INFORMATION EXCHANGE AGREEMENTS BETWEEN LINER SHIPPING COMPANIES UNDER EC COMPETITION LAW

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I. Co-operation in Liner Shipping: A Prospective View

On 18 October 2008, the special rules which applied to the liner shipping sector in the European Union were repealed and maritime transport operators have finally become fully exposed to the general competition regime established by Articles 81 and 82 of the EC Treaty.1 Repeal of the liner conference block exemption will not, however, put an end to all forms of horizontal cooperation between competing carriers.

It is unlikely that liner shipping companies will attempt to set up explicit cartels in EU trades in the form of traditional liner conferences.2 Such activities are clearly prohibited by Article 81(1) EC and the conditions for exemption contained in Article 81(3) EC would not be fulfilled.3 In any case,

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3 In principle, even “hard-core” restrictions on competition, such as price fixing, capacity limitation and market sharing, are not excluded from the scope of the exemptions in Article 81(3) EC: see Case No. T-17/93 Matra Hachette SA v. Commission [1994] ECR II-595, § 85. However, they will only in exceptional circumstances fulfil the conditions for exemption under Article 81(3) EC: see A. Pozdnakova, Liner Shipping and EU Competition Law, Alphen a/d Rijn: Kluwer Law International, 2008, pp. 123 et seq.
traditional liner conferences had lost their appeal to carriers even before the review of the liner conference block exemption, as modern carriers prefer to co-ordinate their pricing and other market strategies in more flexible ways. This is well illustrated by the rate discussion agreements implemented in US trades and the so-called stabilisation (tolerated outsider) agreements which allow carriers to adjust prices and capacity in the manner of a liner conference, but without the obligation to adhere to conference tariffs and capacity levels. These practices are banned in the EU and fall within the same category of Article 81 EC infringements as liner cartels.

The major challenge for European competition law enforcers is to ensure effective competition in the market, and to do so not by an outright prohibition of all forms of co-operation between carriers, but by preventing or penalising conduct which is equivalent in its objects to a liner cartel or which may have anti-competitive effects on the market. Although the European Court of Justice has developed a substantial body of case law clarifying the application of Article 81 EC both generally and in relation to liner shipping, there is considerable uncertainty and tension about the way in which Article 81 EC will apply to co-operation between liner shipping companies in the future, particularly from the carriers’ perspective. The Commission has attempted to assist the industry by issuing its Guidelines on application of Article 81 EC to maritime transport services. These are discussed in Section 2 below.

During the review of Regulation 4056/86, it became clear that, in future, the focus of co-operation in liner shipping will shift to information exchange agreements between carriers.

Competition policy traditionally treats with suspicion any horizontal co-operation between competitors because of the potentially harmful market

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5 Members of discussion agreements are not bound to specific rate levels, and are attracted by the opportunity to exchange information and the ability to agree voluntarily on pricing policy: see FMC Report (1998), op. cit., note 4.


7 See TAA, op. cit., note 6.

8 Case law on the application of Article 81 EC to liner shipping deals primarily with the scope of the liner conference block exemption and Council Regulation 4056/86, but also analyses the application of Article 81 EC to agreements not covered by the block exemption, and Article 82 EC. See, e.g., Joined Cases C-395–396/96 Compagnie Maritime Belge Transports SA and Others v Commission (CEWAL) [2000] ECR I-1365 [2000], All ER (EC) 385; Case T-86/95 Compagnie générale maritime and Others v Commission (FEFC) [2002] ECR II-1011; Case T-395/94 (TAA), op. cit., note 6.