Leading the Way - European Commission Proposes Repeal of Liner Shipping Conferences Exemption

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I. Introduction

Shipping conferences and their exemption from antitrust laws in some countries began nearly a century ago. The 1990s witnessed mounting criticism against the exemption for these ocean liner conferences. But little was accomplished other than reducing the scope of the exemption due to concerns of international comity and failure to provide evidence that the basic rationale was incorrect. The OECD in 2002 stated "More words have been said, more ink has been spilled and more acrimonious jibes exchanged on the subject than on possibly any other in the maritime sector. And yet, there is no clear resolution in this matter."[1] In a historic move, the European Commission, is leading the way through this impasse by proposing to its ministers to approve the repeal. On September 25, 2006, Competitiveness Council agreed to repeal Regulation 4056/86.

Part II of this paper will examine developments in the European Union proposing the repeal of the exemption. In Part III, the major developments in the US following its 1998 reforms will be examined. In Part IV, Australia's review of its exemption will be described. In Part V, Canada's current status on this issue is reviewed. Finally, in Part VI whether the end of the exemption is near is examined with a few concluding remarks.

II. EU - Leading the Way

In 1986, Council Regulation 4056/86 was adopted providing an exemption to liner conferences from the EC Treaty competition rules on restrictive business practices (Article 81). The exemption allowed carriers to fix prices and regulate capacity.

A) Factors Leading to Review of Council Regulation

A review of the exemption was undertaken in 2000 when the Lisbon European Council called on the Commission "*to speed up liberalisation in areas such as gas, electricity, postal services and transport.*" A number of other factors also provided increased momentum for the review. In May 2000, the OECD workshop on Reform in Maritime Transport met in Paris to consider their

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***** *The views expressed here are those of the authors and are not purported to be those of the Commissioner nor of the Competition Bureau nor of Industry Canada.*

discussion paper that recommended the removal of immunity from the application of antitrust laws to common rate fixing by conferences together with discussion and capacity stabilization agreements. On November 6, 2000, the OECD published an interim report [2] and on April 16, 2002, it published its final report. The OECD report concluded "that exemptions for conference price-fixing no longer serve their stated purpose (if they ever did) and are no longer relevant." The report recommended that OECD countries "seriously consider removing antitrust exemptions for price-fixing and rate discussions."[3]

Other considerations include. First, no comprehensive review of the regulation had taken place in more than fifteen years since the regulation was first adopted in 1986. Second, changes had occurred in the market such as increase in the use of container vessels, increase in the size and speed of vessels, and development of networks. This led to operational changes such as consortia and alliances which do not involve price fixing, raising the question whether transport services can be provided by less restrictive means than horizontal price fixing. Third, the scope of the exemption had been reduced in other jurisdictions (eg. OSRA 1998 in the U.S., Review of the Trade Practices Act in 1999 in Australia and SCEA 2002 in Canada). Fourth, antitrust procedures applicable to all sectors were modernized which led to questions as to whether the rules applicable to transport should be modernized to deal with the changed market situation.

B) Review of Council Regulation (EEC) No. 4056/86

1. Consultation Paper on the Review of Council Regulation

On March 27, 2003, the Commission released a consultation paper. It described the background of EEC Regulation 4056/86 on shipping conferences; made a preliminary identification of those issues that require further examination in light of current market conditions; and described the programme of modernization of the EC Competition rules and international and other developments. It focussed in particular on the liner conference block exemption, the exclusion of tramp vessel services and cabotage from the scope of the regulation. It also raised questions and invited comments from third parties.

The commission's preliminary conclusions were that: the regulation is in need of simplification and modernization; the justification of exemption of tramp services and cabotage from the regulation does not seem obvious; the justification for the block exemption to liner conferences is open to challenge (in other words, the impact, the supposed benefits and the possibility of obtaining the benefits by

less restrictive forms of co-operation); and a number of provisions have little practical value. It therefore raised questions on the scope of the regulation, the benefits (i.e., stability, reliability and adequacy of service; benefits to users; indispensability and effective competition); and the arguments for retaining the provisions relating to technical agreements.

