



October 2010

**Review of the Competition (Block Exemption for Liner Shipping Agreements)
Order 2006 (BEO)**

**Position of the European Shippers' Council to the
Competition Commission Singapore (CCS)**

Introductory remarks

The European Shippers' Council (ESC), representing the freight interests of around 100,000 companies across Europe, has had a long-standing interest and played a central role in the debate and legal cases concerning liner shipping competition policy, for some twenty years. Shippers around Europe hugely welcomed the unanimous adoption, at the 25th September 2006 Competitiveness Council, of the Commission's proposal to repeal Council Regulation 4056/86.

In October 2008 the repeal of the block exemption for liner shipping conferences became effective. All tariff and rate-fixing agreements in shipping markets to and from Europe, including surcharges and capacity regulating arrangements became unlawful and liner shipping became subject to the normal EU competition rules.

The ESC is pleased to be able to provide its views on the impact of the repeal of the block exemption in Europe in view of the Review of the Block Exemption in the Maritime Sector to the Competition Commission of Singapore.

As a proponent of free trade, Singapore has one of the most liberal and transparent trade regimes in the world. It is also an active member of regional and international economic fora, including the World Trade Organisation, and pursues Free Trade Agreements to further liberalise and facilitate trade and investment. ESC believes that the Singapore government would be well advised to align its maritime regulatory environment with that which is already in place in other major jurisdictions and trading blocs such as in Europe and is therefore not supporting the extension of the block exemption regulation for another five years.

The impact of the Repeal of the Block Exemption Regulation in Europe

The repeal of Regulation 4056/86 laid the foundations for improved customer-carrier relationships to build, leading to a more sustainable shipping sector, more robust and able to

withstand the ebb and flow of economic turbulence and better able to respond to the ever changing needs of industry. Regulatory reform in European competition law affecting liner shipping coincided with the onset of the most severe and sudden global economic recession for many decades.

By December 2008, the global financial crisis had turned into the deepest global recession in nearly seventy years. The recession and financial crisis affected everyone. The shipping lines were especially badly affected because of their excesses during the previous years which had lead to poor investment decisions in new ship orders, far in excess of demand forecasts even before the events of 2008/2009.

So disconnected from their customers were they, operating at times in an apparent world of their own, that they had been caught sleeping while the warnings were being sounded months before, that a financial crisis was looming.

The ESC firmly believes the financial impacts of the crisis on shipping lines was multiplied because their attention had been focused on each other, with other lines within their liner shipping conferences. They should have instead been focusing more on their customers' businesses and their customers' needs and how they, individually could best meet those needs. Ironically, it can be argued that their conference-mentality has actually hindered the economic recovery: withdrawing more shipping capacity from the market than was required by the levels of demand in 2009, thereby artificially raising the rates; introducing without consultation slow and super-slow steaming thereby introducing for their customers longer lead times and higher inventory and supply chain costs; a unified approach to raising rates and charges through traditional General Rate Increases (GRIs), Rate Restorations (RRs), Emergency Rate Restorations (ERRs), and through surcharges, with little variation or differentiation between the lines, thereby removing choice. All these actions have contributed to a dramatic increase in the price of shipping and costly delays to cargo, and continue so at a time when industry is trying to claw its way out of recession.

It should be noted that the situation may have been far worse for shippers had not the removal of Europe's block exemption for liner shipping conferences made it more difficult for the lines to jointly enact capacity and price management strategies in a fashion and on a scale that they once were able to.

ESC and its members however had noted some positive changes since October 2008:

- Carriers now have their own individual pricing and pricing policies both in terms of ocean freight, ancillaries and surcharges and are no longer permitted to use conference tariffs and charges
- More shippers, especially those with significant freight volumes, are managing to negotiate more sustainable and competitive rates and service agreements.

