



Carrier executives and their lawyers confer during the Brussels hearing on conference immunity.

## EC weighs conference 'benefits'

*Carriers reject call for end of conference immunity. Hearing highlights continuing industry divide.*

BY PHILIP DAMAS

If conferences were a consumer product, they would be difficult to sell: There is no overall agreement on what this product's benefits really are.

During a European Commission hearing in Brussels Dec. 4, ocean carriers sought to defend their antitrust immunity, arguing the benefits of conferences that were cited in Regulation 4056 of 1986 still play a role. Carrier officials and their lawyers insisted that conferences provide rate and ship supply stability, denying contrary arguments by shippers.

In heated exchanges before European Commission competition lawyers and European government officials, representatives of container shipping lines have rejected shippers' calls for an end to conferences' antitrust immunity under European law.

The public hearing followed a written consultation started by the EC in March 2003 to review EC Regulation 4056 — the European law that grants an exemption from competition law to liner conferences.

Carriers told the hearing that shippers have provided no hard facts proving that the immunity

should not continue.

"Our industry is important," Ken Sorensen, director of the European Liner Affairs Association, told the hearing. "It deserves a thorough review. Against that benchmark, the consultation process so far, I have to say, has regrettably failed."

Sorensen, a former APL executive, noted that a European Commission consultation paper issued in March did not produce sufficient market information to reach con-

clusions on a potential reform of Regulation 4056.

The EC hearing was attended by a high-power delegation of carrier executives that included: Knud Stubkjaer, partner of A.P. Moller-Maersk; Jacques Saade, chairman of CMA CGM; Klaus Mewes, chief executive officer of Hamburg Sud; Minoru Sato, managing director of NYK (Europe); Ulrich Kranich, managing director of Hapag-Lloyd Container Line; Alfons Guinier, secretary general of the European Community Shipowners' Association; and Chris Koch, president and CEO of the Washington-based World Shipping Council.



Stubkjaer



Saade

However, shippers' organizations put pressure on carriers by saying the alleged benefits they get from conferences are fictitious, and that conferences work only to the benefit of carriers.

"Price fixing does not have the objective of sharing any economic benefit with customers and consumers," said Mark Clough, partner at Ashurst Morris Crisp and a lawyer representing the European Shippers' Council.

**Reasons For Exemption.** During and before the Brussels hearings, the EC tried to establish whether the technical justifications for the antitrust exemption of liner conferences, as seen in 1986, still exist. It also sought to work out whether there were ways other than the conference pricing exemption to obtain the same outcome.

The justifications are expressed in Regulation 4056/86:

"... liner conferences have a stabilizing effect, assuring shippers of reliable services ... they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interest of users ... such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity ... "

Therefore, the hearing focused on whether the conference immunity is indispensable to pro-

### Summary of EU's conference immunity review

- Carriers, shippers hold contrary views on alleged benefits of conferences, notably stability of rates, stability of vessel supply and provision of reliable services.
- Carriers say no evidence has been produced to make a case for reform or removal of conference immunity.
- European shippers' bodies call for end to immunity.
- EC struggles with complex questions such as the dominance of individual contracts outside the scope of conference decisions, and the respective role of consortia and conferences.
- EC gave no indication of future policy, but European regulators may consider U.S. model of single law for consortia and conferences and rules on service contract confidentiality.

vide stability and reliable services.

But Clough described the justifications for immunity as “bogus economics.”

In an apparent departure from previous policy, the European Shippers’ Council also said it sees no value in rate stability — one of the alleged benefits of conferences.

“Even if price fixing were to have the effect of achieving its objective — call it ‘price stability’ if you like — it will thereby eliminate effective competition in a market,” Clough said.

Asked whether shippers were ready to take the risk of the elimination of conferences, Clough replied emphatically: “Yes!”

“They will live with supply and demand. Shippers do not want this wonderful (price) benchmark of conferences,” he added.

Clough alleged that it was “scandalous” that Europe continued to allow carriers to “decide” freight rates. “We actually don’t know if rates would be lower if we had a free market,” he said.

“The central question in the review process is obviously whether the objectives and benefits of Regulation 4056 — stability — are still achieved,” Sorensen said. In its written submission to the EC, the European Liner Affairs Association argued that instability is inherent in liner shipping, and that conferences mitigate this instability, in particular by allowing conference carriers to plan and implement capacity increases and exchange information on demand.

