

# Maritime Guidelines and Liner Consortia Block Exemption

We will in this briefing discuss recent developments within the area of shipping and competition law:

- On 1 July 2008, the European Commission implemented "Guidelines on the application of Article 81 of the EC Treaty to maritime transport services" ("Maritime Guidelines"), see [http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/guidelines\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/guidelines_en.pdf).
- The block exemption for liner *conferences* has been repealed with effect from 18 October 2008.
- A new draft block exemption for liner *consortia* was issued on 21 October 2008.

## BACKGROUND

Regulation (EC) No 1419/2006 of 25 September 2006 extended the enforcement powers of the European Commission to cover *tramp shipping* services and *cabotage* services. In September 2007, the Commission published draft guidelines on the application of Article 81 of the EC Treaty to maritime transport services and the final Maritime Guidelines were issued on 1 July 2008. For the *liner* sector, the block exemption allowing liner operators to co-operate in *liner conferences*, i.e. price and capacity fixing between competing liner operators, was repealed with effect from 18 October 2008 so such cooperation no longer benefits from a block exemption. Now the Commission is undertaking a review process of the block exemption for *liner consortia*, i.e. co-operation between liner shipping carriers with a view to providing a joint service on a trade not involving price or capacity fixing, and the Commission has issued a new draft block exemption for liner consortia.

## TRAMP POOLS

According to the Maritime Guidelines, the key feature of shipping pools is joint selling of transportation services, coupled with some elements of joint production of such service. Each pool must be analysed on a case-by-case basis, by reference to what the Guidelines call its "centre of gravity", in order to determine whether it is caught by Article 81. The Guidelines do not further explain how to determine whether the pool's centre of gravity is joint selling or joint production of the transportation service, but offer the following general guidance on the application of Article 81:

- If the *pool members are not actual or potential competitors*, then there is no restriction on competition and the pool is not caught by Article 81. The Guidelines give as an example a pool which

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is set up for the purpose of tendering for contracts of affreightment ("COAs") for which the participants could not bid successfully or which they could not carry out on their own. The Guidelines state that such a pool could still occasionally carry other cargo representing a small part of the overall volume without being caught by Article 81. This is a change in the final Guidelines compared to the draft which referred to pools having COAs as their "sole purpose".

- The Guidelines state that pools whose activity does not influence the relevant parameters of competition because they are of *minor importance* are not caught by Article 81(1) and refer to the Commission Notice on agreements of minor importance (de minimis notice). This is a change from the draft Guidelines which said that the agreement will be caught by 81(1), irrespective of market share, if it "contains provisions regarding joint price fixing and joint marketing". The de minimis notice states that if the aggregate market share of the parties does not exceed 10% on the relevant market, then the agreement is not caught by Article 81(1), except if it contains any hardcore restrictions, i.e. agreements which have as their object the fixing of prices, limitation of output or sales or allocation of markets or customers. There is a further change in section 67 of the final Guidelines compared to the draft which stated that agreements between competitors "involving price fixing" will always fall under Article 81(1) irrespective of the market power of the parties. The final version on the other hand states that pool agreements "*limited to joint selling*" will generally always be caught. It may be argued that a normal pool may have fixing of prices as a part of its object, but we believe that the changes in the final Maritime Guidelines show that the Commission is not likely to focus its attention on normal pools with a market share below 10% in the relevant market. The Guidelines contain guidance on how to define relevant markets.
- Even if the pool is caught by Article 81(1), it may be *exempted under Article 81(3)* if the pool essentially brings about efficiency gains, for example through increased capacity utilisation, better availability and flexibility of the services, reduction of trading risks, better integrated distribution functions and creation of economies of scales, which the consumers receive a fair share of and which cannot be achieved in less restrictive ways. It is up to the shipping companies involved in the pool to demonstrate that the pool falls within the exemption. The final Guidelines provide some more guidance on this exemption than the draft version, but it may prove difficult for shipping companies to obtain 100% certainty through this self-assessment.

### FULL FUNCTION JOINT VENTURE AS AN ALTERNATIVE FOR SHIPPING POOLS

If, following an assessment in accordance with the above, shipping companies participating in a pool are concerned that the pool is not acceptable under Article 81, the alternative could be to reduce the number of participants in order to reduce the market share of the pool or to dissolve the pool entirely. There is, however, an alternative which could allow the parties to continue to cooperate in the commercial operation of their vessels, namely by making the necessary structural changes in order to convert the pool into a *full-function joint venture* and chartering their vessels to such joint venture company which will operate the vessels commercially in the market. If the parties' revenues exceed certain thresholds, the joint venture must be notified for approval to the Commission under the EC Merger Regulation (Council Regulation (EC) No 139/2004) or to national authorities under applicable national merger control rules. The participating companies would thereby obtain certainty as to the joint venture's compliance with the applicable competition law.