2. Final Report on Public Submissions to the Consultation Paper

On November 12, 2003, the final report in response to the consultation paper was released. The report concluded that "... at this point, no convincing new arguments are made either for or against the existence of conferences."[4] First, almost all the respondents were not in favour of extending the scope of the regulation to tramp shipping and cabotage in light of the competitive nature of the former and attempts to liberalize cabotage in Europe. Second, regarding block exemption the report stated "The shippers are in favour of abolishing conferences, arguing that they have not contributed to stability, reliability and competition, while carriers argue the opposite (sometimes using the same arguments). The freight forwarders take a middle position, being in favour of a limited degree of price fixing and favouring stability, but opposing the conference system when it engages too much in applying adjustment factors."[5] Due to lack of data provided in the submissions no new insights were gained. Third, the opinions on retaining the provisions for technical agreements in the regulation were divided.

3. Discussion Paper of the Competition Director General on Review of Council Regulation

On June 16, 2004, the Competition Director General released its Discussion Paper based on the outcome of the consultation paper. First, on the liner shipping block exemption (BE) the paper stated "the conditions for an exemption would appear to be no longer fulfilled. There is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstance and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified. ... On that basis, DG COMP would propose to repeal the present BE for liner shipping conferences."[6] Second, on the scope of the regulation, the paper indicated that no credible consideration has been put forward why these services need to benefit from different enforcement rules applicable to all other sectors. It therefore stated "On that basis, DG COMP would propose to bring maritime cabotage and

tramp vessel services within the scope of the general enforcement rules."[7] Third, on retaining technical provisions in the regulation, the paper stated "the provision in Regulation 4056/86, as confirmed by the Court, is merely declaratory and DG COMP would therefore propose to repeal this provision..."[8] The Commission decided to prepare a Commission paper containing proposals for Community action.

4. White Paper on Review of Regulation 4056/86 (October 13, 2004)
The White Paper's conclusion were the same as the above Discussion paper. Its key proposals were: to consider repealing the current block exemption for liner conferences together with exception for technical agreements; to examine what type of instrument would be needed to replace the regulation; to examine the European Liners Affairs Association (ELAA) proposal for a new regulatory proposal; and to propose to change regulation 1 / 2003 to remove the current exclusion of tramp and cabotage services from its scope.

In response, the ELAA proposed a compromise through which carriers would abandon their right to collectively set rates in exchange for permission to share aggregate cargo data and rate indexes and to set common formulas for surcharges. The ELAA hoped to retain some of the Conferences' past privileges so that conferences would be able to avoid rate wars and maintain stability.

5. Discussion Paper on the Review of Regulation 4056/86
In response to the White Paper and after contacts with third countries, the Commission released its Discussion Paper on July 13, 2005. In addition, it set out its competitive analysis on 12 trades and the ELAA proposal for an information exchange to replace the block exemption. It found that there was broad consensus on the abolition of the liner shipping block exemption, except by carriers. Bilateral contacts with the US, Canada and Australia confirmed that a repeal of the exemption would not give rise to international conflict. Further, the repeal would not lead to a significant increase in concentration on a global scale even if it led to an increase in merger activity. Furthermore, the repeal would have considerable pro-competitive effects.

In considering the ELAA proposal, the Commission found that there could be some efficiencies in the exchanges of information on capacity and on commodities proposed. It stated "..., a trade committee where competitors discuss, interpret and evaluate trade data is a scheme aiming at eliminating

uncertainty as regards competitors' future market conduct. In addition there are price elements that do not appear either indispensable nor beneficial to shippers. The common formulae for ancillary charges and surcharges amounts to joint price fixing as surcharges account for an average 30 % of the price of transport. The quarterly price index is potentially a signalling mechanism allowing carriers to benchmark their own price so as not to deviate from that of competitors."[9] In light of this and due to concentration in the market, the Commission concluded that the ELAA proposal did not meet the four conditions of Article 81(3) and should not be allowed in its present form. It indicated that it would conduct a study on the impact of the removal of the block exemption and the impact of its replacement with an information exchange system.

