MARITIME LINER CONFERENCE AGREEMENTS

-- Note by the European Commission --

This note is submitted by the EC delegation FOR DISCUSSION at the forthcoming Competition Committee meeting to be held on 21, 22 and 23 February 2007.
EU COMPETITION RULES IN MARITIME TRANSPORT SERVICES
THE REPEAL OF THE LINER CONFERENCE BLOCK EXEMPTION

Introduction

1. On 25 September 2006, the European Union (EU) Council voted unanimously to put an end to the possibility for liner shipping lines to meet in conferences, fix prices and regulate capacities on trades to and from the European Union.¹

2. This is a direct implementation of the recommendation issued by the OECD when, in 2002² it invited Member countries to remove antitrust exemption for price fixing whilst maintaining exemptions for operational arrangements.

3. This paper explains the process leading to the end of conferences in EU trades and the impact it will have on the application of competition law in maritime transport services in the European Union.

A brief introduction to the EU antitrust system

4. Article 81(1)³ of the European Community (EC) Treaty prohibits agreements which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Prohibited agreements are automatically void. Article 81(3), however, recognises that a restrictive agreement caught by Article 81(1) may have pro-competitive effects that outweigh the anti-competitive effects of the restriction. Thus the prohibition set out in Article 81(1) is inapplicable to an agreement that fulfils the following four cumulative conditions:

   • contributes to improving production or distribution or to promoting technical or economic progress;
   • allows consumers (users) a fair share of the benefits;
   • does not impose restrictions that are no indispensable to the attainment of the objectives;
   • does not afford the undertakings involved the possibility of eliminating competition in respect of ‘a substantial part of the products/services in question’.


³ The articles of the Treaty establishing the European Community (EC) were renumbered by the Treaty of Amsterdam. Prior to 1999, Articles 81 and 82 were respectively Articles 85 and 86 EC.
5. **Article 82 of the EC Treaty** prohibits any abuse of a dominant position by an undertaking within the common market or any substantial part of it that may affect trade between Member States. Article 82 is directly applicable. Abuses of a dominant position are commonly divided into exclusionary abuses, those which exclude competitors from the market, and exploitative abuses, those where the dominant company exploits its market power – for example – by charging excessive prices.

6. Up to 1st May 2004 the European Union was endowed with a **centralised authorisation system for all restrictive practices requiring exemption**. Whilst the European Commission, national courts and national authorities could all apply Article 81(1), the power to grant exemptions under Article 81(3) was granted exclusively to the Commission. Prior notification of restrictive practices was not compulsory but undertakings which wished to benefit from Article 81(3) had to notify their restrictive practices to the Commission.

7. On 16 December 2002, the Council of the European Union adopted a new Regulation implementing Articles 81 and 82 of the EC Treaty. The reform eliminated the notification and exemption system and replaced it by a system of **direct application of the law**, which can be enforced not only by the Commission but also by the national competition authorities and by national courts. This means that an agreement which fulfils the conditions of the exemption rule contained in the Treaty is legal from the outset and enforceable by national courts. Article 81(3) of the Treaty can be invoked as a defence in all proceedings, including before national courts and national competition authorities without the need for an administrative intervention by the Commission. **It is no longer necessary or indeed possible to obtain an individual exemption under Community law either from the Commission or from Member States.** Conversely, just as was the case before the entry into application of Regulation 1/2003, a restrictive agreement which does not fulfil the conditions of the exemption rule under Article 81 (3) of the Treaty will be void and unenforceable from the beginning.

8. Undertakings are now in the obligation to **self-assess their business practices** to determine whether they comply with competition law. To smooth the shift to the new enforcement regime which became effective on 1 May 2004 and help undertaking to carry out an informed self-assessment, the Commission issued **several notices** providing guidance to undertakings.

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9. The review of the antitrust exemption in liner shipping deals mainly with the application of Article 81 of the EC Treaty as it concerns agreements between shipping lines to fix prices and to regulate capacities. These are severe restrictions of competition usually black listed or identified as hard core restrictions of competition. Agreements of this nature generally fail (at least) the first two conditions in Article 81.3 and are not likely to be exempted.

