MINISTRY OF TRADE AND INDUSTRY

COMPETITION BILL CONSULTATION PAPER

Comments by

BRITISH MARITIME LAW ASSOCIATION

(European & Competition Law Sub-Committee)

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Ministry of Trade and Industry

Competition Bill Consultation Paper

Comments by the British Maritime Law Association (BMLA)

Competition Law Committee

Summary of major points

- The MTI needs to take account of European Community competition law, including the latest changes in the procedure for enforcement, which came into force on 1 May 2004.
- The MTI needs to consider introducing appropriate group exemptions for agreements in the International Maritime Transport Industry; these should cover both liner conferences and liner consortia, both of which benefit from exemption in the EU.
- Similarly, it needs to take account of the EC block exemption for certain arrangements in the insurance sector.
- We question the need for an individual notification system, when, following the recent reform of EC competition law this has been abolished at EC and UK level and a number of other Member States.
- Singapore needs to review its law on legal professional privilege to ensure consistency with best international practice

Statement of Interest

The British Maritime Law Association ("BMLA") is the UK association affiliated to the Comité Maritime International ("CMI"), the leading international forum for legal and regulatory issues affecting the maritime industry. The BMLA is divided into a number of specialist committees, which are regularly consulted on legal issues by the regulatory issues, and which voluntarily offer comments to the UK Government, the European Commission and other public entities.

This submission is being made by the European & Competition law sub-committee, whose primary focus is on competition legislation affecting the maritime industry. The membership of the BMLA is taken from firms of solicitors and barristers' chambers based in the UK, all of whom act for wide-ranging shipping interests. Given the international nature of shipping a significant proportion of the BMLA's clients are potentially affected by the proposed new competition legislation in Singapore, and the BMLA accordingly feels justified in raising its concerns on their behalf.

Comments

Introduction

We understand that the Singapore Ministry of Trade and Industry ("MTI") has studied the competition legislation of various jurisdictions including the United Kingdom in preparing the draft Competition Bill ("the Bill"). It is unclear from the website whether the MTI may also have considered the competition legislation, being rules and policies that govern the European Union ("EU") as a whole. The BMLA suggests that it would find it helpful to do so, in view of the fact that the UK regime cannot be seen in isolation.

The EU expanded in size from 15 to 25 Member States on 1 May 2004. The EU is based on three basic Treaties: the Treaty on European Union; the Treaty establishing the European Community ("the EC Treaty"); and the Treaty establishing the European Atomic Energy Community ("the Euratom Treaty"). The provisions governing competition law are to be found in the EC Treaty and the relevant body of law is referred to as "Community law", as opposed to the law of the constituent Member States over which Community law takes precedence (under the doctrine of supremacy).

Under Community law, arrangements on price between undertakings (commercial firms), including some forms of discussion, trade association recommendations and concerted practices, are made unlawful by virtue of Articles 81(1) and 82 of the EC Treaty (previously known as Articles 85 and 86 respectively).

The MTI should be aware that although the jurisdictions which it has studied have their own national legislation and rules, those countries that form part of the EU, *e.g.* Ireland and the United Kingdom, fall under the umbrella of the EU. The European Commission ("the Commission") is the politically independent institution that represents and upholds Community law. It is the driving force within the EU's institutional system: it proposes legislation, policies and programmes of action and it is responsible for implementing the decisions of the EU Parliament and the EU Council.

The basic framework of Articles 81 and 82 of the EC Treaty has been replicated in the United Kingdom Competition Act 1998, and has therefore indirectly been taken into account by the MTI in drafting the draft Bill. As part of that framework the Commission was empowered by the Council under Article 81(3) to exempt either individual agreements or classes of agreements from the prohibition in Article 81(1) provided that what can loosely be described as "public interest" criteria are satisfied. Until 1 May this year the Commission had the sole prerogative to issue exemptions. Since that date those powers have become shared with the national competition authorities.

In exercise of its powers to adopt "block exemptions" for classes of agreements satisfying the criteria of Article 81(3) and subject to relevant delegated authority from the Council, the Commission has allowed certain industries to benefit from block exemptions, *e.g.* transport and insurance. We believe the MTI will be aided by reviewing the Commission policies in relation to these exemptions. At the same time the Council, in applying the competition rules to international maritime transport services in 1986 (in the form of Regulation 4056/86) introduced a block exemption for liner conference agreements, reflecting the fact that such conferences were allowed and encouraged by the UNCTAD Code on Liner Conferences, to which a number of Member States of the European Community were (and are) party.