C) Findings of the Commission and Recommendation

1. Consultant study on the impact of repealing the exemption for liner shipping conferences (November 10, 2005)

On November 10, 2005, the Commission released a study by an outside consultant on the impact of repealing the exemption for liner shipping conferences. The main findings on repealing the exemption were: prices of transport for liner shipping services will decline; service reliability on deep sea and short sea trades will likely improve; service quality will either be unaffected or will improve; competitiveness of EU liners will either be positive or neutral; small liner shipping carriers will not experience particular problems; and employment and trade from EU ports to developing countries will not be faced with a negative impact.

The ELAA submitted a proposal to replace the current block exemption regulation with an information exchange system. However, *Global Insight* said that the proposal should not be accepted as it would constitute an 'invitation to collude'. It did favour the concept of a trade association and a quarterly or bi-annual data exchange system rather than a monthly exchange system.

2. Commission Proposes Repeal of Exemption (December 14, 2005)

In light of the above, in a historic move, on December 14, 2005, the European Commission called for an abolition of the liner conference system that covered shipping services since the 1870's. The European Commission called on member governments to repeal the block exemption. The EC said "Repealing the exemption will benefit EU exporters by lowering transport prices whilst

maintaining reliable services. This will enhance the competitiveness of EU industry. ... Liner conferences do not deliver the benefits for which block exemption was established and the commission's impact assessment shows that lower transport prices are likely to result from the block exemption's repeal."[10] The Commissioner said "The European shipping industry is strong and has everything to gain from a competitive market. Customers are clamouring for business in the industry to be conducted as it is in all other sectors."[11] The Commission indicated that the end of the exemption should take effect two years after the EU ministers have approved the measure. This will provide time for carriers to adapt to a competitive market and governments to review their relations with non-EU countries where shipping conferences are still legal.

3. Competition Council Agrees to Repeal Exemption (September 25, 2006)

On 25th September 2006, the matter was finally put to rest.[12] The Competitiveness Council agreed to repeal Regulation 4056/86 ending the possibility for liner carriers to meet in conferences, fix prices and regulate capacities as of October 2008. It also amended Regulation ½003 – the general regulation setting out the procedural rules needed to implement Articles 81 and 82 of the EC Treaty – extending its scope to include cabotage and tramp shipping. The abolition of the exemption for liner conferences will affect EU and non-EU carriers operating on routes both to and from Europe. The European Commission welcomed the unanimous adoption of its proposal by the Competitiveness Council. The Commissioner who handled this proposal said "I am delighted the Council has adopted this proposal less than a year after we presented it. The European shipping industry will benefit from the more competitive market that will result from the repeal of the block exemption and the EU economy as a whole stands to benefit from lower transport prices and more competitive exports."[13] To ensure that the new regime fosters competitive markets, the Commission will issue Guidelines on the application of the competition rules to maritime transport before the end of the transitional period.

III. USA

In the US, the *Shipping Act of 1916* was adopted based on the recommendations of the Alexander report. It recognized certain benefits and shortcomings of the conference system. In 1960, the act was amended following investigations by two congressional committees. The act was again amended, in 1984, as a result of major developments in the industry. The substantial changes were on

agreement standards, antitrust immunity, independent action, service contracts, common carriage, tariff filing and enforcement and discrimination in foreign-to-foreign trades.

A) OSRA Reforms

On May 1, 1999, reforms to the Ocean Shipping Reform Act of 1998 (OSRA) went into effect. The key reforms were on: competition; efficiency; and administration.

Regarding competition: the purpose clause was expanded; the notice period for independent action was reduced to five days; an ocean common carrier can no longer regulate or prohibit the use of service contracts (it cannot restrict members from negotiating with shippers, it cannot require disclosure of terms and conditions of a service contract and it cannot adopt mandatory rules for service contracts); the 'me too' provision on service contracts was eliminated; a service contract is prohibited that is a unjustly discriminatory practice or unreasonably prejudicial or disadvantageous; a shipper may combine with a shipper to obtain a service contract but it cannot be offered by a non vessel operating common carrier (NVOCC); and an intermodal agreement can be made if it is not in violation of the antitrust laws and is consistent with the purposes of OSRA.