10. In the EU competition system, certain categories of agreements that breach Article 81.1 are deemed to fulfil the four cumulative conditions of Article 81.3 and are thus exempted by Block Exemption Regulations (BER). A safe harbour is thus created for agreements that fall within the scope covered by the regulation. Block exemption Regulations are granted by the Commission after a thorough consultation process to ensure that the agreements covered are compatible with the competition rules. Moreover, Commission Block Exemption Regulations are always limited in time so that the Commission can regularly check if market developments have not altered the compatibility conditions.

11. Two block exemptions were adopted in the liner shipping sector: Regulation 4056/86 containing the liner conference block exemption, now repealed and Regulation 823/2000\(^8\) on liner shipping consortia, in force until 2010.

**Regulation 4056/86: The liner conference block exemption**

12. Regulation 4056/86 had a dual function. First, it enabled the Commission for the first time since the adoption of the EC Treaty in 1957 to apply competition rules (Articles 81 and 82 of the EC Treaty) to the maritime transport services. Secondly, it provided for a block exemption for liner conferences. Article 3 of the Regulation thus provided for an exemption from the prohibition contained in Article 81(1) of the EC Treaty for agreements between carriers concerning the operation of scheduled maritime transport services. These agreements must have as their objective the fixing of rates and conditions of carriage, and must in addition cover one or more of the following forms of co-operation:

1. the co-ordination of shipping timetables, sailing dates or dates of calls
2. the determination of the frequency of sailings or calls
3. the co-ordination or allocation of sailings or calls among members of the conference
4. the regulation of the carrying capacity offered by each member
5. the allocation of cargo or revenue among members

13. Various other obligations were attached to the block exemption. Agreements must not cause detriment to ports, lines must not apply discriminatory conditions of carriage according to the country of origin or destination, lines must consult with transport users. Whilst loyalty arrangements, were allowed such arrangements must contain safeguards for transport users. Transport users must also be free to make their own arrangements concerning inland transport and quayside services. Tariffs and other conditions applied by the conference must be made available to transport users on request, or must otherwise be available for examination.

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14. Failure to observe the above and other conditions may cause the Commission to withdraw from the conference the benefit of the block exemption. It may also lead to the imposition of fines.

Why was a review of Regulation 4056/86 necessary?

15. It is exceptional for a block exemption Regulation to be incorporated in a Council Regulation as was the case of the liner conference block exemption. It is also exceptional for such an exemption to be open-ended in terms of duration as was Regulation 4056/86 and not to contain any review clause. Most importantly it permitted hard core restrictions of competition such as price fixing which were not likely to be exempted in other circumstances. In the TAA case, the Court of First Instance recalled that it is settled case-law that provisions derogating from Article 81(1) of the EC Treaty must be strictly interpreted. It found that this conclusion must apply a fortiori to the block exemption provisions of Regulation 4056/86:

“by virtue of its unlimited duration and the exceptional nature of restrictions on competition authorised (horizontal agreement having as its object the fixing of prices). It follows that the block exemption provided for by Article 3 of Regulation No 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to market conditions” (paragraph 146 of the judgment).

16. This exemption has to be seen in its historical context. Since the 1870s, liner shipping has been organised in the form of cartels - liner conferences - that bring together all lines operating in a specific geographic zone. Liner conferences were recognised by the 1974 United Nations Convention on a Code of Conduct for Liner conferences. Fourteen Member States of the European Union and several OECD member countries ratified the Code. This resulted in conferences being recognised or tolerated in almost all jurisdictions.