The MTI should also be aware that s10 of the United Kingdom's Competition Act 1998 made provisions for "parallel exemptions". Under this section an agreement is exempt from the Chapter I prohibition if it is exempt from the Community prohibition:

1.

(a) by virtue of a block exemption Regulation

(b) because it has been given individual exemption by the Commission, or

(c) because it has been notified to the Commission under the appropriate opposition or objection procedure and:

(i) the time for opposing, or objecting to, the agreement has expired and the Commission has not opposed it; or

(ii) the Commission has opposed, or objected to, the agreement but has withdrawn its opposition or objection.

2. An agreement is exempt from the Chapter I prohibition if it does not affect trade between Member States but otherwise falls within a category of agreement which is exempt from the Community prohibition by virtue of a Regulation.

3. An exemption from the Chapter I prohibition under this section is referred to in this part as a parallel exemption.

4. A parallel exemption:

(a) takes effect on the date on which the relevant exemption from the Community prohibition takes effect, or, in the case of a parallel exemption under subsection (2), would take effect if the agreement in question affected trade between Member States; and

(b) ceases to have effect

(i) if the relevant exemption from the Community prohibition ceases to have effect; or

(ii) on being cancelled by virtue of subsection (5) or (7)…

By way of example, when Ireland implemented its own Competition Act to bring into effect the EC Treaty Articles, it did not include a parallel exemption clause. This caused Ireland severe problems because it meant that no block exemptions had been adopted at all. This resulted in a flood of notifications to the competition authority and significant costs being incurred. The UK, having witnessed Ireland's error, sought to ensure that parallel exemption dates were synchronised.

Transport

Provision has been made in the draft Bill for block exemptions for scheduled bus and rail services, as well as cargo terminal operations. We believe that it would be useful to provide block exemptions for liner shipping services also.

We consider that the new legislation must give due recognition to the fact that Singapore occupies a vital place as a key port in the network of international maritime transport, especially in the case of ocean liner services providing scheduled services on pre-determined routes. This makes it highly desirable that the Singaporean competition legislation should take account of its relationship with the legal systems of major trading partners. In addition to the law of the European Community we therefore consider it vital in this context that Singapore should also reflect the current legal position in other major trading nations such as Australia and the United States. For instance, the US legislation (*e.g.* the Ocean Shipping Reform Act) equally grants immunity for certain types of conference arrangements as does Part X of the Australian Competition Act.

A "liner conference" is described in the relevant EC Regulation (Regulation 4056/86) as a group of two or more vessel-operating carriers that provide an international liner service, for the carriage of cargo on a particular route or routes, within specified geographic limits, under a *uniform* or *common* tariff and conditions of carriage. Regulation 4056/86 provides for an automatic block exemption for

certain practices of liner operators providing services under liner conference arrangements (as defined in that Regulation).

The rationale of the EC Council of Ministers, when adopting the Regulation, was the policy view that co-operation of shipping lines within conferences brought stability to the maritime markets where they operated by cooperation on such matters as the creation of joint tariffs and certain types of ancillary activities to assist the tariff's operation, such as seasonal capacity regulation. Over the years the decisions of the Commission and the rulings of EC Courts have provided the shipping industry with a list of activities for which joint pricing and other conference activities (such as capacity regulation) are allowed and prohibited respectively.

In order to benefit from the exemption agreements between members of liner conferences, these must have as their objective; the fixing of rates, conditions of carriage; and co-ordination of sailings. Over the years the Commission has provided the shipping industry with a list of activities for which joint pricing is allowed and prohibited respectively.

Case law over the years has refined exactly what the boundaries are between prohibited and exempted practices within the liner industry. The European Commission has recently launched a major review of Regulation 4056/86 details of which have been posted on the Commission's Europa website by the European Commission's Directorate General for Competition. It is too early to tell what, if any, changes to the existing legislation will result from this review, but the Commission is said to be questioning the continuing economic and public interest rationale for the block exemption. A similar review has begun in Australia and periodic reviews have taken place and continue to take place in the United States. The Singapore legislation should perhaps contain powers for the terms of any automatic dispensation for liner conferences to be kept under ministerial review and varied in line with international developments.

