

SHIPPING BLOCK EXEMPTION FROM COMPETITION LAW

Seaborne cargo is the backbone of international trade. It accounts for 80% of world trade when measured in weight volume or 70% when measured in monetary value, with over 9.55 billion tons of cargo loaded in 2013 (UNCTAD 2014). Reliable and regular scheduled ship liner services play a crucial role in supporting the global economy.

Background

Cooperative agreements among ship liners have existed for over a hundred years to ensure regular services. The Calcutta Conference, formed in 1875 consisting of five carriers, is the first modern conference in the shipping industry. Following the Calcutta Conference, conferences were formed in most major trade routes, e.g. Transatlantic Conference Agreement, Far East Freight Conference etc. There were over 150 conferences in effect as of 2001 (OECD 2002)¹.

Liners conference is a cartel among ship liners serving the same route allowing members to agree upon operational and revenue co-operations such as coordinating sailing schedules, controlling capacity and fixing tariff. In addition, members within a conference may also jointly fix certain surcharges, ancillary charges and terminal handling charges².

As global trade and economic policy progressively move towards liberalization, increasing numbers of country enact competition law to promote competitive business environment, contain abusive market domination and restrict anti-competitive commercial behavior. This effectively renders certain elements and practices of Conference / Consortia in conflict with the legal environment.

Ship liners defense

Ship liners claim that fundamental characteristics of the shipping industry require extensive cooperation among competitive carriers. High entry and variable cost and substantive investment requirement, in combination with trade imbalances and low margin are often cited to justify cooperation in resource pooling in order to achieve economy of scale, and to provide reliable and regular shipping services.

¹SJOSTROM William, Ocean Shipping Cartels: A Survey, June 2004

²BENINI & BERMIG, The Commission proposes to repeal the Liber Conference Block Exemption, Competition Policy Newsletter Spring 2006.

In recent years, freight rates especially in dry bulk and tanker market hit a 10-year low in 2013 and container rates remain weak due to a combination of poor economy and overcapacity in the global shipping market³ are among reasons, frequently evoked.

In July 2011, comments submitted by the International Chamber of Shipping to New Zealand Productivity Commission to justify block exemption included:

- Conference and consortia agreements allow shipping services to cope better with trade flow imbalances and seasonal fluctuations.
- Cooperation among liners allow better resource pooling for the long term investment required to operate high value assets such as vessels and logistics infrastructure.
- Lack of regulatory barriers to new carriers entering markets creates market instability. Significant capital investment is required to guarantee continuous long term services required by customers despite short term demand variations.
- Market changes, seasonal fluctuations and trade imbalances mean some leg of unused ship capacity is lost.⁴

Similar reasons were jointly presented by the World Shipping Council, European Community Ship-owners Associations and International Chamber of Shipping to the European Commission in March 2014:

“...the industry is not concentrated; there are no regulatory barriers to carriers entering markets; the industry struggles with overcapacity for structural, cyclical and seasonal reasons, but such excess capacity cannot be utilized or easily idled; capital and operating costs are high; the industry is highly competitive with shippers having an array of service choices; and profits (where they exist) and returns on investment typically lag behind those of other major industries. In short, the industry is a very challenging one for vessel operators and is a favorable one for the European importers and exporters that use the services of those vessel operations.” (Quoted from source)⁵

Block exemption to competition law

Block exemption from competition law is accorded when regulators believe that such arrangement generates more positive than negative effects to the economy and that benefits will be passed on to end consumers.

Acknowledging the characteristics of the shipping industry and its net economic benefits, many major trading economies have granted block exemption to the shipping sector. It is worth noted that block exemption is not unique to the shipping industry. For example, motor vehicle and insurance sector are also granted exemptions from the European Union competition law.

Nevertheless, the precision and technicality of exemption accorded varies among countries considering national-level economic structure and legal environment.

³ UNCTAD Review of the Maritime Transport 2014

⁴ <http://www.productivity.govt.nz/sites/default/files/Sub%20006%20-%20International%20Chamber%20of%20Shipping%20%28ICS%29%20Submission.pdf>

⁵ http://ec.europa.eu/competition/consultations/2014_maritime_consortia/wsc_en.pdf

In general, exemptions are granted to operational agreements such as vessel sharing, slot swap etc. among ship liners. However, pricing discussion and rate fixing may not be exempted and thus, prohibited in some jurisdictions. “Market test” mechanism may be introduced in certain jurisdictions to prevent a consortium from achieving an overly dominant position within a specific market, which can be used against the commercial interests of other stakeholders and distort market competition.

