

RESPONSE TO THE ELAA PROPOSAL FOR A NEW REGULATORY FRAMEWORK FOR THE LINER SHIPPING INDUSTRY – ARTICLE 81 EC ASSESSMENT, 10 MARCH 2005

ESC Executive Summary

1. This submission is made by the European Shippers Council (ESC) on behalf of its members in response to the ELAA's Proposal for a New Regulatory Framework for the Liner Shipping Industry – Article 81 EC Assessment (10 March 2005). For the reasons set out below in this memorandum, the ESC submits that the purpose of the ELAA proposed information exchange system reveals that regardless of the nature of the information exchanged, the risk of collusion between the parties to such an agreement and, therefore, the application of Article 81 may not be excluded or excepted. In particular, the ELAA's Article 81 Assessment of their proposed information exchange system and Trade Committee Discussion agreements has not made a convincing case for the introduction of a new block exemption regulation.
 - (1) **The Consortia Regulation Is Sufficient To Guarantee A Sustainable Supply Of Shipping Services**
2. There is no need to replace the liner conference block exemption regulation when it is repealed. The consortia block exemption regulation already provides a much more generous exemption to horizontal co-operation agreements between competing carriers than the 2000 specialisation block exemption regulation available to them and all other industry sectors for the purpose of joint production and joint marketing.
3. The only important restriction of competition permitted by the liner conference block exemption under Regulation 4056/86 which is not covered by the consortia block exemption under Regulation 611/2005 is price fixing. The ELAA says the carriers do not want the Trade Committees to use the results of the information exchange system to fix prices, so there can be no justification for any further restrictions of competition than those permitted by the consortia regulation.
4. In particular, the ELAA says that the Trade Committees only will discuss individual lines' deployment and investment decisions to achieve stability of supply. This is not necessary and will undermine the sustainable supply of shipping services that has been provided through consortia and alliances ever since the first consortia block exemption regulation was adopted in 1995. The Commission expressly recognised from the outset that an essential feature inherent in consortia is their ability to make capacity adjustments (recital 7).
 - (2) **The ELAA Proposal Has A Collusive Objective**
5. The ELAA summarises its proposal in the executive summary of the beginning of its Article 81 EC Assessment (see pages 4 and 5). It makes it absolutely clear that the main objective of its proposal is the same as Council Regulation 4056/86¹ which the Commission proposes to repeal:

"The essential welfare benefit generated by the current regime is the stability of supply, defined as the matching of supply to demand at all times, which seeks to ensure a relatively stable environment for an inherently unstable industry, as per the main objective of Regulation 4056/86.... Stability of supply was (and remains) a valid objective for Regulation in this industry."
6. It is equally clear that the objective of the ELAA in its proposal is to regulate the supply of international shipping services (and therefore the price of such services) through "capacity planning across the industry, in the short term as well as in the long term" (page 4).

¹ See, Regulation 4056/86, recital 8.

7. The aim of the ELAA proposal, therefore, is based on a discredited economic rationale which depends on the totally unrealistic picture painted of the shipping industry by the ELAA as necessitating "regulatory intervention" because of the "chronic instability" constituting "market failure" all of which warrant "continued sector – specific treatment to ensure the stability of supply" (page 4).
8. The Information Exchange System proposed by the ELAA to achieve this aim of "stability of supply" is said to constitute two items:

"The exchange of aggregated data via the Independent Data Service, and the exchange of views in the Trade Committee Meetings" (Page 4).
9. Consistent with the aim of the ELAA proposal being the same as the main objective of Council Regulation 4056/86, namely the stability of supply, the ELAA claims to have determined "the core elements of the current regime that must be preserved to maintain stability of supply". (Page 5). It is clear, therefore, that the ELAA proposal for an Information Exchange System is intended to maintain the *status quo* with regard to stability of supply without express price fixing but relying on the previous approach to information exchange that sustained the liner conference system, albeit seeking to improve the quality of the information exchanged under the new system:
10. The ELAA has made it clear that the liner conference exchange of data system has not enabled the lines to forecast supply and demand successfully. However, the ELAA says that it wants to maintain the *status quo* in the sense of improving a continued information exchange system which would provide the former conference lines with similar (but even more accurate) data than the conference information exchange system itself.
11. The flaw (legally and economically) in the ELAA information exchange system's objective is that by seeking to maintain the *status quo* regarding the information available to lines for the purpose of making individual capacity and investment decisions, they have overlooked the fact that, in reality, the objective of the conference information exchange system that they seek to maintain was stability of supply through rate stability (see, Recital 8, Regulation 4056/86).

