



**EUROPEAN COMMISSION**  
Directorate-General for Competition

**Directorate F: Transport, Post and other services**

Brussels, **24 FEB. 2012**  
COMP/F1/CR/sp/D2012/ 020029

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By e-mail and hardcopy

**Our reference: HT 2904**

**Your reference: Inquiry into International Freight Transport Services**

Dear Sirs,

1. I am writing in connection with the Productivity Commission's public consultation on its draft report on international freight transport services dated 12 January 2012 ("the Draft Report"). I am grateful for this opportunity to comment on the Draft Report, and I wish to commend the Productivity Commission and its staff for producing a balanced and thorough assessment of the complex issues covered in the Draft Report.
2. I am writing in my capacity as Director of Directorate F in the European Commission's Directorate-General for Competition ("DG COMP"). Directorate F is responsible for the application of the EU competition rules in the transport sector. I should add that this letter reflects the views of my services and may not be regarded as stating an official position of the European Commission as a whole.

3. For obvious reasons, this letter focuses on the competition law treatment of container shipping markets (section 11 of the Draft Report), especially ratemaking agreements such as conferences or discussion agreements. Since there is broad agreement about the benefits of at least some operational agreements (also called consortia, alliances, vessel-sharing agreements, or non-ratemaking agreements), I will not address these types of agreements further.
4. I note that some respondents to your July/August 2011 public consultation have already submitted my October 2010 letter to the Singapore Competition Commission as an annex to their submissions. That letter set out (a) the reform of EU maritime competition policy in recent years; (b) the current EU maritime competition policy regime; and (c) the case against exempting liner cartels from the antitrust rules. The views expressed in that letter remain valid, and I hope that they can be useful to your inquiry.
5. Many of the relevant issues have already been covered and explored in the OECD report of 2002, in DG COMP's review of the EU Liner Conference Block Exemption between 2003 and 2006, and in the earlier stages of your inquiry. Accordingly, this letter will focus on two key points, namely (A) the global regulatory landscape and (B) the effects of liner cartels. I also note that the Draft Report refers to the EU experience with respect to the 2008 repeal of its Liner Conference Block Exemption. I will address this point in section (C).

## A. The global regulatory landscape

6. It is important to recall the global regulatory landscape in the area of maritime antitrust. The EU's decision to abolish its Liner Conference Block Exemption ("the EU repeal") is sometimes portrayed as isolated and out of line with the norm.<sup>1</sup> Further, some carrier organisations contend that the EU is "the only major exception" to the international standard in this area.<sup>2</sup> They also point to the recent decisions by Singapore and Japan to extend their exemptions until 2015. That is not the full picture. The reality is much less favourable to the carriers.
7. First, the EU repeal is very significant in that it expressed the unanimous agreement of the then 25 EU Member States. Any Member State could have vetoed the proposed legislation. Yet all Member States chose to support it – including several Member States that have significant economic interests in the container shipping sector, such as Denmark, France, Germany and Greece, as well as island nations such as the United Kingdom, Ireland, Cyprus and Malta. The unanimous repeal reflected the policy decision of each of the 25 Member States, based on published evidence from DG COMP's three-year review<sup>3</sup> and on the OECD report of 2002.<sup>4</sup>

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<sup>1</sup> ICLC submission, page 6; JSA submission, pages 1 and 2; ICS submission, page 2; ASF submission, pages 1 and 2.

<sup>2</sup> ASF submission, page 2.

<sup>3</sup> See [http://ec.europa.eu/competition/sectors/transport/legislation\\_maritime\\_archive.html](http://ec.europa.eu/competition/sectors/transport/legislation_maritime_archive.html).

<sup>4</sup> See <http://www.oecd.org/dataoecd/13/46/2553902.pdf>.

8. Second, many countries around the world never enacted an exemption for liner cartels, and several more countries recently enacted competition laws without such an exemption. The "no exemption" countries include major trading nations such as Brazil, Russia, India, South Africa (i.e. four of the five BRICS countries), as well as Norway, Iceland, Turkey, and many others. Furthermore, Malaysia joined the "no exemption" countries on 1 January 2012 by introducing its new competition act and Israel is scheduled to abolish its liner cartel exemption on 1 July 2012.
9. In my October 2010 letter to the Competition Commission of Singapore, I wrote that trades to/from the EU alone accounted for 44 % of the world's deployed TEU capacity as of 2010. If one were to add the countries that never had an exemption in the first place, one would arrive at an even higher percentage. This means that the prohibition of liner cartels now covers a large part of the globe. In sum, exempting container shipping cartels can hardly be described as the global regulatory standard.
10. Finally, stating the obvious, price-setting agreements are in principle prohibited under all competition rules around the world. Accordingly, liner conferences and other forms of ratemaking agreements are the exception, not the norm.

