COMPETITION COMMISSION OF SINGAPORE

Public Consultation on
Proposed Block Exemption Orders Recommendations for
Liner Shipping Agreements

WHY THE REPEAL OF THE SINGAPORE BLOCK EXEMPTION IS NECESSARY

Response by
GLOBAL SHIPPERS' FORUM

4th October 2010

Address for correspondence:
Asian Shippers' Council
c/o Singapore National Shippers' Council
47 Hill Street, #07-05 SCCCI Building
Singapore 179365
Tel: (65) 6337 2441
Fax: (65) 6336 3851
Email: asc@snsc.org.sg

TABLE OF CONTENTS

1. Introduction

The Global Shippers' Forum is the world-wide body that represents shippers and transport users internationally. The GSF comprises the major national and regional shippers' organisations in Europe[1], North America[2], Asia[3] and Africa[4], representing over 50 countries across the world's major trading regions.

The GSF was established to promote competitive global transport markets and supply chains to further the development of international trade and commerce. In this regard, a prime policy objective of the GSF is to promote ocean shipping reform and regulatory oversight of certain shipping practices, which inhibit fair competition and cause major disruption to efficient global supply chains.

The GSF welcomes the opportunity of commenting on the Competition Commission of Singapore (CCS) Proposed Block Exemption Order (BEO) Recommendations to the Minister with respect to Liner Shipping Agreements.

2. Summary

The GSF is opposed to liner conferences and carrier discussion agreements that distort normal market competition, which result in higher prices paid by shippers for ocean shipping services and in higher-priced consumer goods than would be obtained by a normal, fair and competitive market in the provision of ocean shipping services. GSF is consequently opposed to the Singapore Liner Conference Block Exemption Order and the proposed extension of the block exemption for a further 5 years.

The CCS review of the BEO is timely, in that it coincides with the imposition of a variety of unacceptable shipping practices, including the imposition of abrupt and opportunistic rate increases and surcharges, 'roll-overs', the limitation and withdrawal of capacity and general lack of adherence to rate and contractual arrangements on an unprecedented scale in Pan-Pacific Asian markets.

The major disruption to Asia-Pacific trade has prompted a series of investigations in the United States by the Federal Maritime Commission (FMC), and following unparalleled complaints by U.S. shippers has resulted in the tabling of a Bill to remove anti-trust immunity for conferences and carrier agreements by Congressmen Oberstar and Cummings on 23 September 2010.

[1] European Shippers' Council (ESC)
[2] The U.S. National Industrial Transportation League (NITL) and the Canadian Industrial Transportation Association (CITA)
[3] Asian Shippers' Council(ASC), including Oceania states of Australia and New Zealand
[4] The Union of African Shippers' Councils (UASC)

Moreover, similar historic substantiated complaints by European shippers (*TAA, EATA, TACA, CEWAL and FETTSCA cases)* [1] ultimately resulted in the withdrawal of the European Commission block exemption for liner conferences on the 18 October 2008 following a detailed investigation by the European Commission [2].

The GSF, ASC and Singapore National Shippers' Council (SNSC) have yet to see the Singapore Competition Commission review impact assessment, but note that carriers have, in numerous recent inquiries around the world, failed to provide any reliable evidence or economic data, which they have exclusively within their control to provide, to justify the case for an exemption from competition and anti-trust laws.

The fact that carriers have failed to provide such evidence provides compelling grounds for the CCS not to extend the BEO for a further 5 years. Moreover, it would be premature to extend an extension for the BEO in view of the current FMC investigations and the proposed legislation from Congressmen Oberstar and Cummings, "The Shipping Act of 2010 (H.R.6167)", to remove anti-trust immunity for liner operators. The GSF believes the CCS should introduce legislation to remove the BEO applicable to liner conferences and discussion agreements, thus bringing its competition laws into line with those in Europe and this congruent proposal in the United States.