- There is an increasing acceptance by some carriers of contractual provisions proposed by their customers that supersedes those printed on the B/L. This movement certainly still very limited, however, it tends to grow under the requests from shippers
- Lines must now engage in individual negotiations with customers
- The Bunker Adjustment Factor (BAF) has gained in transparency with the advent of BAF calculators on web-sites of some carriers.
- There is more differentiation between carriers
 - Some are taking a transparent approach
 - Others sticking closely to the traditional conference approach to customer relationship management and service offering
- THCs have now been fixed at country level versus trade lane level as seen previously
- Importantly the number of lines offering Gi-Go (gate in – gate out) all in rates has increased

Asian shippers, especially those involved in non-EU trades, have been less fortunate. With little or no protection from shipping cartels and lines taking advantage of their immunity from prosecution, Asian shippers frequently complain of unfair practices and behaviour from among the liner community: being charged for terminal handling charges even though the charges may have been covered in the freight rate paid by the overseas consignee; paying for peak season surcharges even though the costs are more than covered by the increased market rates at the time; exorbitant documentation fees; still insufficient transparency of costs allowing bunker fuel surcharges to be higher than the true costs of fuel; GRI's imposed without negotiation; Emergency Revenue Charges and Emergency Bunker surcharges being imposed with impunity.

In Europe, the lines know they are being closely watched for breaches of competition law and abuse of dominant positions. Nevertheless, the continuation of liner coordination still possible elsewhere in the world, such as the important Pacific and intra-Asian trades, acts to undermine the foundations for a new sustainable era of liner shipping that have been created in Europe.

In the European post-conference environment it is imperative that we protect the advances made in Europe by supporting our colleagues and allies elsewhere in the world to remove similar block exemptions for shipping lines. These remaining block exemptions and immunity from anti-trust rules hurt Europe's competitors as much as they hurt us: shipping is international by nature, and international trade relies on it being able to flourish and respond directly to the needs of trade, not to their own or collective ambitions.

Shipping can legitimately cooperate in ways which are not anti-competitive in order to remove or reduce their operating costs, increase their ability to serve customers and to prosper.

The establishment of alliances and consortia (non-rate making liner shipping agreements) are legitimate business practices towards achieving just that. Nevertheless, there is a possibility that they could potentially stifle competition if they became too dominant on trades that could otherwise support several competing operators, and if they began to coordinate more than simply their schedules. Coupled with the sharing of sensitive information among operators of a consortia or alliance and networks of alliances and consortia, it would be relatively straight forward to operate largely as a liner conference. It is important therefore, that they should also be closely monitored for signs of anti-competitive behaviour.

Notwithstanding the current economic conditions and its affects on liner shipping companies and business globally and freight rates generally, the ending of the conference system was expected anyway to expose shippers to greater price variability. The fact we have seen huge rate volatility in the main liner shipping markets can be put down to the 'collective' response of the liner shipping sector, influenced hugely by little more than 15 to 20 shipping lines managing the majority of international containerised cargo. Nevertheless, ESC is aware of many shippers that, through hard work in the building of longer term, improved relationships with only preferred carriers, and application of considerable liner shipping knowledge and experience, the imposition of otherwise ludicrously high spot rates by many lines have been avoided.

International Maritime Regulatory Reform

On a broader basis the European Shippers' Council and its colleagues of the Global Shippers' Forum¹ have long supported policies that advance and foster competitive ocean transportation services and customized economic partnerships between liner operators and their customers.

The European Shippers' Council has recently welcomed the "Shipping Act of 2010" introduced by Congressman Jim Oberstar that proposes to eliminate antitrust immunity for ocean carrier agreements in the US. The proposed legislation will prevent carriers from discussing, fixing and/or regulating freight rates and surcharges through conferences and/or discussion groups.

¹ The Global Shippers' Forum (GSF) is recognized in the international world of freight transportation and trade as the voice for shipper groups whose respective members are responsible for making and purchasing transportation services on behalf of their respective companies. Originally comprised of organizations from three major trade regions of the world, the GSF today represents numerous shipper groups whose central focus is on policies and industry practices that impact the movement of international commerce.

ESC strongly believes that the reforms in Europe as well as ongoing reform in the US will provide comparable benefits for Asian countries, resulting in less influence by liner shipping conferences and so-called 'discussion agreements' over rates and services.

ESC believes, along with its colleagues of the Global Shippers' Forum, that anti-trust immunity as it relates to the ability of liner carriers to benchmark, discuss, set or fix rates, service terms and/or surcharges, is not necessary and should be terminated. Equally it urges a move towards the removal of preferential sectoral treatment within competition policy.

Conclusion

ESC strongly believes it will be in the interests of Singapore trade and industry to remove the block exemption for the liner shipping sector.