(3) **The ELAA Proposal Infringes Article 81(1)**

12. The decisions of the European Court and Commission have established that:
 - (a) Where regular consultation between competitors following formal termination of a cartel agreement between them may constitute or give rise to a continuation in practice of the cartel activities, especially where the consultation is designed to ensure that the *status quo* is maintained, Article 81 will be infringed because of the obvious risk of tacit collusion following the previous period of express collusion. The key element is whether or not the element of uncertainty and secrecy between competitors has been eliminated;
 - (b) Even where the exchange of certain information is permissible, the undertakings concerned should not meet to discuss the significance of the information exchanged or the possible reaction of the industry or of individual undertakings to that information (which the ELAA accepts in principle will infringe Article 8(1));
 - (c) Exchange of information on investment intentions has been considered capable of infringing Article 81(1);
 - (d) The use of price data to influence prices which would otherwise be freely determined on an individual basis, through a price index, would also infringe Article 81(1) (as recognised by the ELAA).
13. It follows that the ELAA's proposed information exchange system including the Price Index, and Trade Committee discussions will infringe Article 81(1):
 - (a) The object of the exchange of production and price data is to restrict competition since the object is the same as the objective of the information exchange system

applied by the liner conference system under Regulation 4056/86, and in particular Recital 8 where the restrictions of competition are said to have the objective of rate stability resulting from stability of supply;

- (b) The ELAA concedes that the Trade Committee discussion agreement infringes Article 81(1) and may only be lawful if it satisfies the criteria for exception laid down by Article 81(3)²;
- (c) The ELAA also is understandably sensitive to the controversial nature of any type of industry created "price index", whose object is the same as the other elements of the ELAA information exchange system³.

(4) The ELAA Proposal Does Not Satisfy The Exception Criteria In Article 81(3)

14. The claims made by the ELAA, at page 14 to 15 under the heading Article 81(3) EC Findings of the ELAA Article 81 EC Assessment, are all undermined by the clear confirmation that the benefits intended to be achieved by the ELAA Proposal are the "benefits of the current system" which had been found by the Commission (and the OECD) to be capable of restricting competition on any genuine economic (rather than political) analysis which would be capable of surviving legal challenge before the European Court of Justice. Similarly, no adequate explanation is provided by the ELAA as to why "none of the alternatives (such as long-term contracting, cooperation through alliances/consortia, chartering and carrier self-assessment data based on external information providers) would not yield the same potential benefits" said to be improved deployment and investment decisions by individual carriers.

15. It follows that the ELAA's proposed information exchange system and Trade Committee Discussion agreements will not satisfy the four exception conditions laid down by Article 81(3):

- (a) Where the object of an agreement is to restrict competition, it is not necessary to analyse any effects which that agreement may have in the market to conclude that it restricts competition. When the object of an agreement constitutes what the Commission calls a hard core restriction of competition, such as price fixing, production quotas/restrictions or market sharing it is almost unheard of for such restrictions to satisfy the exception criteria of Article 81(3). Accordingly, the exchange of production and price data with the subsequent discussion of reports and analysis based on that data, for the same object as the restrictions of competition permitted to liner conferences by Regulation 4056/86, will not be capable of exception under Article 81(3) once Regulation 4056/86 is repealed;
- (b) Even if it were conceivable that the ELAA's proposed Information System Exchange and Trade Committee Discussion agreement were capable of satisfying the first two positive conditions of Article 81(3) insofar as they were necessary for promoting the economic benefit of the sustainable supply of shipping services and shippers enjoyed a benefit in terms of reliable services at competitive prices, the two negative conditions of Article 81(3) will not to be satisfied. In particular, the ELAA proposals cannot be said to be indispensable as long as the existing method of providing the sustainable supply of shipping services through cooperation in the form of consortia agreements is automatically exempted by Regulation 823/2000 (as amended by Regulation 611/2005);

² See ELAA Article 81 EC Assessment, page 17: "a comprehensive analysis of the caselaw of the EC Commission and the European Courts shows that the Trade Committee discussions and the subsequent demand forecast may be capable of falling under Article 81(1) EC."