Overview of the application of block exemption in various jurisdictions includes:

Australia: Part X of the Trade Practices Act 1974 allows conference ratemaking and other non-price agreements (e.g. operational cooperation). Carriers seeking exemption must file price setting agreements with the Federal Government Registrar of Liner Shipping.⁶

China: Article 21 of the Regulation of the People’s Republic of China on International Maritime Transportation, service and rate agreements concluded among international shipping operators shall be filed with Ministry of Transport. However, in general, the Ministry pays more attention to ratemaking agreements.⁷

European Union: The European Maritime Consortia Block Exemption Regulation has been extended to April 2020. The exemption allows liners operating within shipping conference with a combined market share of less than 30%, or 35% for consortium of non-conference carriers to enter into cooperation agreements to provide joint cargo transport services. Price discussion and tariff fixing are prohibited.⁸

India: On 11 December 2013, the Ministry of Corporate Affairs issued a notification to renew exemption granted to Vessel Sharing Agreement (VSA) but not Voluntary Discussions Agreements (VDA)⁹. Another renewal notification for VSA was issued in 2015 and will remain valid till February 2016. Price fixing and limitation of capacity sales are prohibited. All agreements have to be filed with the government.¹⁰

Israel: Maritime Transport Block Exemption came into force in January 2013 applies to operational agreements and practices between shipping liners (consortia) and excludes agreements relating to prices and hardcore violations. Exemption only applies to consortia agreements with total market share below 40%.¹¹

Japan: Maritime Transportation Law exempts shipping conferences from the Anti-Monopoly Act. All ratemaking and non-ratemaking agreements must be filed with the Ministry of Land, Infrastructure, Transport and Tourism.¹²

Malaysia: Block exemption order for Vessel Sharing Agreements and Voluntary Discussion Agreement comes into operation on 7 July 2014. Depending on agreements, operational cooperation and market data sharing qualify for exemption. However, any elements on tariff/pricing discussion and abuse of market dominant are not allowed. Agreements have to be filed with the Commission.¹³

⁶ New Zealand Productivity Commission (April 2012), International Freight Transport Services Inquiry, Appendix E

⁷ Meyrick Steve, APEC Transport Working Group (May 2008): Liner Shipping Competition Policy: Non-Ratemaking Agreements Study

⁸ http://europa.eu/rapid/press-release_IP-14-717_en.htm

⁹ <http://www.conventuslaw.com/india-government-extends-exemption-for-shipping-liners/>

¹⁰ <http://www.ihsmaritime360.com/article/16892/india-renews-exemption-to-vessel-sharing-pact>

¹¹ OECD (June 2013), Annual Report On Competition Policy Developments in Israel 2012

¹² Meyrick Steve, APEC Transport Working Group (May 2008): Liner Shipping Competition Policy: Non-Ratemaking Agreements Study

¹³ <http://mycc.gov.my/wp-content/uploads/2014/05/Explanatory-Note-for-Competition-Block-Exemption-for-Vessel-Sharing-Agreements-and-Voluntary-Discussion-Agreements-in-respect-of-Liner-Shipping-Order-2013.pdf>

Singapore: Current Block Exemption Order is valid till December 2015. The order permits a wide range of liner activities including agreement on capacity decisions and prices, subject to conditions. Not filing required if the aggregated market share is below 50%.¹⁴

United States: Shipping Act 1984 exempts shipping liner agreements from prohibitions on collusive conduct (including price fixing, capacity regulations, revenue pooling, scheduling). All agreements must be filed with the Federal Maritime Commission and “essential terms” will be made available to the public.¹⁵ Despite allowing price fixing, US regulation does create competition among liners. Carriers’ agreements cannot prohibit confidential individual service contracts and thus, deviation from conference tariff is not observable.¹⁶

Considering the importance of scheduled sea-freight liners in international trade, international coordination on regulations and policies harmonization can provide clearer legal and better economic framework to improve market efficiency.

Within the Asia Pacific region, The Asia Pacific Economic Cooperation (APEC) Transportation Working Group adopted the following general guidelines on liner shipping non-ratemaking agreements as recommended practices for member economies to consider:¹⁷

Guideline 1: Non-ratemaking agreements between ocean carriers may continue to be permitted as a positive form of supplier collaboration for efficiency-enhancement within APEC member economies’ competition regulations. A formal exemption from the relevant provisions of general competition law may be provided for non-ratemaking agreements in those APEC member economies where: Either, the provisions of general competition law prohibit the efficiency-enhancing behaviors that are typical of non-ratemaking agreements, or The provisions of general competition law give rise to uncertainty as to whether, in a particular instance, these behaviors are or are not legal.

Guideline 2: APEC member economies may collect such information for liner shipping non-ratemaking agreements that enjoy exemption from the application of general competition legislation as each economy deems appropriate for the effective oversight of the agreements. APEC member economies recognize the benefits of information sharing to foster effective oversight of non-ratemaking agreements and may cooperate bilaterally or as appropriate, in a manner compatible with their respective laws and interests, and subject to their availability of resources.

Guideline 3: APEC member economies may wish to consider a separation of ratemaking and non-ratemaking agreements in the course of their oversight process.

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