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Jason Chuah

School of Law

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EUROPEAN UNION

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EXTENSION OF THE LINER SHIPPING CONSORTIA BLOCK EXEMPTION

Jason Chuah

On 25 April 2005, the Commission issued a press release stating that the Block Exemption for Liner Shipping Consortia (Regulation 823/2000) has been extended until 25 April 2010. The block exemption was adopted in 1995 and was subsequently renewed in 2000. Under the block exemption, all agreements with the object of promoting and facilitating joint operations of liner shipping services were exempted from the application of Article 81 of the EU Treaty. Article 81, as might be recalled, prohibits anti-competitive commercial practices. The block exemption was deemed necessary because, as the Preamble to Regulation 823/2000 states:

consortia . . . generally help to improve the productivity and quality of available liner shipping services by reason of the rationalization they bring to the activities of member companies and through the economy of scale they allow in the operation of vessels and utilization of port facilities.

It is also the reasoning of the regulation that consortia help to promote technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity. It should, however, be remembered that consortia, as defined by the regulation, exclude any agreement or arrangement resulting in price fixing.

The block exemption covers liner shipping consortia with a market share of less than 30 per cent. If the consortia operated outside the liner conference context, the threshold was 35 per cent. Under the original regulation, a consortium with a market share above those ceilings but below 50 per cent may still benefit from the block exemption, if the agreement is notified to the Commission and the Commission does not oppose the exemption within six months. That was amended on 12 March 2004 by Regulation 463/2004 as a result of the new system introduced by the Modernization Regulation 1/2003 which abolished the notification system. The amendment provided that any consortium claiming the benefit of the block exemption:

must be able, on being given a period of notice which the Commission or the Member States' competition authorities shall determine on a case-by-case basis and which shall be not less than one month, to demonstrate at the request of the Commission or the Member States' competition authorities that the conditions and obligations imposed by [the block exemption] are met.

Another change to the block exemption introduced by Regulation 463/2004 was the provision that the Commission may withdraw the benefit of the consortia block exemption, if it finds in a particular or individual case that an agreement or measure taken by the consortia has certain effects which are incompatible with Article 81(3) EC. This is especially the case where, in a given trade, competition

from outside the conference within which the consortium operates or from outside a particular consortium is not effective.

There is also a number of other conditions with which the consortia must comply before becoming exempt from article 81. These include, generally, the existence of effective price and other forms of competition between members of the conference within which the consortium operates, the right of members to withdraw from the consortium, the right of members to offer their own individual service contracts, the right of members to use their own marketing strategies, the need for regular and effective consultations, etc.

The renewal of the block exemption retains these conditions with only minor modifications. The Commission stated that with the current review of the block exemption for liner shipping conferences (Regulation 4056/1986), which may lead to substantial re-writing of the law, there is no necessity to make substantial changes to the consortia block exemption which is closely linked to the liner conferences regulation. One modification, however, is the extension of the time within which a member might withdraw from the consortium. Under the current regulation, a member may withdraw from the consortium without having to pay a financial penalty after an initial period of 18 months from the entry into force of the agreement. That period has now been extended to 24 months. In addition, that initial period would apply where the parties to an existing agreement have agreed to make substantial new investment in the maritime transport services offered by the consortium. Such investment would be considered substantial when it constitutes at least half of the total investment made by the consortium members. Another change is that the ability of members to offer confidential independent individual service contracts would be presumptive of price competition in the agreement/measure in question; thereby meeting one of the conditions specified in the block exemption.

It is obvious that, while the Commission finds it difficult to ignore the strong evidence that consortia are necessary and vital for the state of efficient and economic shipping services, it is deeply distrustful of any business or commercial practice which does not fit tidily into its model of optimal competition. Hence, the retention and, indeed, tightening of the conditions in the block exemption.