In a full-function joint venture the parents must have *joint control* over the JV's strategic decisions. This will be the case where the parent companies have equal voting rights in the decision-making bodies of the joint venture or if minority participants are given veto rights over decisions pertaining to the strategic commercial behaviour of the joint venture. The veto rights must go beyond the rights normally given to minority shareholders in order to protect their financial interests. Veto rights conferring control typically

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include decisions on issues such as the annual budget, the business plan containing the aims of the company and measures to be taken in order to achieve those aims, major investments, appointment of senior management or rights that are particularly important in relation to the market concerned.

The joint venture must further have *its own management* dedicated to its day-to-day operations and other personnel resources. The personnel do not have to be employed by the joint venture company itself. An operational agreement with a third party may be sufficient if that is standard practice in the relevant industry. Secondment of staff from the parent companies could also be acceptable for a start-up period, but the joint venture must be free to employ personnel on its own.

The joint venture needs to have *access to sufficient resources*, including finance and assets necessary for its business, and (after a transitory period) not be dependent on the owners with respect to the resources, e.g. with respect to access to vessels for the chartering activities of the joint venture. The joint venture should, after such start-up period, not rely solely on chartering vessels from its parent companies and must be free to charter-in vessels from third parties. Further, chartering of vessels and other business between the joint venture and its parents must, at least after the start-up period, be on arm's length basis. This will in our view mean that the charter rate cannot be on an open rate basis giving the vessel a share of the total profits of the joint venture based on the vessel's earning capacity.

However, this does not prevent the profits of the joint venture, after time charter hire has been paid out to the vessel owners, to be distributed on the basis of the earning capacity of the vessels contributed to the joint venture if this is in compliance with the corporate law applying to the joint venture. Norwegian internal partnerships ("indre selskap") may be a favourable corporate vehicle for a shipping full function joint venture, due to the flexibility that applies to internal partnerships under Norwegian law. The capital commitments of the owners do not have to be paid in on start-up of operations and the profits may be distributed regularly according to the earning potentials of the vessels that are chartered to the company, provided sufficient financial resources are retained in the company for working capital needs and in order to cover its liabilities and otherwise as necessary to comply with the requirement to have sufficient financial resources. We have recently assisted ship-owners in creating a full function joint venture based on this model and have obtained clearance from applicable competition authorities for this structure.

## LINER SHIPPING

The Maritime Guidelines contain detailed guidance on *information exchanges* between competitors in liner shipping. This issue will not be discussed further in this briefing.

Following the repeal of the block exemption for liner *conferences* with effect from 18 October 2008, it is now only liner *consortia* that still benefit from a block exemption. This block exemption is set to expire on 25 April 2010 and the Commission on 21 October 2008 issued a new draft block exemption regulation for liner shipping consortia which is intended to replace the existing block exemption and which is intended to apply for a further 5 year period until April 2015. Some of the changes in the new draft are:

- The exempted market share has been lowered from 35 to 30%.
- If the market share increases above the threshold, the exemption will continue to apply for a period of 6 months following the end of the calendar year, which shall be extended to 12 months if the market share limit is exceeded due to the withdrawal from the market of a carrier which is not a member of the consortium. The latter is a new useful element of flexibility.
- The draft contains a new requirement regarding aggregation of market shares. If a carrier is operating both individually and within a consortium on the same relevant market or if a carrier is a member of more than one consortium operating in the same relevant market, then the market shares of such carriers and consortia are to be aggregated. The Commission's argumentation is that there is a

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possibility for coordination of capacity allocation, marketing activities, sailing schedules or port calls etc. amongst such carriers/consortia through information spill-over. This aggregation of market shares has received criticism from market participants and there will probably be a focus on this in the hearing process.

The draft block exemption can be found at the following website:

<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/#3>. The Commission has invited interested parties to submit their comments by 21 November 2008.

## OUR SERVICES

We would be pleased to assist shipping companies in assessing whether their current or new proposed pool agreements or consortia agreements comply with EC competition law and if necessary assist in establishing alternative structures.

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