³ See ELAA Article 81 EC Assessment, page 13: "information exchanged that touches upon pricing obviously requires extra attention... even if there was an effect on competition, the index is more than justified by the benefits to consumer welfare they achieve". It is not clear how the index will benefit consumer welfare and the benefits are described in the context of Article 81 (c), in the following terms, at page 14: "We show that the ELAA proposal: ... is likely to yield substantial *benefits* for the deployment and investment decisions made by the carriers, as it maintains and improves some of the most important (and recognised) benefits of the current system ...". "Furthermore, all elements of the proposal are necessary in order to achieve the benefits. No information will be collected and made available that would not be essential for improved deployment and investment decisions."

- (c) Further, the ELAA's recognition that its proposal is intended clearly to cover the entire trade concerned, shows that there is a risk that effective competition will be eliminated in the relevant ELAA market because all competitors will behave in the same way, as intended by the ELAA.
16. The shipper is the best source of information on current and future demand. If the lines would listen to their customers, and in particular discuss with them on an on-going individual basis what their likely future demand requirements will be, the individual line (or consortium) will be able to forecast its own individual capacity and investment requirements. It is not monthly supply and demand on a trade-by-trade basis that concerns individual shippers but the availability of capacity to meet their individual demand.
17. Further, the trade journals and consultants (some of which have complained that the ELAA proposal will deprive them of business) are more than able to collect historic information in confidence, aggregate the information and produce market statistics on trade volumes that will enable individual lines and shippers to calculate various statistics which will assist their commercial decisions, including individual capacity and investment decisions by the lines. The resultant information and/or analysis will be either published in the public domain or be available to all commercial operators who wish to pay for this service, (see, Annex for recent information service described in Containerisation International, CI-Online News Flash, 10 May 2005: New – CI Market Analysis Report "World Container Census 2005 Market Analysis. Published April 2005, it is the only industry recognised analysis of the global container fleet. This bigger and better version includes even more tables of data and fleet statistics than ever before").

(5) **Conclusions**

18. The shippers believe that an information exchange system such as that proposed by the ELAA is a diversion. What is important is that the individual lines start working together with the individual shippers. Shippers do not have buyer power contrary to the suggestions of the ELAA. The contribution to the sustainability of the supply of shipping services by the consolidation of the industry (Maersk and PONL), the contractual stability provided by individual service contracts and the ability to match supply to demand enjoyed by Consortia which operate in accordance with Regulation 823/2000 (as amended by Regulation 611/2005) is far more important than any attempts to re-cartelise the industry. In the shippers view, "self-regulation" is just another word for cartel and is an antiquated and unjustified approach to any industry in the 21st century.
19. Consequently, the ESC sees no grounds for dispelling the clear risks of collusion that would follow from the ELAA information exchange system. In fact, it will involve even more restrictions of competition because:
- (a) the ELAA wants the whole trade to participate;
 - (b) it is impossible to exclude the risk of collusion, especially where the system depends on discussion by competitors in Trade Committees when they have previously belonged to a conference cartel;
 - (c) the sort of information that would benefit the individual line's capacity and investment decisions can be made available without any exchange of information between the lines themselves, and in an open way of benefit to all the commercial operators in the shipping sector;
 - (d) the objective of sustainable shipping services can be achieved through cooperation in consortia agreements with significantly less restrictions of competition than those produced by the ELAA proposal.
20. In particular, the necessary information is available from individual shippers in their commercial negotiations with individual lines. The shippers would prefer to negotiate the details of their individual service requirements on a one-to-one basis with the ship owners concerned so that they can establish a customer focused relationship over time with the service supplier.