission should be treated as a question of fact, which cannot simply be presumed) but not against all agreements that "involve" price fixing.

Moreover, the Horizontal Guidelines in fact make a specific exception for agreements where the joint selling is carried out by a production joint venture that also markets the jointly produced goods: "Decisions on prices," it says, "need to be taken jointly by the parties to such agreements limited to joint selling in cases where the parties establish a production joint venture that also markets the jointly produced goods."

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7 The wording is taken from paragraph 25 of the Horizontal Cooperation Guidelines. Note that in the German text "a pool agreement between competitors" is rendered as "Jede Poolvereinbarung", leaving out the words "between competitors."

8 The wording is taken from paragraph 148 of the Horizontal Cooperation Guidelines.
an agreement. In this case the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market to determine the applicability of Article 81(1)." This is repeated at paragraph 141 in the context of the guidance on commercialisation agreements.

The draft Guidelines avoid any mention of this. We are well aware that the Commission may not yet have the evidence to judge whether the activities of a pool manager within a standard shipping pool amount to joint production or whether they might if they are sufficiently integrated. The Commission is nevertheless aware of the arguments in favour of such a view. Some guidance on this (or at least on the evidence that the Commission would wish to see to satisfy itself that was the case) would have been extremely helpful.

After all the Commission is itself prepared to acknowledge that the key features of shipping pools include features of joint production.

Finally on this point, the general Horizontal Cooperation Guidelines state that an effects analysis is appropriate for "commercialisation agreements that fall short of joint selling." The draft maritime Guidelines do not contain any guidance on whether this may not in fact also be the correct analysis for pool agreements.

3.2 Pools that may fall under Article 81(1)

Section 3.3.3 contains a summary analysis of the factors to be taken into account in determining if Article 81(1) applies to pools that do not have the object of restricting competition. The existence of this paragraph appears, however, paradoxical if our understanding of what the Commission is stating at paragraph 67 is correct. Does the Commission accept that there are in fact pools that fall under Article 81(1) only if they have an appreciable anti-competitive effect, in particular on rates? As stated, the clear assumption of the draft Guidelines as they stand is that, where pool managers are delegated to fix vessels, this automatically puts the pool agreement into the hardcore category and, however minimal an effect they have on competition in the market, they are presumed to fall under Article 81(1).

Against that analysis, very few pools indeed are likely to fall in the category of agreements requiring an effects-based analysis. In contrast, the Horizontal Cooperation Guidelines describe two types of agreement that do not automatically fall under Article 81(1) but require a preliminary effects assessment, and it would be helpful if the Commission could address the circumstances in which either of these might apply to pools.

The first type consists of "joint commercialisation agreements that fall short of joint selling" which may fall under Article 81(1) if they either allow the exchange of sensitive commercial information or influence a significant part of the parties' final cost."

The other type of agreement that contains price fixing provisions but that the Commission is satisfied does not have the object of fixing prices is the joint production agreement.

Normally, the draft Guidelines suggest, a pool manager is responsible for the commercial operation of the vessels, including planning vessel movements and instructing vessels, nominating port agents, keeping customers updated, issuing freight invoices, ordering bunkers, collecting earnings and distributing them to members under the agreed distribution key. These are all critical functions to enable the actual shipping services to be delivered to the customer, and indeed define the very service that is being provided. They go much further

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9 Paragraph 62.
than mere selling on of a service. It is therefore perfectly legitimate to categorise the
 provision of such functions by a pool manager as the "joint provision" of a shipping service,
 which for EC competition law purposes should clearly be categorised as joint production and
 not joint selling or joint commercialisation. In these circumstances, any price fixing should
 be viewed as merely ancillary to the elements of joint production of a service and should not
 be presumed to be the object of the arrangement.

The Commission appears to put too much emphasis on the role played by the owners of the
 vessels in the pool in providing the actual shipping service. The Commission defines a pool
 as an arrangement whereby services are marketed jointly but performed individually by the
 members. That does not in fact fully reflect the business reality. Members typically have
 very little involvement in the actual performance of the services provided by their pools, as all
 the day-to-day operations of the vessels are entrusted to the pool manager, within the overall
 scope of authority laid down by the members through their pool strategy committee or
 equivalent body. Very often the vessels are chartered to the pool on long-term time charters
 and the pool (or the legal entity that constitutes the pool) acts as a disponent owner. Pools
 operate on the market as single entities, usually under a single brand, and are viewed as such
 by shippers and brokers.

It is a common feature of the shipping industry for a number of functions to be subcontracted
 to specialised management companies. Owners often subcontract the technical management
 of their vessels to ship managers who arrange all such matters as crewing, insurance,
 maintenance and classification. Those functions are quite discrete from the operational and
 commercial functions. Where owners time charter their vessels to other shipping operators
 they remain legally responsible for these functions, but the actual transport service (consisting
 of the operational and commercial functions) is provided by the operator that has chartered
 the vessel. That operator becomes in shipping terms the disponent owner. As we have stated,
 the pool is in no different a position.

Even where the "owner" is also the operator of the vessels, it will often not be the owner in
 the legal sense, as the title in the ships will very often be vested by way of security in the
 finance house providing ship finance and the ship bareboat chartered to the owner, that
 becomes the disponent owner.

In a typical pool structure, therefore, it is wrong to read too much into the fact that the vessels
 on which the service is provided may be owned by the members. The vessels are merely the
 means used to provide the service itself, and an "input" in economic terms.

