

## **The European Voice of Freight Logistics and Customs Representatives**

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Brussels, 8<sup>th</sup> November 2007

### **RE: European Commission's draft guidelines on competition in maritime transport services**

#### **PREAMBLE**

CLECAT, representing freight forwarders, logistic service providers and Customs agents has been closely involved in the discussions on the repeal of Regulation 4056/86, as well as on the content of the upcoming guidelines on competition in maritime transport services.

In spite of being generally in favour of a liberalised liner shipping market and therefore somewhat sceptical about what the guidelines would bring, CLECAT has been willing to cooperate in process of elaborating the guidelines. In particular, this cooperation took the form of two official positions:

- General comments on the ELAA Revised Proposal (11<sup>th</sup> September 2006)<sup>1</sup>
- Reply to the European Commission's issues paper (25<sup>th</sup> October 2006)<sup>2</sup>

In the light of the above, CLECAT understood the action of repealing the block exemption granted to liner shipping industry as an action intended to dispose of an outdated anomaly in market rules, an action which stemmed from the Commission's careful examination of the unmistakable changes that differentiate today's maritime services from the conditions which were observed in the last century.

After an initial examination of the draft guidelines CLECAT found itself confronted with a dichotomy: on the one hand the guidelines are articulated and worth detailed comment (which will follow), on the other hand it is impossible not to observe that the proposed guidelines are far from reaching the most obvious result they would be required to achieve, that is to say to serve market forces in their effort to restore full and fair market conditions in EU liner shipping business.

Even an immediate appraisal of the envisaged provisions is leaving the reader with the unquestionable feeling that a number of these provisions serve only the purpose of allowing the liner shipping industry to continue in the practice of adopting their commercial strategies collectively. In turn, the level of commercially useful information allowed for collective consultation is such that it might work anti-cyclically against normal market dynamics even at an individually itemised level, when assisted by collectively prepared quantitative data. Another argument that would suggest that the market may be better served by no guidelines at all than

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<sup>1</sup> <http://www.clecat.org/dmdocuments/PP014OMAMa060911Reg4056ELAAprop.pdf>

<sup>2</sup> <http://www.clecat.org/dmdocuments/PP015OMAMa061025Reg4056ECIssuesPaper.pdf>

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by having them is that the guidelines could be misused as an instrument for market segmentation.

In light of the above, one could be faced with a fundamental question: why do EU markets need guidelines to perform the simplest function expected from them, that is to say: individually agreeing on service prices, as dictated by the law of supply and demand, in total freedom of contract and competition. A second question, no less important, is quite legitimately coming to the fore, what kind of upside do shippers find in the adoption of these guidelines? Whilst they seem to take good care of protecting the interests of the liners, they do not seem to even consider the fact that in principle they should serve two opposite interests and be mindful of the shippers' interests as well. Only liners' interests seem well served, shippers' and contractual carriers' interests appear to be almost entirely forgotten or not sufficiently developed.

Despite these fundamental observations, which could put in question the very need of guidelines, CLECAT will undertake a detailed examination of the provisions contained therein. The following comments on the European Commission's draft guidelines are based on the official positions that were submitted to the Commission over a period of time.

Finally, in the event EU trade will have to eventually face the adoption of such guidelines, CLECAT will only be able to take a firm stand on them after a brief initial trial period. Practice will tell us whether they produced any benefit for trade in general, lead to abuses or – as most probable – just prove unnecessary, because market forces will prevail in the end. Their adoption in their present format may however contribute to further delaying the progress of the market at the expense of EU competitiveness.

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## **COMMENTS ON THE DRAFT GUIDELINES**

### **Duration**

The draft provides for an initial period of application of 5 years. This would mean that the guidelines would be applied for at least 5 years and may then be renewed and extended.

CLECAT has always made clear that, if necessary at all, in order to achieve the aim of 'smooth transition' towards full competition, the guidelines ought to be of a brief, temporary nature and not just serve as a substitute to current arrangements. If the guidelines are to be consistent with this aim, their duration should be restricted to a maximum of 2 years with the possibility of one renewal only, if agreed by all parties.

### **Market structure**

#### ***Level of concentration***

The draft guidelines indicate that in highly concentrated oligopolistic markets, market restrictive effects are more likely to occur. In its 2006 Issues Paper, the European Commission highlighted the fact that, despite ELAA claims that market concentration in liner shipping is low, when one looks at the 9 biggest EU liner shipping trades, their services will remain concentrated, even after the abolition of liner shipping conferences. Such concentration covers the majority of the supply.

Given this observation, one could argue that it is reasonable to presume that the exchange of information in the liner shipping industry is likely to have market restrictive effects. Therefore, there should be a higher *transparency test*, than would normally prevail, for any information exchange system allowed to exist in the future.