3. Competition is the key driver in the modern global economy

The key premise in today's modern global economy is that competition and open and competitive markets are fundamental requirements for successful companies competing in a global market. The development of modern competition policy is an essential component of the modern global economy. The goal of competition policy is to ensure that restrictions to competition and cartels are eliminated, particularly agreements that involve price fixing, tariff and capacity sharing agreements, which specifically have the object and effect of eliminating competition or enabling the parties to such agreements to derive economic benefit and income at the expense of consumers.

This system of market regulation has now replaced the widely discredited policy of sectoral intervention in favour of recognition that competitiveness, innovation and commercial success are dependent on the primacy of the market and the maintenance of open and competitive markets. This policy has led to the deregulation of many key industries including steel, insurance, telecoms, gas, electricity and water throughout the world. Shipping is no different to these and other industries and should therefore, be subject to the full application of Singapore competition policy.

It is against this background that the CCS should examine the merits of the BEO and any consideration of extending the exemption for a further five year period. At a time when Singapore businesses, as well as the Singapore economy, are subject to the full

glare of global competition it is unacceptable that shipping lines should be able to fix conference rates and tariffs and surcharges under the protection of anti-trust immunity provided by the Singapore BEO.

4. Impact of the Singapore block exemption- Liner shipping cartels do not benefit the customer

There is widespread acceptance by economic regulators and others that price-fixing cartels are not in the public interest or of any benefit to customers or consumers of goods and services. Shippers therefore strongly assert, and dispute any claims made to the contrary by the shipping industry, that shipping conferences and other restrictive practices employed by shipping lines including price-fixing, tariffs, surcharges and capacity agreements provide any benefit to their customers and consumers. Such practices artificially inflate freight rates and therefore the cost of Singapore imports and exports at the expense of Singapore consumers and exporters and the Singapore economy as a whole.

The continuation of the Singapore BEO would place Singapore industry at a competitive disadvantage compared to Europe and North America, where in the former case the EU has withdrawn the benefits of the liner conference block exemption and in the latter the United States Congress has now tabled a Bill to normalize the application of anti-trust laws to the shipping industry.

The consequence for Singapore industry is that any extension of the BEO will continue to allow 10 key liner conferences and discussion agreements, including the Transpacific Stabilization Agreement (TSA) and the Intra-Asia Discussion Agreement [3] to fix rates, tariffs and surcharges [4], placing Singapore business at a serious competitive disadvantage compared to its major competitors in Europe and North America.

Recent experience of the behaviour of liner conferences and discussion agreements detailed in [3 and 4], in particular the TSA, has dramatically illustrated the adverse impact of liner shipping cartels on Singapore Trade. In the past 18 months, in common with shippers in the US, Singapore shippers have experienced unprecedented ratcheted rate increases, cancelled bookings, cargo 'roll-overs' [5], the shortage of space, capacity manipulation and the limited availability of containers. *There is little doubt that this has been the result of deliberate policy strategy by the TSA. For example, Neptune Orient Line state in their 2009 Annual Report: "Our long history and record of innovation makes us a leader in containerised trade. During the chaos of 2009, we advanced that reputation by: helping to bring stability to the bellwether Transpacific Trade through our leadership role in the Transpacific Stabilization Agreement"* [6].

These practices have prompted a series of investigations by the US Federal Maritime Commission into capacity and equipment shortages [7] and the introduction of legislation which would eliminate collective ocean liner carrier activities involving the joint discussion, fixing or negotiating of rates or surcharges [8]. The measures would eliminate ocean carriers' anti-trust immunity, which presently exists in the U.S. for collective ratemaking and would establish a new set of requirements on individual and joint carrier activities.

The proposed "Shipping Act of 2010" (H.R. 6167)" in the United States was introduced by Congressmen Oberstar and Cummings in partly in response to shipper's concerns that shipping line behaviours have threatened Presidential plans to double US exports in five years and to ensure that imposed surcharges and capacity problems do not act as an obstacle to American farmers to get their crops to markets as a result of the possibility of shipping lines not honouring their obligations [9].