Conferences provide short-term and long-term stability of price and vessel supply, said Trevor Soames, the lead lawyer for carriers at the EC Hearing.

**Complex Issues.** The European Commission expressed some frustration that shippers and carriers were not prepared to provide direct answers to technical questions that it asked during the hearing.

Neither carrier representatives nor shippers offered suggestions of potential amend-



David Wood  
lawyer

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## No convincing case for or against

Five advisors asked by the European Commission’s competition directorate to help analyze industry and government comments on the conference antitrust immunity consultation have concluded in a report that the submissions provided insufficient information to make a case for or against the existence of conferences in liner shipping.

The team of advisors from the Dutch Erasmus university reviewed comments and material sent by 31 organizations representing shippers, carriers, forwarders and governments as part of the EC’s consultation on a potential reform of the European liner shipping Regulation 4056/86.

“Reviewing all responses it must be concluded that, at this point, no convincing new arguments are made either for or against the existence of conferences,” the academics concluded in their report to the EC in November. The advisory group noted that the submissions “hardly provided any new evidence or proof,” and said that more market data is needed to form the basis for a sound review of the regulation.

“Apart from the European Liner Affairs Association, very little market information was provided in response to the consultation paper,” the advisors said. But even the data from the European Liner Affairs Association, a Brussels-based carrier lobby, showed only “official liner conference prices” that represent

only 10 to 20 percent of total volumes, the advisors remarked.

The advisory group concluded that many questions in the EC consultation paper remain unanswered.

However, the advisors said that independent action, service contracts and independent carriers “have eroded substantially any market power vested in conference rate-setting.”

“Most experts would tend to agree that any carriers’ reluctance to regulatory reform is based on psychology and preconceptions rather than any foreseeable tangible ramification,” the report added.

In an annex to the report, produced on the consultants’ initiatives, the advisors carried out a quantified economic analysis of the relationship between freight rate stability and other variables, such as excess capacity. One result from the analysis “gives credence to the notion that ocean liner shipping conferences are not price setting cartels,” the report said. The advisors argued that conferences are “platforms to discuss prices and the related cost levels,” but “hardly set prices and stick to them.”

The Erasmus University advisors noted that shippers appear to be in favor of liner consortia and carrier alliances. They suggested a compromise between abolishing price-setting immunity and ensuring that conditions are put in place to safeguard liner shipping alliances.

ments of the conference regulation, or alternatives that could replace the current immunity. A potential compromise on a reform between shippers and carriers seemed out of the question.

Questions on whether the immunity was “proportional,” and whether carriers could still provide reliable services to shippers without the immunity, did not produce substantive answers from carriers.

Sorensen said it is impossible to disentangle the role played by conferences and consortia in providing stability and economic efficiency.

“Unfettered competition is clearly worse than the current arrangements,” Soames said.

The EC asked whether it is possible to distinguish the effects of conferences from those of operational cooperative agreements and the normal dynamics of supply and demand.

European law grants exemptions to conferences and to operational cooperative agreements like consortia under two sepa-

rate regulations (In the United States, the Ocean Shipping Reform Act deals with both types of ocean common carrier agreements in the same law).

Industry sources say the EC is considering linking the conference and the consortia regulations. Shippers’ organizations, in particular, argue that whereas consortia provide greater economic efficiency, conferences play no role in ensuring the provision of reliable scheduled liner services.

Consortia are “incapable” of providing stability, said David Wood, a senior lawyer representing carriers and former competition official at the EC. “If you want ... stability, you have to have conferences.”

The EC is facing another complex industry issue: Conferences discuss and agree on tariff rates only, but the majority of cargo moves under contracts or equivalent arrangements.

The EC hearing did not help reach any firm conclusion on the actual market power of conferences. Whereas a shipper repre-

representative described agreements on prices as “the absolute devil,” carrier representatives suggested that conferences are benign arrangements that merely reduce the volatility of freight rates.

Confidential service contracts are widely seen as having decreased the ability of conferences to influence freight rates.

But instead of seeing these changes as a sign that conferences have been marginalized, carriers talk of the modernization of conferences, whereas European shippers’ organizations believe that conferences are even less justified than before.

“Today, the market sees conferences as an irrelevance,” Clough said.