#### **B. The effects of liner cartel exemptions**

11. The starting point of any analysis of maritime antitrust is that discussion agreements as well as liner conferences and other types of ratemaking agreements are cartels. It does not matter whether the agreed price is "binding" or not. Cartels increase prices, decrease the quantities consumed and impose a deadweight loss on society. Moreover, cartels often affect other parameters of competition such as service levels, product quality and innovation. This is standard economic theory and has been observed in real life time and again. Indeed, under EU law, prior experience of cartels is such that they are

presumed to produce anti-competitive effects, without any need to prove their actual effects. However, on a case-by-case basis, it is not excluded that a particular cartel also produces pro-competitive effects – i.e. customer benefits – that outweigh its anti-competitive effects, under Article 101(3) of the Treaty on the Functioning of the European Union. In this case the cartel would be legal. I understand that the situation is similar in New Zealand. On this basis, the main question is whether all liner cartels can be presumed to always produce net pro-competitive effects, so that it is justified to grant them a block exemption instead of examining them on a case-by-case basis.

12. As the Draft Report notes, if liner cartel exemptions really produced benefits to shippers (namely stable rates and reliable services), then one would expect the shippers to support them,<sup>5</sup> while in fact they are steadfastly opposed to such exemptions.<sup>6</sup> For example, the argument that removing exemptions will increase rate volatility mostly comes from carrier organisations<sup>7</sup> – but the shippers have repeatedly<sup>7</sup> stated that they would rather have competitive prices than stable high prices.<sup>8</sup> In any event, price stability is not an antitrust objective.<sup>9</sup> Finally, a key point of the analysis is to check that

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<sup>5</sup> Pages 182-183 of the Draft Report.

<sup>6</sup> According to Containerisation International's November 2011 annual shipper survey, in response to a question whether the EU repeal made the industry more competitive and should be replicated elsewhere, 70% of shippers responded "yes".

<sup>7</sup> Some carrier lobby groups that submitted comments on your inquiry state that it is "well documented" that EU trades have experienced more volatility than trades where liner cartels remained legal. See the ASF submission at page 2 and the JSA submission at page 2 (using almost the same language). That says nothing about causation. For example, volatility on the Asia-Europe trade could be caused by the prevalence of spot and short-term contracts rather than long-term contracts.

<sup>8</sup> See e.g. the submission of the Global Shippers' Forum at page 3: "as a general proposition, there is no benefit to shippers and consumers of stable high prices which substantially exceed the competitive level as a result of liner shipping cartel pricing."

<sup>9</sup> In the *Atlantic Container Line (TAA)* judgment of 2002, the EU's Court of First Instance (now General Court) noted that at the time of the 1986 EU Liner Conference Block Exemption, the EU legislator "did not

sufficient benefits accrue to the customers. The carriers are obviously likely to derive "benefits" from collusion. However, benefits that solely accrue to the carriers and are not passed on to the customers are not relevant in this antitrust assessment.

13. According to the carriers' submissions to the Productivity Commission, the liner industry is a fixed-schedule, high-fixed-costs business that requires a cartel exemption to function properly. The argument is that removing the New Zealand exemption would lead to "destructive competition", increased concentration, lack of investment and reduced service to/from New Zealand.
14. The carriers made similar claims before the European Commission during its three-year review of the EU liner cartel exemption from 2003 to 2006, and the European Commission ultimately found that there was not enough evidence to substantiate these claims. For present purposes I would like to highlight four points in particular:
  - (a) The "destructive competition" argument can be tested in several natural experiments. First, the EU has not experienced "destructive competition" in the three years since the repeal: there are still many carriers active on EU trades, and they now offer even more capacity than before the repeal. Second, Brazil and South Africa (for instance) have been functioning without liner cartels for even longer, and they seem to be adequately served by many carriers.

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assert (and indeed could not have asserted) that stability is more important than competition". See case T-395/94 [2002] ECR II-875, paragraph 261.

- (b) In fact, the liner industry is no different from other fixed-schedule, high-fixed-costs transport industries (such as the airline sector or the rail sector) that function well under the standard competition law regime.
- (c) The EU repeal has not led to significantly increased concentration. In any event, consolidation (subject to merger control) is preferable to cartels, as it can improve efficiency and increase competition.
- (d) The argument that without a cartel exemption, the carriers would reduce investment in their key assets (i.e. container ships) does not hold. We have observed that a number of carriers are expecting the delivery of many large vessels earmarked for the Asia-Europe trade.<sup>10</sup> Moreover, regardless of any liner cartel exemption or repeal, the prospect of operating newer, larger and more efficient vessels can act as a strong incentive to invest in new vessels.

### **C. The effects of the EU repeal**

15. The Draft Report states that the Productivity Commission is interested in further information on the impact of the EU repeal.<sup>11</sup> Despite our constant market monitoring and regular contacts with shippers and carriers, we have not been able to identify repeal-driven detrimental effects on EU trades in terms of all-in prices and service

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<sup>10</sup> See Alphaliner, issue 8, volume 2012: MSC is expecting 13 vessels of above 11,500 TEUs in 2012. "The most likely destination is the Far East-Europe trade." Meanwhile Maersk is expecting 20 18,000-TEU vessels from 2013 – the largest container ships ever built.