17. Defenders of liner conferences have always claimed that the liner market is unique and thus required special treatment under competition law. An examination of the market shows this is no longer so today: in the twenty years that the Regulation has been in force the liner shipping market has changed considerably. The continuing trend towards containerisation has led to an increase in the number and size of fully-cellular container vessels and to an emphasis on speed, frequency of service and global route networks. This has contributed to the popularity of consortia and alliances as a means of sharing the cost of the investments required to provide a competitive liner shipping service. The growth in importance of these operational arrangements, which do not involve price-fixing, has been accompanied by a decline in the significance of conferences. The latter trend has been particularly marked on the trades between the EU and the United States, largely as a consequence of Commission decisions and changes in US legislation, which have promoted individual service contracts at the expense of carriage under the conference tariff. These developments raise the question of whether reliable scheduled maritime transport services can be achieved by less restrictive means than horizontal price-fixing and capacity limitation. This in itself would be sufficient to justify a review of the EU liner conference block exemption.

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9 This means that the procedure leading to any modification of the Regulation had to be endorsed by a qualified majority of Member States after consultation of the European Parliament. Usually, the European Council empowers the European Commission on a case by case basis to adopt block exemption regulations.


18. An important incentive to review the actual benefits of the conference system came from the OECD itself. As part of the OECD’s general Regulatory Reform Programme,12 the OECD Secretariat presented a “Discussion document on regulatory reform in international maritime transport”13 in May 1999. The document recommended _inter alia_ that agreements to set common rates should no longer receive automatic antitrust immunity or exemption. The draft report, circulated in November 2001, made, _inter alia_, the following findings of particular interest for EC maritime competition policy:

- The liner shipping industry is not ‘unique’ in the sense that its cost structure does not differ substantially from that of other transport industries and shipping lines do not suffer from exceptionally low returns on investment when compared to other scheduled transport providers. There is therefore no evidence that the industry needs to be protected from competition by antitrust immunity for price-fixing and rate discussions;

- There is no evidence that the conference system (with anti-trust immunity or exemption for price-fixing) leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. On the contrary, the OECD finds support for the view that the most competitive markets provide the greatest stability.

19. In the light of its findings, the draft Report came to the conclusion that countries should:

- re-examine anti-trust exemptions for common pricing and rate discussions, with the goal of removing them, except where specifically and exceptionally justified;

- have the discretion to retain exemptions for other operational arrangements so long as these did not result in excessive market power.

20. Following discussion at the OECD in December 2001, the report was not endorsed by the Members of the OECD because there was no unanimity for the recommendation to suppress price fixing liner conferences. The paper was therefore published by the OECD Secretariat as a final report on 16 April 200214. The report essentially endorsed the above findings. In particular, it found that it had not been established that collective price-fixing, whether by conferences or within discussion agreements, was an indispensable pre-requisite for stable freight rates and regular scheduled services15.

21. As explained below, during the three year review process carried out by the European Commission, all the major findings of the OECD report as regards the market for liner shipping were confirmed. There was only one instance where our findings did not concur with those of the OECD report. The report stated that as carriers had everything to gain from perpetuating the century old organisation of liner conferences. In our experience, carriers started off by defending the conference system but gradually became actively involved in the review process and eventually did not oppose the abolishment of conferences. They have since been working towards identifying what aspects of the conference system are useful to retain in today's market conditions.

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12 The Programme is a result of the request by Ministers in 1995 that the OECD should embark on a study of the reform of regulatory regimes in OECD countries. The review of liner shipping has a parallel in a similar OECD review of air cargo transport.

13 DSTI/DOT/MTC(99)8, 19.5.1999.


15 Report, pages 69 and 76.
22. Turning to the implementation of the conference block exemption regulation, we note that contrary to the experience in implementing block exemptions in other sectors, the **implementation of this exemption has not been smooth**. Although the provisions were very generous allowing carriers to jointly fix prices and to regulate capacity, there were regular instances when carriers tried to expand as much as possible the scope of the block exemption. The interpretation of the exemption for rate-fixing was in issue in several competition cases. In its 1994 TAA and FEFC decisions, and again in the 1998 TACA decision, the Commission objected, *inter alia*, to the collective fixing of tariffs for the inland leg of multimodal transport operations. In the TACA case, the Commission also objected to attempts by the conference to restrict the availability to shippers of individual and confidential service contracts. Finally, the Commission objected to capacity freezes in the TAA and EATA cases, decided with the obvious purpose of increasing freight rates by limiting supply. In its TAA and EATA decisions the Commission found that these capacity freezes were not consonant with the aim of Article 3(d) of Regulation 4056/86, which was the improvement of the scheduled transport service(s) provided by the members of the conference. The Court upheld the all the Commission’s decisions on the substance.