“Carriers accept the need for reform of 4056,” Soames said. “The issue of individual contracts shows that conferences are not about price fixing in the traditional sense,” he said. “Conferences may look like, but do not act like, cartels.”

Soames noted that following the “Revised TACA” agreement, approved by the EC, carriers do not know the prices charged by fellow conference carriers. He said carriers merely agree on a tariff that serves as a benchmark for carriers’ individual service contracts or equivalent arrangements with shippers. Individual service contracts or equivalent arrangements with shippers are “unregulated,” Wood said.

The need for confidential contracts between individual conference carriers and shippers is now recognized by the EC (and by U.S. legislators), although it was not required in the original Regulation 4056.

**Burden Of Proof.** Shippers and carriers disagreed on the question of the burden of proof for any change in regulations. Shippers argued that carriers benefit from the immunity, and should prove it is still justified, whereas carriers said both sides should share the burden of proof.

Sorensen compared the situation to a surgeon telling a healthy patient: “I will amputate your leg unless you prove to me that it is functioning well and does not require amputation.”

“It has not been shown by carriers that competition restriction agreements benefit the economy, benefit users, and are indispensable to provide these benefits,” said

Jean-Paul Tran Thiet, attorney partner at CMS Bureau Francis Lefebvre, representing the French shippers’ council AUTF. Responding to the leg amputation analogy, he said the conference pricing immunity gives carriers five legs, when other industries have just two.

Tran Thiet showed the EC hearing a recent announcement of a general rate increase by the Europe/East Coast of South America conference, saying that rates will be increased at short notice. The conference announcement gave no reasons for the rate increases, and did not invite consultation from shippers. Tran Thiet criticized the “opacity of prices” in liner shipping, and said freight surcharges are “imposed” without any room for negotiation.

Tran Thiet cited a study by the Singapore National Shippers’ Council of an increase in terminal handling charges. Whereas carriers sought to justify the higher terminal charge by saying port costs had increased, the port authority of Singapore said it had lowered its tariffs over the same period, he said.

But Sorensen told the EC “there is no evidence on public record that indicates that the industry structure does not work.”

Carrier representatives from the United States and Australia said that reviews of the conference immunity in their countries had resulted in retaining the immunity.

Llew Russell, CEO of the conference secretariat firm Shipping Australia, cited the review of Part X, the Australian shipping antitrust immunity law, in 1999.

“All the reviews concluded that the block exemption should be retained because of all the benefits of conferences that have previously been described,” Russell said.

“We’ve also looked at alternatives to conferences,” said Koch, referring to OSRA. The 1998 reform act led to changes to tariff

filing and “me too” non-discrimination rules, but there are no such rules in Europe, he noted.

Leonardo Sorgetti, spokesman for the European forwarder lobby Clecat, told the hearing that forwarders favor a conditional retention of the immunity for conferences. Their pricing immunity should cover only maritime ocean freight, but not terminal handling charges, port surcharges and inland charges, he said. Conferences should also give six months’ notice of planned rate increases. Without these conditions, Clecat said it would support full liberalization.

**Joint Study Request.** At the hearing, the European Liner Affairs Association suggested to the European Shippers’ Council and the EC that they work together to agree on terms of reference for the gathering of freight rate data, which it regards as necessary to continue the regulatory review (Contrary to the U.S. Federal Maritime Commission, the EC has no copy of carrier/shipper contracts).

But the ESC did not take up the carriers’ offer, saying that carriers already have all the data. Carriers also insisted that much more work remains to be done before the EC can make proposals for regulatory changes.

The review of the conference regulation is the first since the law was adopted 17 years ago. Some 120 industry and government delegates and lawyers attended the Brussels hearing, but with no official from the U.S. administration and or the FMC present at the hearing.

The EC hearing displayed the antagonistic relationship between shippers’ and carriers’ associations in Europe. Despite a requirement that conferences consult shippers under Regulation 4056, no such consultation has taken place

for about 10 years.

The EC will now compile and review the answers from the industry. Competition commissioner Mario Monti will decide the next step of the review. EC officials could not say whether the agency would publish a “green paper” of potential policy options, or undertake further information-gathering procedures like ordering the production of data on individual service contract rates. ■

Mark Clough  
partner,  
Ashurst Morris Crisp



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Trevor Soames  
lead lawyer for  
carriers at EC hearing



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