



17 November 2014

Competition Policy Review Secretariat  
The Treasury  
Langton Crescent  
PARKES ACT 260

## **GSF Response to the Findings and Draft Recommendations of the Australian Competition Review**

### **1. General Comments**

The Global Shippers' Forum welcomes the general thrust of the competition policy review and the draft recommendations regarding Part X of the CCA in respect of liner shipping. The GSF in particular welcomes the Review Panel's recommendation that liner shipping should be subject to the normal operation of the CCA. This recommendation is consistent with the more recent and up-to-date international treatment regarding the application of competition policy to the liner shipping sector, and will substantially align Australian competition policy with other advanced economies such as the EU, UK and US.

### **2. Global Shippers' Forum**

The GSF is the internationally recognised shippers' organisation that represents shippers' organisations in Australasia, Asia, Africa, Europe and North and South America. They in turn represent tens of thousands of shippers as users of international transport services. The GSF has specific and internationally recognised expertise in the application of competition policy and the regulatory frameworks relating to liner shipping and aviation markets. As such, the GSF and its member associations, have provided detailed expert advice and legal input into recent major reviews into liner shipping, including the 2000-2002 OECD review into liner conferences and the major reforms in the US and EU. Shipper representations in the US resulted in the US Ocean Shipping Reform Act 1998 introducing confidential contracts and the repeal of the EU shipping conferences block exemption in 2006. More recently, the GSF contributed to the New Zealand liner shipping anti-trust review which following an extensive consultation process is shortly to repeal anti-trust exemption for liner conference agreements.

### 3. Draft recommendation 4-liner shipping

The GSF supports the main conclusions and recommendations of the Review Panel, in particular the Review Panel's analysis at 17.5 (Liner Shipping Exemption under Part X of the CCA) and Draft Recommendation 4-Liner Shipping. The GSF welcomes recognition by the Review Panel that the international regulatory framework for the liner shipping industry has changed significantly over the past two decades. The GSF reiterates that this reflects the situation where the anti-trust environment in the liner shipping industry is changing<sup>1</sup>.

The GSF wishes to emphasise that the US 2012 Federal Maritime Commission Study into the impacts of the EU repeal of the liner shipping anti-trust exemption provided a very positive assessment of the EU repeal. Indeed the FMC states that "the Study's primary finding is that no significant changes in rate levels occurred between EU and the US liner trades due to the repeal. During the period examined, the repeal of the block exemption appears not to have put US shippers at a disadvantage to EU shippers in Far East trades"<sup>2</sup>.

There is, consequently, no evidence that the EU repeal, which accounts for over 44% of globally traded TEU's (containers) including the Australia-EU liner trade, has caused any adverse consequences for international trade or the provision of efficient liner shipping services for the benefit shippers and liner shipping carriers.

Moreover, as repeatedly asserted by the EU repeal review and OECD liner shipping study, the liner shipping industry is not unique, like other fixed schedule transport industries (aviation), it can perform well under competition law, and empirical observation shows that carriers can provide stable and efficient services in non-exempted trades such as the Asia-Europe trade.

As set out in GSF's earlier submission to the Review Panel, the GSF recognises that cooperative non-rate making agreements, such as traditional consortia and vessel sharing agreements may under certain conditions lead to efficiency gains, lower costs and improved services for customers. The GSF therefore supports this form of cooperation which may potentially benefit from exemption under a block exemption arrangement as recommended by the Review Panel or via a substantially reformed Part X arrangement in accordance with submissions made by the Australian Peak Shippers Association (APSA). It is important however, as argued in this submission and recommended by the Review Panel, that any block exemption immunities are strictly narrowed to those arrangements that produce pro-competition outcomes such as those provided by traditional consortia and vessel sharing agreements or to those existing arrangements set out in Part X of the CCA identified by APSA which facilitate the development of liner shipping to services for the benefit of Australian importers and exporters.

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<sup>1</sup> European Commission submission to the Singapore Competition Commission 1 October 2010, p3.

<sup>2</sup> [www.fmc.gov/assets/1/Documents/FMC](http://www.fmc.gov/assets/1/Documents/FMC) EU study.pdf.