The review process

23. Exemptions from competition rules are normally reviewed by the Commission every few years to ensure that they continue to fulfil the four cumulative conditions of Article 81.3 EC. Regulation 4056/86 had never been revisited. This until March 2003, when the Commission initiated an extensive review of Regulation 4056/86 to ascertain whether the block exemption delivered the benefits for which it was first established and to determine how best to apply competition rules to liner transport services in today’s market conditions.

24. In the three years leading to repeal of the Regulation, the Commission put forward several papers for public consultation, held a public hearing and on several occasions reported results to the EU Member States. Three independent studies were carried out. Industry contributed with substantive submissions both in favour and against the repeal of the block exemption. Other EU institutions and bodies also took an interest in the debate. On 1 December 2005, the European Parliament issued an own

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Findings of the review

25. Recital 8 of Regulation 4056/86 is predicated on the assumption that liner conferences have a stabilising effect, assuring shippers of reliable services and that such results cannot be obtained without joint price fixing and capacity regulation.

26. The main objective of the review was to verify whether the legislator’s assumption was still valid in today market conditions and in particular whether the four cumulative conditions of Article 81(3) were fulfilled.

27. To fulfil the first condition of Article 81(3) of the Treaty, it must be established that concrete economic benefits flow from the price fixing and capacity regulation by conferences. To follow the legislators’ assumption, a direct causal link would need to be established between price-fixing and supply regulation within conferences (leading to stability of freight rates), and reliable scheduled maritime transport services.

28. “Price stability” has been defined in the TAA decision as “the maintenance of freight rates at a more or less constant level by liner conferences, in accordance with a set structure over a substantial period of time”\(^\text{24}\). It is questionable however if price stability as such would be regarded as sufficient for the fulfilment of the first condition of Article 81(3). Price stability only becomes relevant if it is read in conjunction with the concept of “reliable services” meaning “the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs”. Data put forward during the review process did not show that actual freight rates have been stable or that conferences have contributed to rate stability, i.e. with or without conferences there is price volatility. It was found that with conferences the source of price volatility comes from the structural instability of market participation and conference membership. This can be a fundamental and wasteful problem, since market entry and exit can be associated with transaction and investment costs. In contrast, without conferences price volatility will continue. This is due to revenue maximising behaviour which is normal competitive conduct.

29. Carriers consider the reliability of service as the main benefit that derives from conferences. However, in today’s market, conferences are not able to enforce the conference tariff and do not manage the capacity that is made available on the market. The majority of cargo is carried under confidential individual agreements between carriers and transport users (“contract cargo”) rather than under the conference tariff. The proportion of contract cargo is very high ranging from 90% and above in the transatlantic trade to 75% in the Europe to Australian trade. The same occurs in the Europe to Far East trades. Regarding capacity regulation, this is a decision that is taken by individual lines or by consortia. Thus, it is difficult to claim that the provision of reliable services results directly from conference price fixing and capacity regulation. The alleged causal link between the restrictions and the claimed efficiencies is therefore too tenuous to meet the first condition of Article 81 (3).


