EUROPEAN COMMISSION
Directorate-General for Competition

Directorate F: Transport, Post and other services

Brussels, 01 OKT. 2010
COMP/F1/CR/D 37562

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By e-mail and hardcopy

Subject: HT.641 – CCS's proposed recommendations with respect to the Competition (Block Exemption for Liner Shipping Agreements) Order 2006

Dear Ms Chia,

1. I am writing in connection with the Competition Commission of Singapore's ("the CCS") public consultation on its proposed recommendations to the Minister for Trade and Industry with respect to the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 ("the BEO") under Section 36 of the Competition Act of Singapore. I refer to the Consultation Document published on 14 September ("the Consultation Document").

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 to 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. As you know, over recent years, the European Commission has gone through a similar exercise as the one launched by the CCS. As a result, the European Union promoted and achieved a major review of its antitrust policy in the maritime sector.

4. On 25 September 2006, the then 25 Member States of the European Union unanimously repealed the EU Liner Conference Block Exemption, with a two-year grace period running until 18 October 2008 (see EC Regulation No. 1419/2006 repealing EC Regulation No. 4056/86). Until then, price-setting maritime conferences were exempted from EU antitrust law, while similar conduct in any other sector was prohibited as a hardcore cartel. The thorough market review carried out by the European Commission showed that there was no evidence that the liner shipping industry required such an exemption to operate. Specifically, the review showed that the block exemption had not produced its purported benefits, namely reliable services and stable rates.[1] The results of the review have been published on the Commission's website.[2] They are also briefly summarised in the recitals of EC Regulation No. 1419/2006.[3]

5. Following this substantive review, the liner shipping sector is now treated as any other sector in the EU. As you know, and as the level of fines levied every year on cartel participants illustrate, price collusion is prohibited and sanctioned in the EU, whether it takes the form of price-fixing agreements or is limited to discussions of non-binding pricing guidelines. Liner conferences as well as "discussion agreements" (hereafter

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1 Importantly, the EU legislator never promised stable rates as a result of the repeal. It could be that "with or without conferences there is price volatility": see Benini and Bermig, "The Commission proposes to repeal the Liner Conference Block Exemption", Competition Policy Newsletter, Spring 2006, at page 45.

2 The European Commission's consultation paper, discussion paper, impact assessment paper and white paper are available at ec.europa.eu/competition/sectors/transport/legislation_maritime_archive.html.

3 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:269:0001:0003:EN:PDF

"ratemaking agreements") are now considered as illegal hardcore cartels under EU law.[4] The same applies to fixing or discussing capacity.

6. This prohibition applies both to conduct within the European Union and agreements concerning trades to and/or from the EU, as well as trades between non-EU ports if the practices at issue produce an effect within the EU.[5]

7. According to the *Containerisation International* website, trades to/from the EU alone[6] account for 44 % of the world's deployed TEU capacity as of 1 September 2010. In fact, on two of the world's three largest transcontinental trades (transatlantic and Asia-Europe), liner cartels are banned as a result of EU competition law. In addition, a number of jurisdictions around the world never exempted the liner sector from their competition laws. In effect, this means that the prohibition of liner cartels now covers a large part of the international liner sector.

8. This reflects a situation where the antitrust environment in the liner shipping industry is changing. A number of reports and studies – by the OECD, the World Bank, and other organisations in Europe, the U.S., Asia and Australia – have stressed the benefits of competition in the liner shipping sector and have criticised the existence of liner cartel exemptions that remain in place in some countries. On 22 September 2010, U.S. Representative James Oberstar introduced H.R. Bill 6167 ("The Shipping Act of

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4 Discussion agreements are agreements whereby the participants agree on non-binding rate guidelines, among other things.

5 See Bermig and Ritter, "The new Guidelines on the application of Article 81 of the EC Treaty to the maritime sector", Competition Policy Newsletter, 2008, issue 3, at page 27.

6 Defined as Europe, the Mediterranean, the Black Sea, Scandinavia, the Iberian Peninsula and EU rivers and waterways.

2010"), which would abolish the U.S. exemption for liner cartels.[7] As more and more countries realise that they have more to gain from competitive shipping rates than from protecting ocean carriers' margins, antitrust exemptions for liner cartels are likely to continue to lose ground.

9. I wish to add that the EU approach distinguishes between liner cartels on one hand, and non-ratemaking agreements – such as consortia – on the other.[8] In our experience, liner consortia produce less anti-competitive effects and more efficiencies and benefits for shippers/consumers than liner cartels. After a thorough review from 1986 to 1992, the EU legislator therefore concluded that they should be treated differently from conferences. This is why consortia have been exempted from the EU antitrust rules, subject to certain conditions, since 1995. The block exemption was recently extended for another five years (see EC Regulation No. 906/2009), with some modifications.[9] It is now valid until 25 April 2015.

10. The OECD report of 2002[10] and the Meyrick/APEC study of 2008[11] also recommended separating the antitrust treatment of ratemaking and non-ratemaking agreements. Representative Oberstar's H.R. Bill 6167 takes the same position: it

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7 See http://transportation.house.gov/News/PRArticle.aspx?NewsID=1322. As Mr Oberstar put it in his floor statement, "eliminating the antitrust immunity for these conference agreements will increase competition by requiring ocean carriers to compete in the marketplace with the best price and service to get shippers' business. That will benefit the industry as a whole."