### ***Structure of the supply and demand***

The draft guidelines include 'number of competing operators' as one of the factors to consider the potential effects of an information exchange system on competition. One could observe that mergers and acquisitions in the liner shipping sector have had the effect of constantly diminishing the number of operators. Such an element, in combination with the possibility of exchanging information, suggests the risk of collusion is magnified by the limited number of interested actors.

## **Characteristics of the information exchanged**

### ***Aggregation***

Notwithstanding the lack of evidence that exchanging information among carriers would bring benefits to all parties above those obtainable from ordinarily available statistics and studies, according to the draft guidelines, exchange of appropriately aggregated information is in principle authorised.

The level of aggregation should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify their competitors' strategies.

The ELAA revised proposal offered to entrust an independent group of data analysts to deal with highly sensitive commercial data. CLECAT believes that a database run or paid for by ELAA would automatically generate suspicions about its neutrality. It was therefore proposed to have the database managed by an independent body, such as the European Commission, Eurostat or the Baltic Exchange. CLECAT would like to restate this proposal, which seems the only way to ensure an independent management of the information. Should this proposal not find a positive echo in the guidelines, the latter should however foresee some mechanism to control the actual independence of the group of data analysts entrusted by the lines by mandating the presence of users in the management of the group.

### ***Age of the data***

The draft guidelines state that appropriately aggregated data could be exchanged, even if it is recent. CLECAT believes that the level of aggregation is not a sufficient criterion to allow the exchange of recent data, all the more when the number of actors is fairly limited. For instance, the ELAA Revised Proposal<sup>3</sup> foresees an exchange of 8-week old data on capacity utilisation. This would have an impact on customers' ability to extract 'last-minute' lower prices, in the event a ship is about to sail with available space.

On the other hand, exchange of future data is believed to be particularly problematic, especially when it relates to prices or output. CLECAT can only agree with this assumption, since the exchange of any future data entails the risk of adjustment of commercial strategies between competitors. It is very difficult to understand how future data would be used without implying capacity adjustments and in the end restrictive commercial strategy, even at individual level.

Finally, exchange of capacity forecasts not based on publicly available data is considered just as likely to be problematic, even in aggregate form. CLECAT also supports this statement. In particular, supply forecast reports should be strictly prohibited, as they would make it possible for liner shipping carriers to exchange and discuss their commercial strategies in terms of capacity deployment.

### ***Frequency of the exchange***

According to the draft guidelines, the more frequently the data is exchanged, the greater the impact on competition may be.

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<sup>3</sup> [http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/rev\\_elaa\\_prop.pdf](http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/rev_elaa_prop.pdf)

In order to put this statement into perspective, CLECAT would like to point out that the ELAA Revised Proposal envisages the publication of a monthly report with volume and utilisation figures and a price index. In addition to other elements, this high frequency of information exchange would strengthen the presumption of restrictive effects on competition.

As a mere intellectual exercise one would be tempted to examine in which other areas of business undertakings enjoy the possibility to freely exchange commercially sensitive parameters without their behaviour being questioned by competition law. In freight forwarding services this is not even thinkable.

### ***Price index***

The draft guidelines consider that a price index would normally be allowed as long as it is based on appropriately aggregated data.

CLECAT has been invariably against any reference to prices simply because it may lead to similar results as 'conference tariffs' indications, whereas the Commission's Regulation repealing Regulation 4056/86 expressly excludes such possibility. The ELAA Revised Proposal envisages a price index to be published monthly (even though it would cover a quarter with 3 months delay). Such system would impact on competition in a way or another, especially considering the time scale of some negotiations, which often exceed the reference period.

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## **CONCLUSION**

The objective of the guidelines is to smooth the *transition* to a liberalised liner shipping market. It is this objective that must be kept in mind when assessing the content of the guidelines.

CLECAT feels that the 'transition' aspect is somewhat undermined by the duration foreseen for the applicability of the guidelines: 5 years minimum with indefinite possibilities of renewal defeat the purpose. It may also send the wrong signal to the trade community whereas the conditions for keeping Regulation 4056/86 have disappeared a long time ago already. Finally, without a clear deadline, there is no incentive for the liner shipping sector to start embracing liberalisation sooner rather than later. In the unwanted event it were not possible to embrace the most obvious solution, i.e. to resort to market negotiations in full and fair competition, CLECAT's proposal is to limit the applicability of guidelines to 2 years, renewable once only, if such decision is welcomed by all parties.

The second element that may weaken the idea of a transition is related to the content of the guidelines. CLECAT welcomes the fact that exchange of future data, such as capacity forecasts, would be prohibited. However, our concerns remain as regards recent data, even though the latter were appropriately aggregated. Indeed, the frequency of exchange, as planned in the ELAA Revised Proposal, the structure of the liner shipping market and the fact that such data would be managed by an entity paid by the suppliers of information would necessarily cast a shadow on the confidence that the market could have in the system.

A less frequent (i.e. yearly) exchange together with some guarantees on the independence of the entity managing the data (European Commission, Eurostat or Baltic Exchange) therefore seems necessary to win the approval of liners' customers.