The reforms relating to administration include: tariff filing elimination with the FMC; tariff publication electronically; tariff availability electronically to the public at a reasonable price; and service contracts based on percent. Administrative reforms include: amendments to the definition in section 3 (i.e., to delete, add, and modify the meaning of several terms); modification to penalties; and provision for licensing of ocean transportation intermediaries and NVOCCs (the latter's bond was also increased). Other amendments were on appropriations authorized for the FMC, prescription date for regulations, etc.

B. Developments since OSRA

A few months after the *Ocean Shipping Reform Act of 1998* came into effect, the issue of antitrust immunity was raised by the US House Judiciary Committee. This led to the introduction of HR 3138, the *Free Market Antitrust Immunity Reform Act* that would have ended the antitrust immunity for rate setting conferences. In response to HR 3138, the US Department of Justice made a submission calling for an abolition to antitrust immunity. It indicated why allowing price fixing and other anticompetitive practices imposed substantial

costs on their economy through higher prices on a wide variety of goods shipped by ocean transportation. It indicated that carriers' reason for the exemption to keep shipping costs lower was a seriously flawed public policy. It stated "Such an exemption no longer makes sense, especially at a time when countries all over the world are turning to competition, rather than antitrust exemptions and regulation, as the best hope for economic prosperity."[14] Besides the Department of Justice, other organizations such as Freight Forwarders, Pacific Coast Council of Customs Brokers, and some unions supported the bill. Nevertheless, it was believed that any action by Congress was unlikely in 2002, as OSRA was newly enacted and additional time was needed to determine its full impact.

Since then, some liberalization has occurred. The restriction on NVOCCs in OSRA after the passage of the amended Act raised concern. United petitions by five large NVO's led to the FMC's proposed rule. The proposed rule (October 2004) would allow NVOCC's to offer its customers confidential contracts. NVOCC's that offer such contracts would be exempt from the tariff publication requirements, however these contracts would have to be filed. This would give NVO's greater parity with ocean carriers thereby enhancing their ability to compete. While the industry responded favourably to this proposal, it led to demands for additional freedom as the rule prohibited such contracts by shippers associations with NVO members. Further, it did not permit such contracts by more than one NVO as it could give them antitrust immunity. The Chairman of the FMC said that "...it [these confidential agreements] will ultimately result in more competition and a more efficient industry."[15]

Shipper groups petitioned the FMC to reconsider the rule and asked the US Court of Appeals for the District of Columbia to review the rule. Initially, the FMC rejected the petition as it would not cause undue hardship or manifest injustice to the two groups. However, in August 2005, the FMC voted unanimously to begin the legal steps that would lift the prohibition on shippers groups and sought industry comment on NVOs offering joint contracts to its customers. On October 28, the FMC issued its final regulation lifting the ban on the use of NVOCC Service Arrangements by Shippers' associations with NVOCC members. The FMC indicated that such arrangements would likely not reduce competition among shippers associations and will in fact enhance competition. The industry and government agencies had agreed on allowing collaborative agreements

among NVOs and shippers but that they would not be exempt from antitrust laws.

C. The Next Move

The developments in the European Commission are also beginning to have an effect in the United States. On October 18, 2006, the Antitrust Modernization Commission held hearings to examine antitrust laws in all sectors to see if they meet the new economy. The testimony of the few parties that were invited revealed a mixed view together with a dissenting view from the FMC. Nevertheless, the twelve member Commission made clear its dislike for the liner carrier immunity. Commissioner Debra Valentine said "Shame on us that we are trailing behind" the European Union. The Commission expects to issue its recommendations in a report to Congress by 2007 and then its up to U.S. Congress.[16]

IV. Australia

Australia has had a long history of Commonwealth regulation providing shipping conferences with conditional exemption from competition legislation. This continued when the *Trade Practices Act* (TPA) was introduced in 1965. Part XA which was introduced in 1966 provided exemptions from all of the competition rules in Part IV of the Act for all registered conference agreements in return for undertakings to enter into negotiations and provide information to the designated shipper body. Conference agreements could be disallowed if conferences or their members failed to comply with an undertaking or to appoint a local agent, or if they failed to have due regard for the need for services to be efficient, economical and adequate.