\(^{24}\) Recital 388.
30. The second condition of Article 81(3) of the Treaty requires that, if liner conferences were to achieve economic benefits, a fair share of these benefits should be passed on to consumers. In the case of a hard-core restriction of competition such as horizontal price fixing the negative effects are very serious and the benefits have to be very clear cut. However, no clear positive effects have been identified in the review process. Transport users (shippers and freight forwarders) in Europe have systematically opposed the conference system which they consider does not deliver adequate, efficient and reliable services suited to their needs. They call for the abolition of conferences and consider the existing consortia block exemption to provide an adequate framework for co-operation among liner shipping carriers. It should be noted that although the conference tariff is no longer enforced it may act as a benchmark for the setting of individual contracts. This results in a reduction of shippers’ negotiating power. Moreover the common setting of surcharges and ancillary charges and its application by non-conference members leads to, on average, 30% of the price of transport being fixed jointly. To the detriment of shippers there is no price competition between conference members and non-conference members for this part of the price. The second condition is therefore not fulfilled.

31. Under the third condition of Article 81(3) of the Treaty, the test is basically whether there are less restrictive alternatives than conference price fixing which would assure reliable liner services to the benefit of consumers. Today, scheduled liner services are provided in several ways. Independent carriers operate outside conferences on all main trades to and from Europe. Co-operation arrangements between liner shipping lines not involving price fixing, such as consortia and alliances\(^\text{25}\), have increased and have important shares of the market in all major trades. Under certain conditions, consortia are block exempted from the prohibition set out in Article 81(1) of the Treaty by Commission Regulation (EC) No 823/200 on account of the rationalisation they bring to the activities of member companies and the economies of scale they allow in the operation of vessels and port facilities. Moreover, confidential individual service contracts between individual carriers and individual shippers account for the majority of cargo transported. Finally it should be noted that in some trades, conferences do not exist and this has not affected the regularity of the services. The restrictions permitted under Regulation 4056/86 (price fixing and capacity regulation) are therefore not indispensable for the provision of reliable shipping services. The third condition is therefore not fulfilled.

32. Finally, the fourth condition of Article 81(3) of the Treaty requires that competition should not be eliminated on a substantial part of the market. Conferences operate alongside consortia, alliances and independent operators. It would appear therefore that the fourth condition of Article 81(3) of the Treaty may be fulfilled. However, since the four conditions of Article 81(3) of the Treaty are cumulative and the first three conditions are not fulfilled for the reasons explained above, the question whether or not the fourth condition is fulfilled could be left open.

33. This said, carriers are likely to be members of a conference on a trade and outsiders in another. They may also be members of conferences and of consortia or alliances on the same market thus cumulating the benefits of the two block exemptions. In all cases, they exchange commercially sensitive information with their competitors that may allow them to adapt their conduct on the market. Given the increasing number of links between carriers, determining the extent to which a particular conference is subject to effective competition is a case by case assessment. In addition conferences fix ancillary charges and surcharges\(^\text{26}\) and these are followed by non-conference members operating in the trade. Hence for

\(^{25}\) Council Regulation (EEC) No 479/92, based on Article 87 [now 83] of the Treaty empowered the Commission to apply Article 81(3) of the Treaty to liner shipping companies grouped in consortia and providing a joint service (OJ L 55, 22.9.1992, p.3)

\(^{26}\) Ancillary charges are triggered by or associated with the operation of moving containers, e.g. terminal handling charges (THCs). Surchages reflect standard commercial risks such as currency adjustment factors (CAF) bunker adjustment factors (BAF) and others.
ancillary charges and surcharges there is clearly no price competition between conference and non-conference carriers. In EU trades these amount to 30% of the total price of transporting cargo by sea.

34. In conclusion, the four cumulative conditions of Article 81(3) of the Treaty that would justify an exemption are not fulfilled by conferences in present day market circumstances.

35. Besides fixing the tariff, conferences jointly fix certain surcharges and ancillary charges in particular currency and bunker adjustment factors (CAFs and BAFs) and terminal handling charges. As explained above, the same level of charges or adjustment factors is often applied by non-conference members. It is questionable whether joint fixing of terminal handling charges falls within the scope of the conference block exemption regulation. Moreover, fixing of charges and surcharges by lines that are not members of a conference is not foreseen by Regulation 4056/86. This means that in practice carriers are going beyond what is allowed in the very generous block exemption.