<sup>11</sup> Page 182 of the Draft Report.

quality.<sup>12</sup> Certainly there have been noticeable effects from the global economic crisis, which coincided with the EU repeal (October 2008). In these circumstances, it is very difficult to isolate the effect of the repeal. Separately, as you may know, the European Commission carried out surprise inspections at the premises of a number of carriers within the EU in May 2011. As explained in a press release at the time, the European Commission had "reason to believe that the companies concerned may have violated the antitrust rules".<sup>13</sup> If such infringements were confirmed, they may have produced their own effects on the market. The investigation is on-going and you will understand that I cannot comment any further. The fact that the European Commission carried out such inspections does not mean that the carriers involved are guilty of anti-competitive behaviour, nor does it prejudge the outcome of the investigation.

16. The Draft Report also notes that there appears to be little "published empirical research" on the impact of the EU repeal.<sup>14</sup> Since the publication of the Draft Report, the U.S. Federal Maritime Commission's Bureau of Trade Analysis has issued its "Study of the 2008 repeal of the Liner Conference Exemption from European Union Competition Law".<sup>15</sup>

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<sup>12</sup> The JSA submission (at page 3) points to "a number of potential service problems" as a consequence of the EU repeal. It is not clear what "potential" service problems are referred to, or how such service problems could be attributed to the EU repeal.

<sup>13</sup> European Commission press release MEMO/11/307 dated 17 May 2011.

<sup>14</sup> Page 181.

<sup>15</sup> Available at [www.fmc.gov](http://www.fmc.gov).

17. The main finding of the FMC study is that the EU repeal had no significant impact on Asia-Europe prices compared to Asia-U.S. prices. The study also found that (a) carriers tend to maintain more capacity in service on markets where liner cartels are prohibited; (b) the very modest increase of concentration on the Asia-Europe trade was unproblematic; and (c) the impact of the repeal on service quality was neutral (using capacity utilisation and port-to-port transit times as proxies). However, the study did not take account of other key measures of service quality such as punctuality, frequency of service, port coverage or cost efficiencies from Ultra Large Container Ships (ULCSs).
18. Overall, this is a positive assessment of the EU repeal. While the study does not make recommendations on antitrust exemptions for liner cartels, we see it as broadly vindicating the EU's decision to abolish its exemption from 2008.
19. However, one should be mindful of the limitations of the study. In terms of econometric methodology, the study used a "simple", "easy-to-interpret" and "less than ideal" difference-in-difference analysis rather than a regression analysis.<sup>16</sup> (The study notes that the FMC's attempts to obtain better-quality data from the carriers were unsuccessful.)<sup>17</sup> The findings are limited to the study period, which ended in 2010. Because of the downward price trend on the Asia-Europe trade in 2011, I believe that including the year 2011 within the scope of the study would have shown even more positive results for the EU repeal. Moreover, the study is subject to multiple qualifiers and disclaimers. In fact, it does not reach a conclusion on causality, as the lack of

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<sup>16</sup> Pages 19 and 312 of the FMC study.

<sup>17</sup> Page 312 of the FMC study.

significant impact on Asia-Europe prices in the post-repeal period (compared to Asia-U.S. prices) may be due to two different causes: (a) the EU repeal did not produce a significant impact; or (b) the transpacific cartel (in the control group) was ineffective during the study period.<sup>18</sup> Finally, the study concedes that a more sophisticated analysis could produce completely different results<sup>19</sup> and that it contradicts an earlier Korean study on the same topic on some points.<sup>20</sup>

#### **D. Conclusion**

20. The European Commission is confident that the repeal of the EU exemption for liner cartels was the right decision, and many of the issues assessed during our review could also be relevant to your current inquiry.
21. The case against liner cartel exemptions is simple and powerful: the carriers have not shown that liner cartels produce net benefits for shippers, and therefore there is no reason to grant them a block exemption.

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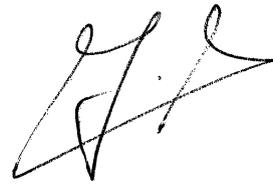
<sup>18</sup> Page 217 of the FMC study.

<sup>19</sup> Page 312 of the FMC study.

<sup>20</sup> Page 216 of the FMC study. The Korean study is summarised in the FMC study (at 216, 304 and 313-314).

22. I hope that these comments will be useful to you when drafting your Final Report. Should you wish to discuss some of these points further, please do not hesitate to contact me or my colleague Hubert de Broca (Head of Unit F-1; tel: +32 2 29 96660; e-mail: [hubert.de-broca@ec.europa.eu](mailto:hubert.de-broca@ec.europa.eu)).

Sincerely,

A handwritten signature in black ink, appearing to be 'F. Ilzkovitz', written in a cursive style.

Fabienne Ilzkovitz  
Director