A. Background to the Exemption in Australia

Over the last twenty-five years, there have been four major reviews of competition regulation in Australia: the 1977 Grigor Report; the 1984 Industry Task Force; the 1993 Brazil Review; and the 1999 Byron Report. The first resulted in no amendments to Part X of *Australia's Trade Practices Act*. The second resulted in amendments: providing for greater regulatory oversight of carriers, improving the bargaining power of shippers, limiting the exemption to sections 45 (anticompetitive agreements) and 47 (exclusive dealing), making agreements subject to section 46 (misuse of market power), introducing a 'me too' provision and requiring conferences to negotiate minimum service levels. The third resulted only in accepting one recommendation i.e. retention of Part X.

The fourth also resulted in a few amendments.

B. Review of Part X of Australia's Trade Practices Act

In June 2004, the Parliamentary Secretary to the Treasurer referred Part X of the TPA to the Productivity Commission for inquiry and report. The Commission's task in reviewing Part X was to consider: first, the justification for industry-specific exemption (i.e. whether Part X should be retained); second, the alternatives if Part X were abolished; and third, the changes that could be made to improve the effectiveness of Part X, if retained.

On July 19, 2004, the Australian Competition and Consumer Commission questioned the benefits of the shipping conferences exemption. Following a public investigation into the Asia-Australia Discussion Agreement, the ACCC Chairman stated that "this highlights both the pervasiveness of these anti-competitive agreements and the permissiveness of the Part X regime." However, the Commission did not recommend that the agreement be disallowed as it could not separate the broader market effects from the impact of the anti-competitive agreement.

On September 15, 2004, the ACCC in its submission to the Productivity Commission suggested that the specialised treatment of the international liner cargo shipping industry be revoked. It stated that " what is not so clear is whether the collusive liner agreements provide benefits which outweigh those detriments." In essence, it proposed the net public benefit of particular agreements between shipping lines be established prior to them being exempted from Australia's competition law.

C. Findings

The Productivity Commission released its Inquiry Report on *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping* in October 2005.

On the first issue, the Commission was of the opinion that Part X reflects a judgment that most agreements are beneficial (that is, that they should generate a net public benefit) and that it would be too difficult or costly to identify and exclude those that are not. This, however, was a presumption.[17] On reviewing the filed agreements the Commission 'considers that no compelling case has been made that all agreements currently registered under Part X operate to provide a

net public benefit'. Accordingly, it was of the view that Part X as currently structured, no longer meets its primary purpose and that evaluation of agreements is needed to ensure that registration is provided only to agreements that are likely to provide a net public benefit. This could be achieved by an alternative mechanism for authorization or modifying Part X.

On the second issue, the commissions's preferred option is for Part X to be repealed and the liner cargo shipping industry to be subject to the general provisions of the TPA. Authorization could be undertaken under Part VII of the TPA as occurs for other industries. Under Part VII, agreements would be assessed individually on the basis of their net public benefit by the ACCC. It could be achieved with a four-year transitional period and is unlikely to result in practical inconsistencies with the regulations as currently applied in the US and the EU.

Regarding the third issue, the Commission's strongly preferred option is to repeal Part X. However, if Part X were to be retained the current arrangements could be improved by either: (i) selectively registering only agreements that do not contain provisions to discuss or set prices and/or limit capacity offered on a trade route, and by revoking registration for those that do; or (ii) excluding from registration, and by revoking the registration of, 'discussion agreements', together with providing for the protection of confidential individual service contracts between carriers and shippers.

It is apparent from the above that the Commission would prefer the repeal of the current exemption and that alternative mechanisms be used to provide immunity for efficiency enhancing agreements or agreements that could be shown to provide a net public benefit.

On August 4, 2006, the government provided its response to the Commission's recommendations. It decided to retain Part X but to amend it promote further competitive reform. The amendments to Part X will: clarify its objectives; remove discussion agreements from its scope; protect individual confidential contracts between carriers and shippers; and introduce a range of penalties for breaches of its procedural provisions.

