

The European Voice of Freight Logistics and Customs Representatives

Brussels, October 25th 2006

RE: Upcoming guidelines on competition in maritime transport - European Commission's Issues Paper

CLECAT, representing freight forwarders, logistic service providers and Customs agents in Europe, welcomes the opportunity to provide further comments on the content of the revised ELAA proposal and the issues it raises in terms of compatibility with European competition rules. We would like to point out that this proposal is no more than one of the industry views, even though it stems from a group representing 90% of the supply of liner shipping services.

On September 11th 2006, CLECAT expressed some general comments on the ELAA revised proposal. Although generally in favour of a liberalised liner shipping market and therefore somewhat sceptical about what the guidelines would bring, forwarders are willing to cooperate in order to make sure that every stakeholder would impartially benefit from what the guidelines would offer.

In this respect, CLECAT explained that it will only be able to take a firm stand on the guidelines after an initial period of application. Indeed, the guidelines would be of a general nature and only practice would tell us whether, they benefited liner shipping industry as well as users, led to abuses, or just proved unnecessary.

This said, and based on its previous positions, CLECAT would like to comment on each of the elements raised in the Issues Paper.

I- EXCHANGE OF INFORMATION

The structure of the market in liner shipping

Concentration & operational links

The Issues Paper shows that although the ELAA claims that market concentration in liner shipping is low, when one looks at the 9 biggest EU liner shipping trades, their services will all remain concentrated (at various levels), even after the abolition of liner shipping conferences. For CLECAT, this factor alone would suggest the entire exercise of guidelines is unnecessary, because of the structure of the supply.

Price transparency

Because of individual confidential contracts, conferences have been less and less successful in enforcing conferences prices. On the other hand, price-fixing of charges and surcharges is still effective in liner shipping. It is not uncommon to see that the share of surcharges and ancillaries has increased over the years and has now become a sizeable part of the total bill.

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Conclusions as regards the market structure and conduct

It is easy to observe that the protection offered by 4058/86 was real and not fictitious and carriers have defended its principles fiercely. This shows 4056/86 does protect enormous economic interests that fail to be unleashed into the market. It protects the interests of few rather than serving the interest of the entire European trading community.

CLECAT agrees with the Commission's findings when analysing the structure of the liner shipping market, and the conclusions drawn on the basis of this analysis. This fairly high level of "collusion facilitation" must therefore be kept in mind when analysing every aspect of the ELAA proposal, all the more when one considers that today conferences have on average a market share of 60% whereas the proposed ELAA scheme has potentially 80% to 100% market coverage.

CLECAT therefore believes that each element of the ELAA proposal must be assessed with the same approach, by asking a simple question: is the risk of collusion outweighed by the benefits granted to the entire trading community?

II- ASSESSMENT OF THE REVISED ELAA PROPOSAL

A- Elements that the European Commission consider potentially incompatible with EU competition law

Supply forecast report

This proposal would make it possible for liner shipping carriers to exchange and discuss their future commercial strategies in terms of capacity deployment. When one considers the impact of capacity on price levels, CLECAT believes that the risk of collusion would not only be unavoidable but actually enhanced. The EATA and TAA examples unfortunately show the consequences of such risk.

Therefore, and although in theory forwarders could find the information of some use for planning purposes, the risk of capacity manipulation inherent in the proposal makes it unacceptable for CLECAT. The adoption of such measures could potentially "regulate" the missing 40% of the market, which is now free.

Carrier only consultation

CLECAT appreciates that in principle companies in the liner shipping industry are perfectly entitled to meet, whether on an ad hoc basis or in the framework of a trade association. It is then their responsibility to make sure that their discussions remain within the boundaries of EU competition law. However, it is a different matter to institutionalise such meetings through a blessing in Commission's guidelines. Indeed, CLECAT believes that there is a high risk that such meetings give rise to collusive practices. Therefore CLECAT is opposed to the idea of the guidelines granting approval for carrier-only meetings.

Currency adjustment factors

From a general point of view, CLECAT shares the Commission's opinion that currency fluctuations are a normal commercial risk. In this regard, we note that other industry sectors do not seek specific treatment for this risk, which can be dealt with on the financial market, if one feels it is necessary.

From a more specific point of view, it is to be noted that information on currency fluctuation is already publicly available. CLECAT does therefore not see any added value in additional information on the fluctuation of the US\$ compared to the average percentage attributed to each

currency per TEU on a trade. On the contrary, we tend to share the Commission's concern that this average index would sooner or later become an "alignment index" that would hinder competition on this part of the price. In a paradox, diverging supplementary CAF and freight rate elements may come to help each other in producing a finally aligned price level, which would be protected by its inside diversity.