Impact of a repeal of the liner conference block exemption

In Economic Terms

36. Defenders of liner shipping conferences have often put forward the argument that perfect competition does not function since the industry has a number of features that are inconsistent with the requirements of perfect competition. This means in certain situations the market does not have an equilibrium (“empty core”), which would endanger the provision of regular and reliable services and price stability. This economic approach is referred to as the “theory of the core”. There is a fairly large body of theoretical literature supporting the view that the liner shipping market has an empty core and, therefore, liner shipping is characterised by an “inherent instability”. However, the theory of the core dates back to the 1960s and comes up with idealised market scenarios in order to show that the market is indeed suffering from an empty core. The basic problem with the core-theory approach is that it does not take due account of the working of competition and competition policy.

37. Modern industrial organisation, notably non-cooperative game theory, which is characterised by a more restrictive view about the ability to set up coalitions among market participants, appears to be a more appropriate framework for analysing the liner shipping market. A game theoretic model of the liner shipping market actually shows that conferences could lead to excess capacity or excess pricing and endanger service reliability. In any case, the model provides no evidence that competition between liner shipping carriers leads to “inherent market instability”. Recent real-world experiences appear to confirm the theoretical model. Furthermore, the cost structure of liner shipping does not differ substantially from that of other transport industries. In short, there is no empirical or theoretical economic evidence that the industry needs to be protected from competition.

38. Assessing the impact of the removal of the conference system in EU trades is a speculative exercise. A sudden change in market conditions may alter any forecast. This said, the Commission carried

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27 The line shipping market’s features are notably regular scheduled services, economies of scale and density, capacity indivisibilities, high fixed avoidable costs, divisible and variable demand, inventories are not feasible and network effects.

28 The core theory’s assumption that each side of the market (carriers and shippers) can coalesce in any form, using enforceable contracts, is unrealistic and appears to violate competition law in any jurisdiction.

29 On the West African trade conferences are likely to have de-stabilising effects on liner markets. On the other hand, the termination of a conference on the Europe-West Coast South America trade did not have any negative impacts on the stability of supply or regularity of services on this trade.
out an impact assessment analysing the economic, social and environmental impact of the repeal of the conference block exemption. The economic assessment comprised the potential impact of the repeal on transport prices and price stability, long-term economic growth and the Lisbon objectives, the reliability of liner transport services, service quality and innovation, competitiveness of the EU liner shipping industry in particular small EU carriers, trade and cross-border investment flows, market concentration and competition in the Internal Market, specific maritime regions and ports, small shippers and consumers as well as developing countries.

39. Summarising the main results of the impact assessment, if we consider today's market conditions the repeal of the conference block exemption is likely to result in lower transport costs. While the ocean transport prices will only moderately drop, the reductions in charges and surcharges are expected to be considerable. About 20% of EU exports will thus directly profit from lower transport prices for liner shipping services to the benefit of shippers and the final consumer. The repeal is also likely to have a positive impact on developing countries since they typically export low-value commodities with a relatively high transport cost share.

40. The abolition of liner conferences would reduce structural overcapacity in the market while ensuring reliable liner services, i.e. a positive impact on service reliability can be expected. This applies to all trades – whether the volume of transactions is high (thick trades) versus low (thin trades), North-South versus East-West and deep sea and short sea.

41. Market concentration in liner shipping will not be affected by the abolition of conferences. Concentration is a process independent of the repeal of the block exemption. Liner carriers are integrating horizontally and vertically as a reaction to customer demand for door-to-door services. Vertical integration provides greater reliability to the carriers to provide such services if they control all the key elements of the transportation chain.

42. The effects on the EU liner shipping industry itself are also expected to be positive. Experience from other recently liberalised transport sectors shows that service quality and innovation are likely to be improved. Since four out of the top five world-wide liner shipping carriers are European, a more competitive environment should allow liner shipping carriers to compete, even more successfully, and grow. Liberalisation gives smaller EU carriers the opportunity to grow fast if they follow an innovative business model. The success of small carriers depends on their ability to adapt to a competitive environment and not on their actual size.