V. Canada

The *Shipping Conference Exemption Act* in Canada providing for the exemption

of shipping conferences from certain provisions of the *Competition Act* was passed in 1970. In 1979, the Act was amended but did not contain any effective pro-competitive measures. The Act was again amended in 1987 with substantive new provisions to promote competition. These were: restriction on agreements between conference members and independent ocean carriers; restriction on loyalty contracts; provision for service contracts; provision for independent action on rates; limitation of exemption in the event of commission of certain acts to engage in predatory pricing; and restriction of the exemption to non-multimodal rate agreements.

A. SCEA Reforms - Present Status

The Shipping Conferences Exemption Act was again amended in 2001 and the amendments came into force on January 30, 2002. The key reforms were on: competition; efficiency; and administration.

Regarding competition: the notice period required for independent action on tariffs was reduced to five days with provision for adopting independent action on the same day; and a specific provision for mandatory individual service contracts was provided with no need for a conference member to give notice to the Conference of the service contract or to divulge the substance of the contract. The reforms relating to efficiency include: filing of documents electronically; deleting the requirement to file tariffs and individual service contracts with the Canadian Transportation Agency; and making available tariffs to the public electronically at a reasonable price. Administrative reforms include:an increase in the fine for non-compliance to $10,000 per day for each offence; and other amendments designed to accommodate the above changes and to provide for reorganization of certain sections.

B. Developments since the amendments in 2002

Since the amendments in 2002, no major developments have occurred in Canada. Nevertheless, Transport Canada is monitoring the impact of the SCEA reforms together with developments occurring on the international front. Regarding service contracts it reports that "In 2004, the Canadian Transportation Agency accepted filings for 15 service contracts, down from 25 in 2003 and 51 in 2002. The contracts applied to both inbound and outbound traffic and to origins and destinations on both the east and west coasts of Canada."[18] It is believed that most cargo is shipped via individual service contracts which are not filed with the

Agency while the above refers to conference service contracts. On the international front, Canada is particularly sensitive to developments in the US as it could affect the competitive position of ports in Canada vs. the USA.

VI. The End: Is It Near?

The developments in the EU, USA and Australia suggest that an end to the exemptions of shipping conferences from the application of competition laws may be near. Within the next five years or so, one expects most of the major jurisdictions to revoke the exemption that shipping conferences have enjoyed from competition laws for nearly a century.

This is not surprising as the reasons for their existence: price stability, adequacy of service, and international comity which may have been valid several decades ago is no longer valid. Various studies have indicated that there would be significant benefits if the exemption to these cartels were revoked. For example, a quantitative study by the World Bank indicates that "Trade liberalization and the breakup of private carrier agreements would lead to an average reduction in liner transport prices by one-third and to cost savings of up to $3 billion on goods carried to the US alone."[19] This study therefore proposed that the General Agreement of Trade in Services provision dealing with business practices be strengthened through the creation of two obligations: an end to antitrust immunity to collective agreements, and the right of foreign consumers to challenge the anti-competitive practices by shipping lines in the national courts of countries whose citizens own or control these shipping lines.

As is usually the case, the end of an era for some organizations usually means the beginning of a new era for others. It is widely recognized that all agreements are not in themselves bad as many may be efficiency enhancing and may provide significant benefits to the economy. Thus while the end of shipping conferences as price fixing and capacity determining organizations may have arrived, their beginning as consortia may gather momentum. This means new guidelines for such organizations, new questions as to what is required for them to comply with the *Competition Act*, new questions as to what is required of efficiency enhancing agreements to satisfy the exemption from the application of provisions of price fixing, new questions as to what types of information is needed for the Commissioner's opinion on certain agreements, etc.

The competition authorities would see maritime activities exempt from the

Competition Act reduced, an objective that the Agency has been trying to achieve for some time, as the Act is a law of general application.

VII. Concluding Remarks

The repeal of the exemption will lead to the demise of rate fixing and capacity determining shipping conferences. It would also mean an end to a controversial issue in shipping where more words have been said, more ink has been spilled and more acrimonious jibes exchanged on the subject than on possibly any other in the maritime sector. It has also become increasing difficult to continue to justify an exemption based on the comity doctrine. Such an exemption no longer makes sense, especially at a time when countries all over the world are turning to competition as the best hope for economic prosperity.