B- Elements that the European Commission consider potentially compatible with EU competition rules

Ancillary and other surcharges (THC, BAF)

CLECAT would like to restate its position according to which all elements of ocean freight should sooner or later concur and be included in freight rates. It is questionable whether the publication of THC rates might help in setting the level of terminal charges between carriers and terminal operators and whether this would lead to collusion or not. In principle, if nothing is said, any price would fall within the mechanism of supply and demand.

Volume data

As expressed in its previous position, CLECAT believes that such data could prove useful. However, one has to bear in mind that such information is already available, at least on a port-to-region level. Since the absence of such data on a port-to-port basis has obviously not prevented liner shipping carriers from operating efficiently, we fail to see the benefit of such system. In addition, we have concerns about the preservation of confidentiality and we do not think that the proposed safeguards are sufficient to prevent the risk of disaggregation.

CLECAT fails to see why this kind of practice should be protected or enhanced. If carriers feel this kind of information is necessary for their operations it is their prerogative to set the system up, while being vigilant that it NEVER interferes with the mechanism of supply and demand.

Capacity (utilisation) data

Any system that protects carriers from the risk of running empty would impact on the ability to extract "last minute" lower prices. Deregulation in the airfreight business has produced significant advantages for clients, which are not observed on sea freight yet. In absence of a protecting mechanism, carriers may decide to run empty anyway or to attract cargo by lowering prices one or two weeks before sailing. This would be a marketing strategy and different companies may react differently. The inherent risk is that weaker actors might not manage to sustain the hard line. Other carriers and freight forwarders have never enjoyed this advantage, which makes it difficult to evaluate its effect in advance.

This being said, carriers might find it advantageous to employ marketing professionals who will suggest the best strategy to protect their commercial interest on the market, rather than seeking the same protection in legal advice.

Price index

CLECAT made clear that it strongly opposed to any discussion on or reference to prices. The proposed price index entails the risk of similar results to "conference tariffs" whereas the Commission's proposal for repealing Regulation 4056/86 expressly excludes the possibility of price fixing. As it stands, the ELAA proposal is therefore unacceptable.

CLECAT agrees that increasing the delay of data and reducing the frequency would reduce the possibility of a collusive agreement. This risk would however not disappear completely, especially considering the time scale of some important negotiations. Such risk will remain as long as references to prices are allowed in one way or the other. CLECAT would advocate a total ban of any reference to prices if the Commission is to be consistent with its decision to exclude the possibility of price fixing.

There is one element to be considered: transparency in prices between private enterprises is an illusion and looks like a relic of programmed economy. Transparency is needed as and if monopolies or dominant positions exist and are allowed to exist. The market is the best watcher of price transparency if it is allowed to unleash its potential without constraints.

Independent data service

The proposal to entrust an independent group of data analysts to deal with highly sensitive commercial data is a minimum prerequisite. CLECAT is of the opinion that this exercise should be 100% transparent, if it ever comes into being. For this reason, in order to ensure it is totally independent, it is advisable that such database be managed by an independent body e.g. the EU Commission or Eurostat. A database run or paid by ELAA would automatically generate suspicions on its impartiality.

Consultations between all stakeholders in trade fora

The conference system provided for such consultation in the beginning. However, over the years the absence of a legal obligation progressively diminished the significance of this consultation, at least for shippers.

Although the proposal for consultations between all stakeholders in trade fora does not raise competition concerns, CLECAT would stick to its opinion: CLECAT doubts that the discussion and interpretation of statistics and other data would prove sufficient justification for the existence of such associations or whether the time and money saved in leaving this idea aside would not be a better alternative.

Besides, a number of initiatives when shippers, carriers and other users come under same roof are already in existence, e.g. MIF¹. These meetings are already dealing with issues of interest for all parties, which are not connected with the prices and/or commercial activities that should remain in the scope of activity of individual enterprises. These gatherings have offered quite some opportunity to exchange views and are already part of our business community. We do not see the need for a multiplication of the discussion tables.

Liner shipping association

CLECAT sees no reason to oppose the creation of a liner shipping association, since every trade sector has the right to set up its own association. It is possible for associations to work proficiently and satisfactorily for their Members without infringement of competition law.

CONCLUSION

CLECAT can only repeat its previous conviction: there is no need to continue protecting liners' activities in the EU and a fully fledged embracing of market strategies can only benefit the entire trading community. This being said, our sector has survived in a protected environment and could continue doing so, if the community feels some kind of protection has to be maintained, which is ultimately the aim of the ELAA proposal.

We are however critical to this alternative. We have stated that we do not see the need to establish guidelines and to provide a lengthy (eternal?) phasing out of the block exemption. All companies, carriers' and shippers', will have an advantage in adjusting to a new strategy as soon as possible without finding themselves obliged to adapt to a series of uncertain and contradicting business practices. In other words: the sooner we end this exercise, the better it is for the trading community.

¹ Maritime Industries Forum – see <http://www.mif-eu.org/>