Given recent developments in the United States, and abolition of liner conferences in Europe, the SNSC, ASC and GSF believe it is inconceivable that the CCS could extend the BEO for a further five year period. This view is reinforced by the clear evidence set out in sections 3 and 4 of this submission which provide incontrovertible evidence of the disruptive nature and damaging impact of carrier agreements set out in *Annex 1,* at 3, 4, 5, 6, 7 and 9 attached. See also section 5 below.

5. Proposals to extend the Block Exemption

For the reasons set out in sections 3 and 4 above the SNSC, ASC and GSF believe there can be no grounds for the further extension of the BEO. The evidence in the public domain clearly demonstrates that carrier conference and discussion agreements inevitably give shipping lines a bargaining power advantage and an ability to secure cartel profits. The evidence also shows that this bargaining power inevitably results in higher prices and surcharges and an ability to considerably disrupt international supply chains and global commerce than would occur in a normal competitive market free from cartel influence.

However, as the CCS will be aware it is not for shippers to make the case for the retention of the BEO. As is the case in all normal competition policy assessments, the onus of responsibility for those seeking exemptions from the normal application of competition policy must rest on the beneficiaries and those seeking such exemptions to ensure that such restrictions on competition are in the public interest. The burden of proof must, therefore, rest with the liner shipping industry to demonstrate the need for price-fixing, rate-setting and carrier discussion agreements regarding the exchange of commercially sensitive information.

Consequently, conferences and carrier agreements should be able to prove the existence of a causal relationship between price-fixing, capacity management and

discussion agreements, the reliability of liner shipping and stability of prices: the basis historically justifying conferences and exemption from competition policy.

In numerous recent investigations into the liner conference system, liner conferences have failed to provide the economic data which is within their sole control to provide, and which is easily available to them to justify their unique exemptions under anti-trust laws. Indeed, the EU impact assessment [2- EC Impact Assessment into the repeal of EC regulation 4056/86] established, inter alia, that conferences can lead to excess pricing, i.e. rates that are above competitive levels, and that abolition of the EU liner conference block exemption would not have a significant overall impact on capacity or market structure. The OECD reached a similar conclusion in 2002: " liner shipping should no longer be granted anti-trust immunity for price fixing and freight rate discussions as there is no convincing evidence that these practices offer more benefits than costs", [10].

6. Liner Conference Stability Theory

The liner shipping industry has long argued that the provision of regular, reliable and efficient liner shipping services is only possible through the stability provided by conferences. As set out in this submission, the GSF asserts, as a general proposition, there is no benefit to consumers of stable high prices which substantially exceed the competitive level, or of any market structure in which the forces of competition have been muted to such an extent that individual operators do not have the appropriate incentives to maximise their efficiency and lower their costs to the benefit of users.

The stability theory relied upon by the shipping industry has been disproved by the extensive investigations recently carried out by the European Commission, and, for example, the OECD.

The GSF reiterates that shipping lines have provided no evidence that reliable services would disappear in the absence of the exemption from price fixing and tariff setting, or that carriers have been able to demonstrate that conferences provide even relative stability.

Similarly, claims that the capital intensive nature of the shipping industry and lifetime of investments in ships (often quoted as being a 25-year investment cycle) justifies price fixing is categorically rejected by shippers. The investment cycle argument is not unique to the shipping industry, note for example the aviation industry, and the shipping industry has not advanced any evidence that they do not receive returns on their original investment. Moreover, the investment life cycle is not an argument that justifies price fixing.

7. Conclusion

The continued ability for shipping lines to collectively fix rates and surcharges in Singapore places Singapore shippers at a competitive disadvantage compared to shippers in the US and Europe.