In fact, this should lead to greater international comity by avoiding embarrassing problems such as getting an agreement approved by one jurisdiction and challenged by another. Narrowing the differences in the treatment of conference agreements between the jurisdictions will be a step forward.

But perhaps the most important result would see shippers and ultimately consumers benefiting from increased competition and lower prices if the cost savings are passed on. If this translates into increased demand from consumers it could lead to increased trade and increased demand for shipping services.

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3. *Competition Policy in Liner shipping*, DSTI/DOT (2002)2, OECD, 2002, p. 6.
4. Carsten Fink, Aaditya Mattoo, and Ileana Cristiana Neagu, " Trade in international maritime services: How much does policy matter?," *JEL*, Nov. 13, 2000 [submitted for publication].
5. *The Department of Justice Analysis of the Impact of the Shipping Act of 1984* (1990).

Appendix-Economic Theories Used in Explaining Shipping Conferences

Several competing economic theories have been used to justify the exemption of liner conferences from anti-trust laws, each with its own implications and policy prescriptions. The well known theories (*The Cartel-Monopoly Theory, The Theory of the Empty Core, The Theory of Contestablity, The Austrian Disequilibrium Theory, The Cost-Based Theory* and *The Value of Service Models*) are briefly described in our publication indicated in the first reference in the Bibliography.[20]

Endnotes

[1] *Competition Policy* in Liner shipping, DSTI/DOT (2002)2, OECD, 2002, p. 6.

[2] "This review has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers and recommends that limited anti-trust exemptions *not* be allowed to cover price-fixing and rate discussions. It also finds that capacity agreements should be carefully scrutinized to ensure that they do not distort the markets in which they are present."

[3] *Competition Policy* in Liner Shipping, OECD, DSTI/DOT(2002)2, April 16, 2002.

[4] Final Report on Public Submissions in to the Consultation Paper, Erasmus University Rotterdam, November 12, 2003 p. 66.

[5] Id.

[6] Discussion Paper of the Competition Director General on Review of Council Regulation, June 16, 2004, p. 2.

[7] Id.

[8] Id.

[9] Discussion Paper on the Review of Regulation 4056/86, July 13, 2005, pp. 1-2.

[10] Commission Proposes Repeal of Exemption, December 14, 2005, p. 1.

[11] Id.

[12] Competition: repeal of block exemption for liner shipping conferences - frequently asked questions, Memo/06/344, Brussels, September 25, 2006.

[13] Competition: Commission welcomes Council agreement to end exemption for liner shipping conferences, IP/06/1249, September 25, 2006.

[14] Statement of Charles A. James, Assistant Attorney General, Antitrust Division, before the Committee on the Judiciary, U.S. House of Representatives Concerning H.R. 1253, the Free Market Antitrust Immunity Reform Act of 2001, June 5, 2002.

[15] FMC approves NVO contract petition, JOC, December 14, 2004, www.joc.com

[16] *American Shipper*, October 19, 2006, www.americanshipper.com

[17] "This presumption of net public benefits runs counter to the general provisions of the TPA, where those seeking exemptions for anti-competitive behaviour are required to demonstrate a net public benefit before such exemptions are provided. It also runs counter to the spirit and intent of competition policy where the 'onus of proof' is placed on those recommending the retention of anticompetitive arrangements to make the case and present the supporting evidence." *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, October 2005. p. XXXVI.

[18] Transportation in Canada 2004, Annual Report, Transport Canada, p. 77.

[19] See Ref 4. Trade liberalization was defined to include cargo reservation schemes and monopoly rights granted to ports and auxiliary services. Private carrier agreements primarily include rate fixing practices of maritime conferences which enjoy an exemption from competition rules.

[20] For a further discussion of these theories and how they apply to specific aspects of liner practices see FMC. (1989*) Section 18 Report on the Shipping Act of 1984*, and *The Department of Justice Analysis of the Impact of the Shipping Act of 1984* (1990).