#### 4. Liner shipping cartel agreements do not benefit customers or consumers

The GSF rejects the argument advanced by carrier interests that liner conference agreements such as price fixing and rate discussion agreements are in the public interest or benefit the customer or consumers. Indeed, such assertions are treated with widespread derision by shippers and, importantly, are not supported by the wider business community which in the modern global economy recognises the importance of effective competition and cartel laws to ensure fair competition in a market economy.

The EU repeal of liner conferences in 2006 has demonstrably shown that price and rate discussion agreements are not indispensable to the provision of efficient liner shipping services. As the EU Commission pointed out in its response to the Singapore Competition Commission in 2010: “There is ample evidence-notably in the OECD report and from decades of anti-trust 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* <sup>3</sup>”.

Moreover, the EU Competition Commission concluded in its response to the New Zealand Productivity Commission review of the anti-trust exemption for shipping agreements that it had not been able to identify repeal-driven detrimental effects on EU trades in terms of all-in prices and service quality<sup>4</sup>. Moreover, some carrier interests have agreed that the EU repeal has worked well and would be happy to see it extended elsewhere<sup>5</sup>.

The GSF therefore supports the Review Panel’s recommendation to introduce a block exemption process which would narrow the scope of the existing Part X anti-trust immunities.

#### 5. Separating anti-trust treatment of ratemaking and non-rate making agreements

There is a clear attempt by carrier interests to conflate consortia and vessel sharing agreements with discussion agreements. The OECD report of 2002<sup>6</sup> and the Meyrick/APEC study of 2008<sup>7</sup> recommended separating the anti-trust treatment of rate making and non-rate making agreements. The reason for this is clear, discussion agreements represent de-facto cartel and competition restrictions which take the form of price and cost discussions leading to price agreements or recommended non-binding pricing guidelines which have the same or similar effects as price agreements. Unlike traditional consortia or VSA agreements, discussion agreements do not therefore contribute to economic progress, reduced costs or lead to improvements in services to shippers. They seek to restrict competition and as a result, unlike consortia and VSAs, ***do not allow consumers and users (shippers) a fair share***

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<sup>3</sup>European Commission letter to Competition Commission of Singapore, 1 October 2010, emphasise added.

<sup>4</sup> EC Competition Commission letter to New Zealand Productivity Commission, 24 February 2012

<sup>5</sup> For Example, the Maersk CEO Eivind Kolding in 2010 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 have worked 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.

<sup>6</sup> <http://www.oecd.org/dataoecd/13/46/2553902.pdf>

<sup>7</sup> wg32/Maritime/Final/08\_tpt\_Liner\_Stages%20and3.pdf

***of the benefits arising from such price discussions.*** Moreover, discussion agreements are not indispensable to the provision of liner shipping services as demonstrated by the EU anti-trust exemption repeal, and the fact that reliable and efficient services can otherwise be provided, for example, via non-ratemaking consortia and vessel sharing agreements.

The Transpacific Stabilization Agreement is a clear example of a discussion agreement which seeks to produce clear guidelines on prices for the benefit of its own members, but provides no countervailing benefits to customers in the form of improved services or lower costs or rates. For example, in a new strategy the TSA has recently introduced minimum rate level guidelines, rather than recommended general rate increase guidelines as previously. The implications behind this are clear, GRI guidelines are difficult to maintain whereas price floors are more likely to deter discounts below the rate floor<sup>8</sup>. Although this is not the same as resale price maintenance, it is arguably analogous with price setting agreements under RPM.

As such, discussion agreements do not accord with the APEC Guidelines regarding non-rate making agreements as they are not efficiency-enhancing or exhibit efficiency-enhancing behaviours. The GSF therefore agrees with the Review Panel's recommendations that any a block exemption should be carefully restricted to minimum pro-competition features as recommended in Paragraph 4 above and in conjunction with the Australian Peak Shippers Association and the competent Australian regulatory authorities.

Yours faithfully,

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<sup>8</sup> <http://www.tsacarriers.org/tp://www.apec-tptwg.org.cn/new/Archives/tpt->