For the reasons set out in this submission the GSF believes that there are no grounds for extending the Singapore BEO by a further 5 years. It would be premature to do so in the light of on-going investigations in the United States and the proposed U.S. Shipping Act of 2010, which advocates the withdrawal of anti-trust immunity for ocean carriers. And it would be inconsistent with the recent world-wide trend in competition policy of removing industry specific exemptions, such as the repeal of the EU liner conference block exemption regulation.

Accordingly, the GSF urges the Competition Commission of Singapore to take the necessary steps to repeal the BEO, bringing Singapore competition policy in line with EU competition rules for liner shipping.

--- --- --- Ends --- --- ---

Annex 1

REFERENCES

1. The European Commission has been forced to bring decisions against liner conferences over a 17 year period since EU regulation 4056/86 was adopted. They included:
    - The TAA case concerning the elimination of competition from independent lines, inland transport price fixing, withholding capacity to increase market power (including the EATA case)
    - The FEFC case concerning inland price fixing
    - The TACA again for inland price fixing and preventing individual service contracts
    - CEWAL case concerning the abuse of a collective dominant position and to eliminate independent competition
    - FETTSCA case involving an attempt to extend agreement tariffs to surcharges

2. EU Commission Staff Working Document for a Proposal for Council Regulation repealing Regulation (EEC) N0 4056/86-Impact Assessment {COM (2005) 651 final}, Brussels 14.12. 2005 (SEC (2005) 1641.

3. Main Conferences and Discussion Agreements Contributing to Higher Costs to Singapore imports and exports

    - Transpacific Stabilization Agreement (TSA)
    - Asia West Africa Trade Agreement (AWATA)
    - Intra-Asia Discussion Agreement (IADA)
    - Informal Rate Agreement (IRA)
    - Informal Red Sea Agreement (IRSA)
    - Canada Westbound Transpacific Stabilization Agreement (CWTSA)
    - Asia/Australia Discussion Agreement (ANZDA)
    - Asia-West Coast South America Freight Conference (AWCSAFC)
    - Canada Transpacific Stabilization Agreement (CTSA)
    - Asia East Africa Trade Agreement (AEATA)

4. Main Surcharges and Fixed Rates Levied Against Singapore Shippers by Conferences and Discussion Agreements in [3] above during 2009-2010.

    - Terminal Handling Charge (THC)
    - Currency Adjustment Factor (CAF)
    - Peak Season Surcharge (PSS)
    - Advanced Manifest Security (AMS)
    - Documentation Fees

- Fuel Adjustment Factor (BAF)
- Container Sealing Fee (CSF)
- Container Imbalance Charge (CIC)
- Preferential Loading Charge
- No Show Charge
- Emergency Revenue Charge (ERC)

5. Cargo 'Roll Overs'. A practice employed by shipping lines that holds shippers toransomby refusing to ship goods or leaving cargo on the quay in favour of higher paying cargo unless the shipper agrees to pay higher rates, often in breach of previously agreed rates and contract prices.

6. NOL 2009 Annual Report, Management Report, Ronald Widdows-Group President & Chief Executive Officer. Mr Widdows was Chairman of the TSA during 2009.

7. FMC Commissioner Rebecca Dye's investigation into vessel capacity and equipment shortage difficulties faced by US exporters and importers. Her findings to-date has called for increased oversight of the TSA and Westbound Transpacific Stabilization Agreement and global carrier alliances.

8. The Shipping Act of 2010 (H.R. 6167) tabled by Congressman Jim Oberstar (D-MN), Chairman of the US House Transportation and Infrastructure Committee and Rep. Elijah Cummings (D-MD), Chairman of the Committee's Coast Guard and Maritime Subcommittee.

9. Lloyd's List, No 60,266, Monday September 27, 210, Richard Lidinsky, Chairman of the US Federal Maritime Commission, "Lidinsky tells lines to support farmers-FMC chair concerned that carriers may renege on capacity commitments".

10. Liner Shipping Competition Policy, OECD, 2002: http:///www.oecd.org/dataoecd/13/46/2553902.pdf