The Commission has also implemented a similar block exemption Regulation 823/2000 for consortia. "Liner consortia", in effect are joint ventures or alliances between two or more vessel carrying operators, which bring about co-operation between the carriers in order to improve the quality and productivity of the liner shipping services. The Commission has recognised that consortia provide strong benefits, and do not necessarily eliminate competition.

Insurance

Under European law insurers benefit from block exemption Regulation 358/2003, which is valid from 1 April 2003 until 31 March 2010. The agreements covered by this block exemption in the insurance sector include:

- the joint calculations of risks and joint studies on future risks;
- the establishment of non-binding standard policy conditions;
- the establishment and management of insurance pools;
- the testing and acceptance of security equipment.

The Commission assessed the impact of agreements on the relevant market by defining categories of agreement, which are exempted up to a certain level of market power, and which specifies certain restrictions or clauses, which are not to be contained in such agreements. We believe that the draft Bill should provide a similar exemption.

Notification

The draft Bill provides for a system of individual notification, based on the system contained in the UK Competition Act 1998 and the equivalent Irish legislation, which in turn were based on the EC system. As a result of the changes to the EC competition law regime which entered into force on 1 May 2004, the system of individual notification has been abolished. In consequence, the UK also abolished its system of individual notification with effect from 1 May 2004[1].

The European Commission offers the possibility of giving guidance on novel points of law[2], but in general parties are no longer able to seek comfort from the competition authorities and must rely on their own analysis. This brings the EU closer into line with the US anti-trust system which never featured a notification system, but where the Department of Justice may be prepared to give informal guidance. The UK competition authority, the Office of Fair Trading, will continue to give informal guidance, but as stated above will no longer be empowered to grant legally binding decisions exempting individual agreements.

The MTI needs to be aware that, in retaining an individual notification system, Singapore would be out on a limb compared with the two major competition law systems in the EU and the US.

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1 See The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, S.I. 2004 No. 1261.

2 See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), published in Official Journal of the European Union OJC 101/78 of 27.04.2004.

Legal Professional Privilege

Legal professional privilege is not dealt with in the EC Treaty or by way of specific legislation. Nevertheless, the European Court of Justice has held that as legal professional privilege is a basic legal principle recognised in all Member States it has to be given recognition by Community law. Thus it applies in relation to the enforcement of Articles 81 and 82 by the European Commission. The Court was, however, prepared to recognise privilege only so far as it applies to communications to and from external legal counsel qualified in a Member State of the EU, thus excluding in-house counsel and counsel from non-EU jurisdictions. Although this limitation to outside counsel is currently being challenged in court, it remains a problem for companies in relation to the obtaining of advice on EC competition law.

Since 1 May 2004, however, the position has been complicated by the fact that jurisdiction for enforcing EC competition law is largely being devolved to national competition authorities who are free to apply their own procedural rules, including rules on privilege. English law recognises legal privilege for communications to and from an in-house lawyer and a duly qualified lawyer from any other jurisdiction in the same way as a lawyer from private practice. It seems to us appropriate that Singapore should equally ensure that firms can claim legal privilege for both in-house and independent lawyers in relation to all competition advice. Ideally, the procedural rules should make allowance for a firm's lawyer to be present at any investigation, *inter alia* to help identify privileged documents, and thus allow firms time to call in their legal advisers if they are not already on the premises.

Conclusion

We urge the Singapore Government to focus early on the whole issue of the timing of the introduction of any necessary block exemptions, which need to be in place before the Competition Act itself comes into force to avoid disruption to international trade in and with Singapore. The BMLA has a particular concern with agreements in the maritime and insurance industry which benefit from special treatment in the EU and which, it is submitted, should equally benefit from such treatment in Singapore. If necessary primary provisions can be included in the draft Bill with a view to excluding or exempting such agreements, particularly liner conferences and consortia, and a defined set of agreements in the insurance sector.

The BMLA has also drawn attention to the anomaly between the Singapore proposals and the recently amended legislation in the EU and UK regarding individual notification.

Finally we urge the Singapore Government to look at the issue of legal professional privilege and ensure that best practice is followed to avoid as far as possible any unnecessary inconsistencies in procedural rules affecting international business.