CLECAT
european association for forwarding, transport, logistic and customs services

Position Paper

The European Voice of Freight Logistics and Customs Representatives

Brussels, 18th of November 2008

RE: Draft Commission Regulation on the application of Article 81 (3) of the consortia Treaty

CLECAT would like to thank the European Commission for the opportunity to comment on the draft Commission regulation on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

CLECAT has already been actively involved during all stages of the procedure. In 2005 CLECAT has produced a policy paper (PP006OMAma050222Consortia) on the proposed extension of Regulation (EC) No 823/2000. We also answered to the consultation on liner consortia block exemption at the end of last year (pp022omama071218consconsortia). We have now evaluated the new draft, which was published in the Official Journal on the 20th of October, and kindly ask you to take into account our position.

CLECAT in principle welcomes the Commission's draft Regulation. We hope that the benefits will outweigh the difficulties that might be encountered and that were seen within the old Regulation on the application of Article 81 (3). However we should also like to acknowledge that in our experience some competition exists between members of a consortium, so from a general point of view there is no substantial gain from the services offered by a consortium compared with those offered by an individual carrier, once the market conditions are settled. In this light the nature of the consortium may appear to be often transitional rather than permanent.

From a more general point of view we believe that the very nature of a consortium would benefit from a clearer definition in the proposed Regulation. The draft Regulation stipulates that *'consortium' means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to one or more trades, and the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements.*

By utilising such a broad-scope definition the Regulation does not discuss the "business requirement" nor the nature of the consortium, whilst it merely takes account of its existence. In our view a consortium is a peculiar form of business association that responds to a precise business requirement (e.g. joining forces to open a new market where single operators would not have sufficient strength, join forces on markets where the frequency of calls would be below a commercially viable level, etc.). In addition one may wish to observe, under the above

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definition, that consortia may exist, thus benefit from a certain degree of exemption, without a minimum requirement of information to third parties. These different aspects might be dealt with by establishing the requirement for the consortium to effectively publish, within the territory of the EU, the scope, nature and duration of the consortium agreement.

Comments on the draft Regulation

It is CLECAT's impression that the shipping lines were and still are extremely reluctant to accept the reality of operating within a fully competitive business environment. The mention that the activities such as 'price fixing', 'freight rate' agreements, etc. syndrome are not included in the consortia block exemption (indent 6 of the preamble) must be kept without fail, in order to deter possible temptations to regard consortia as a way to circumvent competition law. We would like to stress the importance that any benefits that the lines will draw from a consortium, have to be given to a great extent to the parties using the services of the consortium, as it is also referenced in the preamble (indent 7).

CLECAT has some concerns regarding Article 7 (*Obligations to consult transport users*). We are all too aware that shipping lines are traditionally reluctant to consult with users. The fact that liners fiercely defended the liners' only consultation exemption is symptomatic of their less than enthusiastic acceptance of bi-lateral equitable negotiations. The wording of Article 7 is fine when two parties willingly agree to a process. However, in reality, liners may delay for months or even years the moment when an issue is brought to the attention of the EC, according to Art 7 paragraph 5(c). No doubt the concept of Art 7 has in effect been drafted and/or agreed by the liners with a view that this provision may hardly come into fruition. Art 7 (paragraph 2) mentions "*important matters*". This is a very vague term, which is open for interpretation by the users. For example, who decides what an important matter is? This is just one example of what we feel is the 'grey' EC draft policy on Chapter IV – *Obligations* that may ultimately allow lines to hide in the fog of poor wording and we feel, will prove to be an ineffective set of so-called obligations on the lines. In order to overcome the risk we propose that the following language is added to article 7, paragraph 5(c):
[It may be brought to the Commission's attention by either side]: the proposal which is the object of the consultation would then be suspended until a common conclusion is reached;

We remain at your disposal for any further information or clarification you may need, and would welcome the possibility to discuss the issue further with you in the near future.

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