43. It should be noted that conference members come from all over the world. Liner conferences serving EU trades contain EU liner shipping carriers as well as carriers from third countries. EU carriers are also conference members on non-EU trades. Therefore the competitiveness of EU carriers relative to non-EU carriers would not, in principle, be altered by the removal of the exemption.

44. The repeal of the block exemption will not bring about any social impacts or impacts on employment. Finally, the environmental impact is expected to be neutral since positive and negative impacts are likely to offset each other.

31 It should be noted that there is no EU liner shipping carrier that would fall within the Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of small and medium sized enterprises (OJ L 124, 20 May 2003).
32 Positive environmental impacts would stem from the abolition of joint fixing bunker charges (so-called bunker adjustment factors) which will put liner carriers under competitive pressure with respect to bunker
International considerations

45. As explained before, liner conferences have traditionally been tolerated worldwide. This said they do not benefit from anti-trust immunity in all jurisdictions as competition laws do not exist in every country or are silent about it. However, in jurisdictions where such immunity or exemption exists, it has not so far been entirely removed, despite the 2002 OECD call to its member countries to do so.

46. If the EU were the first to repeal the liner conference system, the question arises of whether there is a risk of a conflict of international laws. The Commission considers that such a risk is unlikely. A conflict of laws arises only where one jurisdiction requires undertakings to do something that another jurisdiction prohibits. No jurisdiction imposes an obligation on liner shipping operators to operate in conferences or to fix prices jointly. If this happened it would go against the way operators have organised themselves in the market as there are several carriers that do not belong to conferences and operate as individual lines.

47. Given the nature of the industry, the European Commission has paid special attention to the international impact of the removal of the conference system. Throughout the review process bilateral contacts with the major trading partners (e.g. US, Canada, Japan), as well as with developing countries, have taken place. The result of these contacts is encouraging. Several authorities question whether liner shipping conference cartels are indispensable for the provision of reliable shipping services. We look forward to continuing bilateral and multilateral discussions on this subject in particular under OECD auspices.

Need for a new framework to replace the conference system?

48. Industry is divided on the need for a substantive alternative to Regulation 4056/86. The carrier lobby, the European Liner Affairs Association (ELAA) has proposed that the conference block exemption should be replaced with an exchange of information system. Transport users do not consider this to be necessary. They regard the consortia block exemption as allowing for all the co-operation necessary for the provision of reliable services by carriers.

49. The proposed ELAA system would potentially cover the whole liner shipping market and thus be broader in scope than the exchange of information within the present conference system. To be acceptable, any new system must respect the competition rules. Some elements of the ELAA proposal appear to be in line with these requirements. However, others are problematic notably because they do not differ in effect from what conferences do today. Accepting the proposal as initially presented would remove all the pro-competitive effects of the abolition of the conference system. This said, the has acknowledged that exchanges of information leading to greater market transparency may contribute to the improvement in the way liner services are provided, in the interest of carriers, transport users and the public in general.

50. Given that competition rules have never applied fully to the liner sector, the Commission will issue appropriate guidelines on competition in the maritime sector so as to help smooth the transition to a fully competitive regime. As an interim step in the preparation of guidelines, DG COMP on 29 September 2006 published a staff paper on the potential impact of information exchanges between liner carriers on the market for liner shipping. We are concerned that exchanges of information could lead in practice to a co-ordination of prices and other trading conditions between liner carriers.

costs. As a result carriers might invest in vessels that consume less bunker bringing about less individual greenhouse gas emissions. Negative environmental effects could emerge when the reductions of transport prices lead to accelerated growth in transport demand. In this case, even with reductions from individual vessels, emissions from the sector could be expected to increase.
The extension of the general competition implementing rules to cover cabotage and tramp vessel services

51. Regulation 1419/2005 also amended Regulation 1/2003 so as to include in its scope cabotage and tramp vessel services. Maritime transport services are key to the development of the EU economy. Tramp vessel services account for the major part of the volume of these services. Cabotage is defined as maritime transport services between ports of one and the same Member State.