8 Under EU competition law, a consortium is defined as an agreement between two or more vessel-operating carriers which provide international cargo liner shipping services, that has the object to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of the consortium members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements (EC Regulation No. 906/2009, Article 2).

9 See Prisker, "Commission adopts new block exemption regulation for liner shipping consortia", Competition Policy Newsletter, 2010, issue 1.

10 http://www.oecd.org/dataoecd/13/46/2553902.pdf

11 http://www.apec-tptwg.org.cn/new/Archives/tpt-wg32/Maritime/Final/08_tpt_Liner_Stages%202and3.pdf

proposes to repeal the U.S. exemption for ratemaking and capacity-fixing agreements but preserves the exemption for "efficiency and service-enhancing agreements" whereby carriers share vessels or space and discuss the number and character of these vessels' voyages – a close approximation of our definition of consortia.

11. In general, building on our experience with competition law in the liner sector, and in contrast to consortium agreements, we believe there is a strong case against exempting liner cartels from the antitrust rules:

- The liner industry is not unique: like other fixed-schedule, high-fixed-costs transport industries, it can perform well under competition law. Empirical observation[12] shows that the carriers still serve non-exempted trades such as the Asia-Europe trade – at a profit.[13]

- We have not seen any evidence from the carriers to support the contention that liner cartels are necessary to provide reliable, efficient and reasonably priced services.

- Liner cartels do not produce stable rates – and even if they did, it is not clear that the majority of shippers would be ready to trade price competition for price stability.[14]

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[12] See, for example, the Alphaliner weekly newsletter of 3 August 2010 at page 1: "the main driver for the carriers' return to profit in the first half of the year are increased freight rates in the Asia-Europe trade".

[13] In fact, Maersk Line CEO Eivind Kolding recently stated that "I think shipping lines would be happy to see a solution like the one we have in Europe. ... The European solution seems to work well and European trades have adjusted to the new paradigm, so in general we are happy with what we see there". See Lloyd's List, "Maersk Line expects end to US antitrust concessions", 30 September 2010.

[14] 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 Liner Conference Block Exemption, the EU legislator "did not 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.

- There is however ample evidence – notably in the OECD report and from decades of antitrust law and economics – that conferences and discussion agreements lead to higher rates, to the detriment of shippers and consumers. Conferences and discussion agreements produce an effect on their members' rates as well as on independent carriers' rates.

- Removing the block exemption in EU competition law has not lead to consolidation and oligopoly. In any event, it is our opinion that consolidation (subject to merger control) is preferable to cartels.

- More generally, liner cartels lead to a wealth transfer from customers to liner operators. The extra margin that carriers obtain by cartelising the market acts as a tax on trade that reduces demand for container transport and the underlying cargo.

12. Finally, I should note that the EU approach is to draft and construe any exemption to the competition rules as narrowly as possible. Even at the time of the EU Liner Conference Block Exemption (1986-2008), our approach was to limit the scope of the exemption to what was strictly necessary to achieve the purported benefits of the exemption. Thus, the EU Liner Conference Block Exemption did not exempt

    - price-fixing by liner shipping operators for inland transport supplied in combination with maritime transport as part of a door-to-door, intermodal transport operation (a "through" voyage);[15]

[15] The EU's Court of First Instance (now General Court) came to this conclusion in Case T-86/95 *Compagnie Générale Maritime* [2002] ECR II-1011, paragraphs 230 to 277 (deciding whether it was necessary to exempt the carriers' inland price-fixing to achieve the benefits of the EU liner conference block exemption in Regulation No. 4056/86).

- price-fixing among liner operators in respect of cargo-handling services in the port "for which there is specific supply and demand distinct from that for maritime or inland transport";[16] and

- capacity-fixing as an instrument to create an artificial shortage of capacity in combination with an increase in the conference tariff.[17]

13. In sum, we believe that the ideal antitrust regime in the liner shipping sector is to enact a limited exemption from the antitrust rules for consortia, while applying the full force of the competition rules to liner cartels. Cartels in any other sector are prohibited. We have found no evidence to support treating the liner sector differently.

14. I am grateful for this opportunity to comment on your proposal to renew the BEO for the liner sector. We hope these comments will be useful to you in your further work on the review of the BEO. Should you require further clarifications or have any queries, please do not hesitate to contact me or my colleagues Linsey McCallum (Head of Unit F-1) and Cyril Ritter (case-handler in Unit F-1).

Sincerely,

Fabienne Ilzkovitz
Director

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[16] See Commission Decision C(2002) 4349 final of 14 November 2002 in Case COMP/37.396/D2 – *Revised TACA*, paragraphs 41, 42 and 61. That would include e.g. customs clearance charges and detention charges, for example. Moreover, according to DG COMP's issues paper of September 2006, "In DG COMP's view, the liner conference block exemption does not allow for the joint fixing of terminal handling charges in particular when these are not related to the sea leg of the journey". By contrast, the exemption covered charges that are "indivisible" from the sea leg, such as CAF, BAF, LCL charges, and special equipment/oversize charges.

[17] See Pons and Fitzgerald, "Competition in the maritime transport sector: a new era", Competition Policy Newsletter, 2002, issue 1, at page 13, and Commission Decision C(2002) 4349 final of 14 November 2002 in Case COMP/37.396/D2 – *Revised TACA*, paragraph 84.