In any event the Commission itself recognises that outsourcing is now a common feature of
 many industries: see, for instance, paragraph 94 of the Commission's Consolidated
 Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations
 between undertakings, where it states in relation to the question whether a joint venture that
 does not employ its own personnel can be full-function: "The personnel do not necessarily
 need to be employed by the joint venture itself. If it is standard practice in the industry where
 the joint venture is operating, it may be sufficient if third parties envisage the staffing under
 an operational agreement...." If a joint venture that does not employ its own staff can even be
 considered autonomous for merger control purposes, then there should conceptually be no
 problem in accepting that a pool manager chartering vessels in from one or more pool
 members can be considered to be providing a joint service in its own right.10

10 We are not implying that standard pool agreements constitute full-function joint ventures,
 although the more integrated the production and distribution functions entrusted to the pool the closer it
 becomes to such a joint venture, as the Commission itself has recognised in footnote 41 of the
 horizontal cooperation guidelines. Unfortunately the draft maritime Guidelines do not provide
4. Comments on Section 3.3.4: Article 81(3)

The Guidelines might have been expected to contain a detailed commentary on how the general guidance on self-assessment under Article 81(3) has to be adapted for analysing shipping pool agreements. The Commission has missed an opportunity to provide specific guidance on the factors to be taken into consideration when self-assessing each particular agreement. There is little attempt to tailor the factors specifically to the shipping context, and the Commission has failed to illustrate in a practical way how it would expect the industry to go about the exercise, which it could usefully have done by means of some model case studies.

Moreover, one has to assume that the general Guidelines on the application of Article 81(3) of the Treaty can be relied on for guidance on the methodology to be used in applying Article 81(3) and the factors to be taken into account, but in fact there is no reference to them at this point of the draft maritime Guidelines. This makes it all the more frustrating that the guidance given is so brief. Furthermore, the Commission has been selective in the passages that it has quoted from those general Guidelines and the selection criteria are not given, leading one to speculate on the significance of the passages quoted and those that have not been. Does the failure to mention a factor contained in the general Guidelines mean that this is not considered to be a relevant factor at all?

4.1 Efficiency gains

The statement "the efficiencies generated cannot be the saving of costs that are an inherent part of competition but must result from the integration of economic activities" is not adequately explained in terms of the cost savings and economies of scale which pools can legitimately rely on in justification of their efficiency. Where precisely does the line fall between activities of a pool manager that are sales and marketing activities (and which accordingly cannot be taken into account in calculating cost efficiencies) and those which result from functional integration?

There is also unfortunately no guidance on what different categories of efficiency pools need to show in order to satisfy the first condition and no specific examples from a shipping context. Efficiencies resulting from the common management and operational responsibility for the vessels in the pool must surely count both as cost efficiencies (in particular those resulting from higher utilisation ratios and joint procurement of bunkers, supplies and services) and service-related qualitative efficiencies.

4.2 Benefits to consumers

In providing guidance on the Article 81(3) condition that consumers should benefit from adverse effects of the pool on trade, the Commission has missed a critical step, particularly since this is meant to provide guidance to those actually involved in the industry who, unlike their professional advisers, cannot be expected to know the significance of the word in competition law. Indeed, nowhere in the Guidelines does the Commission define what a "consumer" is. There is a reference to transport users, but this is not put in any kind of context.

This is of great importance as the term consumer should be interpreted broadly, as benefits of pools go much wider than to the person who signs the charterparty. As it is, very often the
receivers have the greatest interest in the certainty of supply, and therefore have the greatest benefit in having a large fleet size to fall back on.

Finally, it is disappointing that the Commission did not use the Guidelines to indicate how its policy in relation to other similar cooperative arrangements in other industries could be applied by analogy (or pointed out whether in its view there are relevant differences).

One industry where types of price fixing arrangements have been exempted or received favourable informal decisions is the aviation industry. The Commission has there been prepared to acknowledge the benefits airline alliances can bring to the market, even where they do contain provisions for joint marketing or lead to coordination of fares. Ms. Neelie Kroes has commented favourably on the important benefits that "highly complementary airline alliances and mergers can bring … to passengers by connecting networks, offering new services and generating efficiencies across the aviation value claim."[11]

CONCLUDING REMARKS

We recognise the difficulties faced by the Commission in preparing these draft Guidelines in both the liner and the tramp sectors, although the nature of the difficulties was not the same. However, we remain disappointed that the guidance given on pooling agreements in tramp shipping, which had been so widely expected, does not go further in discussing some of the key issues that have come up for debate and which the Commission services are aware are causing uncertainty and even concern.

We do not see why the Commission could not have provided some more policy guidance on pools that are too small to have any appreciable effect on their markets; this would have been helpful regardless of the technical status under Article 81.

We would have welcomed more guidance on the Article 81(3) criteria to help those carrying out self-assessments: there is a huge gulf between the level of detail provided by the draft maritime Guidelines and the general Guidelines on Article 81(3).

We note that the Guidelines are stated to be valid for an initial five years and hope that the Commission will keep them under constant review in the light of its experience and if necessary bring out supplementary or clarificatory guidance as and when it is available without waiting for the five-year period to expire.

The Commission should also at the earliest possible opportunity begin reviewing the scope of the rules on liner consortia with a view to their possible extension to all or part of the tramp sector.

HOLMAN FENWICK & WILLAN
(Reference PAW/13)

14 November 2007

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