52. The decision to bring these services under the common competition implementing rules does not involve a substantive change for the industry as the substantive competition rules, set out in Articles 81 and 82 of the Treaty, already apply. It rather establishes equality of treatment between these sectors of the economy and all others. There is no antitrust exemption for tramp vessel services. The maritime sector Guidelines will also deal with the application of the EU competition rules to tramp services.

Conclusions

53. Existing liner conferences will be able to continue operating on routes to and from Europe until 18 October 2008. After that date, conference activities and in particular price fixing and capacity regulation will no longer be permitted.

54. This decision will affect all EU and non EU carriers and shippers operating on trades to and from the EU. The market distorting effects of price fixing will be corrected, and lower prices for sea containers are likely to result. However nothing would prevent carriers from taking part in price fixing conferences or discussion agreements on non-EU trade routes. To give a concrete example, an EU carrier like Maersk Line, member of the Trans-Atlantic Conference Agreement (TACA), can no longer be involved in price fixing and capacity regulation on the North Atlantic-EU and EU-North Atlantic trades as of October 2008, but could still do so on the US-Pacific trades. The same applies to non-EU carriers. This is a logical consequence of the fact that different competition regimes are in force world-wide. In fact, already today there are differences in what liner shipping companies are allowed to do in different jurisdictions. For example, today US law allows carriers to fix prices jointly on inland transport, while EU law has never allowed it.

55. Liner carriers will continue to be allowed to offer joint services. Block Exemption Regulation 823/2000 on maritime consortia allows shipping lines to engage in extensive operational co-operation (vessel-sharing, co-ordination of routes and schedules) but not to fix prices. In 2005, this Regulation was reviewed and extended until 2010 after it was found to be working well by both shipping lines and transport users. This exemption is of particular significance in terms of volume of trade. For example, the majority of cargo between the EU and the US is transported by shipping lines in consortia and alliances using individual service contracts instead of conference tariff prices.

56. Given that the competition rules have never fully applied to the liner sector, Competition Commissioner Neelie Kroes is keen to ensure that guidance is provided to market participants so as to foster a more competitive environment. Before the end of the two-year transitional period, the Commission will publish Guidelines on the application of the competition rules to maritime transport services. Their purpose is to explain how competition rules apply to maritime transport services in general and in particular to the liner and tramp sectors. Guidelines are prepared and issued by the European Commission in consultation with stakeholders. The Commission has already been discussing with the liner and tramp shipping industries how best to issue appropriate guidance on how competition law should apply to the sector, once the abolition of Regulation 4056/86 enters into force. This dialogue has resulted in a number of submissions from the shipping industry, which are all available on the Commission website. Towards
the end of 2007, the Commission will adopt draft Guidelines, which will be published in draft form to allow all interested parties to make submissions. The consultation period will last one month from the date of publication. Following this public consultation, final guidelines will be adopted by the Commission taking into account stakeholders’ comments.

57. Taking the opportunity of the meeting of the Competition Committee, the European Commission would welcome the views of other OECD Member countries as regards the application of their provisions on antitrust immunity for liner conferences.

1. Has a review of the antitrust provisions regarding liner conferences been undertaken since the OECD Secretariat's report of 2002?

2. What is the view of member countries on the role that liner conferences play in today's market?

3. What elements have been identified by shipping lines as being the added value that conferences bring to the market?

4. What is the view that transport users have of liner conferences?

5. Are there any provisions in force that exempt other operational arrangements between carriers providing liner services and what is the rationale for that exemption? How do these exemptions differ from that concerning liner conferences?

Brussels, 8 December 2006

Annex 1: Regulation 4056/86 containing the liner conference block exemption

Annex 2: Regulation 1419/2005 repealing the liner conference block exemption