

9 November 2007

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

With reference to the Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services - hereinafter referred to as the "Draft Guidelines", the Japanese Shipowners' Association (JSA) respectfully submits its comments as follows:

1. General statement

The shipping business has a unique character. A shipping company may transport cargoes on their ships or may charter out its ships to other shipping companies who will then transport them: i.e. shipping companies are not always natural competitors; quite frequently they may become customers of other shipping companies.

The types of contracts that shipping companies make with other shipping companies may be varied: Bill of Lading, Voyage Charter (V/C), Periodical Time Charter, Trip Time Charter, Space Charter, Bareboat Charter, Pool Agreement, Consortium Agreement and their combinations. Charter markets such as Time Charter, V/C, Spot and Contract of Affreightment are, to some extent, interrelated.

These situations show that the nature of shipping contracts and the relationships between shipping companies are rather complex. Given the context of the EU competition law, it is understandable that the Draft Guidelines that the actual or potential effects of an information exchange must be considered on a case-by-case basis, and that each pool must also be assessed on a case-by-case basis. However, a case-by-case based assessment creates serious uncertainty and ambiguity, resulting in shipping companies being unable to make self assessments regarding their information exchange and formation of/participation in horizontal agreements like pool agreements.

In this regard, the JSA respectfully requests that:

- the Guidelines, which are scheduled to be published sometime before October 2008, should provide clearer criteria for lawful information exchanges and horizontal agreements, by which shipping companies can easily self-assess their information exchanges and/or the horizontal agreements in which they will participate;
- that the Commission should set up a prior consultation mechanism where shipping companies could, when needed, ask the Commission whether certain future activities of shipping companies are considered to be lawful or not.

## 2. Liner shipping

The JSA welcomes the removal of the unwarranted reference to collusion that appeared in the Issues Paper of 29 September 2006. As mentioned in our previous submission in October 2006, the liner shipping market is highly competitive. Furthermore, carriers have complied with the laws and regulations in the past, and will continue to do so in the future.

The JSA strongly believes that the information exchange system is essential for the management of the industry. It ensures accurate forecasts of supply and demand, which is truly helpful to shipping companies in avoiding unproductive investment and service decisions. By promoting better decision making, we believe it is also beneficial for shippers. It is therefore certainly welcomed that the Commission grants information exchange between carriers after the repeal of Regulation 4056/86. However, there is still much uncertainty in the Draft Guidelines that is open to interpretation, and this could leave shipping companies to be at risk of breaching the rules through no fault of their own. For instance, the Draft Guidelines set a number of parameters, such as market structure, type/characteristics/frequency of information exchanged and aggregation of data. However, the Draft Guidelines do not specifically state how these factors are to be weighed. Instead, it is mentioned that the actual or potential effects of an information exchange to the market are to be considered on a case-by-case basis. Furthermore, although the Draft Guidelines stipulate that exchanges of historic data on volume and capacity are unlikely to restrict competition and that the historic or recent nature of the information should be assessed with some flexibility, we are uncertain what sort of information could be interpreted by the Commission as "historic".

The JSA therefore fully endorses the comments submitted by the European Liner Affairs Association (ELAA) that the European Commission is required to clarify the criteria, under which information exchange is allowed, in the Guidelines.

## 3. Tramp shipping

The JSA recognises that tramp pools are set up to allow participants to provide service levels that their major customers increasingly demand and that they also contribute to achieve more effective fleet deployment for many years. Tramp pools are operated in an environment of supply and demand where contracts are concluded based on tenders, rates are therefore driven to a large extent by a spot market and brokers play an important role. Customers enter into contracts with pools with due recognition that the pool system is a kind

of joint venture which is definitely different from cartels. The fact that – to JSA's knowledge – there have not been complaints from charterers bolsters the view that tramp pools are not only meeting the needs and requirements of charterers but are also in compliance with the EC law. Pool agreements usually involve companies combining assets and services for a specified period of time and are not permanent, as is the case in merged companies. The regulatory conditions for pool agreements should be more relaxed than for mergers or full function joint ventures. Pools should be exempted under Article 81(3) if they improve transport services or promote technical/economic efficiencies.

The JSA welcomes that the Draft Guidelines consider that tramp shipping pools are per se not in conflict with the EC competition law, whilst recognising that each pool must be assessed on a case-by-case basis. As the Draft Guidelines lack clear guidance, in particular on carrying out a self-assessment of lawful tramp pools under Article 81(3), shipping companies may hesitate to set up or participate in a pool which brings about benefits of economic efficiency. The JSA therefore requests the Commission to lay down more specific criteria on Article 81(3) with regard to shipping. The clarity of the Guidelines on joint bidding would be helpful for shipping companies in constituting a consortium for bidding or tendering a project.

The JSA believes that any reference to “price fixing” as a characteristic of pool functioning (and hence as a hardcore restriction of competition) cannot be sustained in the Guidelines as the agreement of the price between the pool manager and the customer is an inherent part of the service being offered.

Finally, the JSA is of the opinion that the Guidelines on the information exchange are also indicative for non-liner shipping as clear criteria of lawful information would be helpful to those engaged in all sectors of the shipping industry, both in liner and tramp business.

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