In the European post-conference environment it is imperative that we protect the advances made in Europe by supporting shippers elsewhere in the world to remove similar block exemptions for shipping lines. The remaining immunities from anti-trust rules hurt Europe's competitors as much as they hurt us: shipping is international by nature, and international trade relies on it being able to flourish and respond directly to the needs of trade, not to their own or collective ambitions.

The continuation of liner coordination elsewhere in the world, such as the important Pacific and intra-Asian trades, acts to undermine the foundations for a new sustainable era of liner shipping that have been created in Europe.

Annex 1

A brief history of the campaign to reform the liner shipping sector:

- a) The liner conference system goes back some 130 years. In an attempt to protect themselves from the new steam ships plying trades to India and the Far East, the traditional liner shipping companies established cartels to control the important trades with Europe. The principle remains today. There are around 150 liner shipping conferences covering all the trading routes around the world.
- b) In 1986 the European Council of Ministers adopted Regulation 4056 to bring the industry into line with European Community competition law. Despite opposition from shippers, exemption was granted from competition rules under the Treaty of Rome on the basis that the conference system yielded benefits for their customers – one of the four conditions for exemption under Article 81(3).
- c) Since the late 1990s governments have begun to repeal the laws that previously were seen to protect the container shipping industry but were seen increasingly to put them at risk from self destruction. Whilst some have faced the issue head on, many other shipping lines have remained reluctant to acknowledge that the day of protectionism has passed, and continue to this day to argue for its continuation.

The legal challenge

- d) Between 1992 and 2000 shippers made cases against member lines of certain conferences (such as the TAA and its replacement (largely by name only) the TACA conference) for:
 - illegally price fixing between conference lines and non-conference lines,
 - fixing prices for inland transport (also a charge made against the Far Eastern Freight Conference)
 - managing shipping capacity in order to drive up rates
 - agreeing not to enter into individual service contracts and agreeing terms and conditions

It was argued that the conference lines were in breach of EU competition law in the following ways:

- Abuse of a dominant position affecting trade within the EU
 - The restriction and distortion of competition
 - Failure to meet the conditions for exemption from competition rules (i.e. activities not benefiting customers)
 - Extending the exemption to restrict and distort competition to inland transport services offered by the conference shipping lines
- e) In 1994 the European Commission adopted a decision against the TAA upholding the legal challenge made by ESC, British and French Shippers' councils. In 1995 the Consortia Regulation (now modified under regulation 823/2000/EC) was introduced with the support

of shippers² who hailed liner shipping consortia as an appropriate replacement of liner shipping conferences.

- f) Four years after the first decision against the TAA by the European Commission, one name change and a further challenge against the TACA conference, the remaining member-lines of the conference put forward a revised conference; but in 1998 this so-called Revised TACA³ was also objected to by ESC. It took another four years of long and drawn-out negotiations and consultation with the conference before the European Commission (but not ESC) accepted it in 2002. In 1999, the European Commission formally adopted its original decision against the TACA which was immediately appealed by the member lines.
- g) Meanwhile in the USA, shippers' arguments against the restrictive and collective actions of liner conferences resulted firstly, in 1996, in the US Federal Maritime Commission insisting that the then-member lines of TACA allow Individual Service Contracts (ISCs). Secondly, in 1998, this was formalized by the Ocean Shipping Reform Act, an act that introduced the right to independent action by lines and confidential individual service contracts for shippers on all trades to and from the USA.

In 2002, some ten years after the first complaints had been submitted, the Court of First Instance (CFI) ruled in favour of the EC's decisions against the TAA and FEFC, followed by a further ruling by the court upholding the principal decisions of the EC against TACA.

Following a recommendation by the OECD in 2002, the European Commission began in 2003 to review Regulation 4056/86. The decision to repeal the Regulation was taken in 2006.

² Allows shipping lines to establish groups to gain economies of scale and share equipment; it prohibits price fixing; it gives automatic exemptions for lines in consortia but outside conferences where the market share threshold is equal to or below 35%, and below 50% in those cases individually approved by the European Commission.

³ Again under pressure from the European Commission the members of TACA submitted a revised agreement known as the Revised TACA incorporating amendments that might satisfy the EC to accept it as lawful within Regulation 4056 and the Treaty.