For discussion
on 8 November 2011

Bills Committee on Competition Bill

Responses to follow-up questions arising from previous meeting

Purpose

This paper responds to questions raised by Members at the meeting on 11 October 2011.

A. Block exemption

Review of block exemption orders

2. Currently, the issue, variation or revocation of block exemption orders by the Competition Commission (Commission) under clauses 15 and 20 of the Competition Bill (the Bill) respectively are not subject to review by the Competition Tribunal (Tribunal) under clause 82. We note Members' suggestion of a formal review process in respect of the Commission's determinations relating to block exemption orders, which usually apply to a category of agreements carrying wide implications. To this end, we propose that the Commission's decisions relating to the issue, variation or revocation of block exemption orders be made one of the reviewable determinations by the Tribunal under clause 81 of the Bill. A person who has a sufficient interest in the determination may apply to the Tribunal for a review under clause 82.

Publication of block exemption orders

3. The Commission has an important role to play in promoting compliance with the competition rules and enhancing public understanding of the competition law. The use of latest technology such as the Internet would certainly facilitate the Commission in the discharge of its public functions, especially in relation to the dissemination of information. Hence, we accept Members' suggestion and propose to make clear our policy intent in the Bill that the Commission should make use of the Internet and other appropriate means in publishing the proposed block exemption orders under clause 16(1) and in maintaining a register of

decisions and block exemption orders under clause 34(3). Our proposed amendments to these two clauses are as follows –

Clause 16

(1) Before issuing a block exemption order, the Commission must -

(a) ~~publish notice of the proposed block exemption order in any manner it considers appropriate~~ for bringing the proposed block exemption order to the attention of those ~~it~~ the Commission considers likely to be affected by it, publish notice of the proposed block exemption order –

(i) through the Internet or a similar electronic network; and

(ii) in any other manner the Commission considers appropriate; and

(b) consider any representations about the proposed exemption order that are made to ~~it~~ the Commission.

Clause 34

(3) The Commission must make the register available for inspection by any person –

(a) at the offices of the Commission during ordinary business hours;

(b) through the Internet or a similar electronic network; and

(c) in any other manner ~~it~~ the Commission considers appropriate.

Exemption for vertical agreements

4. On the exemption for vertical agreements, our view as elucidated in previous responses remains that in line with international best practices, it would be more appropriate for the Commission to consider issuing block exemption order to exempt certain types of vertical agreements having regard to the circumstances of Hong Kong after enactment of the Bill. Moreover, since we have introduced the warning notice mechanism, businesses no longer need to worry about unknowingly breaching the law. Introducing block exemption to vertical agreements before allowing the Commission time to examine the market

situation of Hong Kong would affect its ability to address serious, hardcore activities.

Overseas examples of block exemption

5. In overseas jurisdictions such as the EU, the UK and Singapore, the competition authorities granted block exemption to specified categories of agreements having fulfilled the test of enhancing overall economic efficiency, similar to clause 15 of the Bill. Examples of agreements falling within the scope of these block exemptions include vertical agreements, research & development agreements, specialization agreements, technology transfer agreements, and liner shipping agreements. For details, please refer to **Appendix A**.

B. Cost for preparing and implementing the Bill in Hong Kong

6. As requested by Members, a copy of the Administration's earlier reply to questions raised by The Lion Rock Institute on the costs of preparing and implementing the Bill in Hong Kong is at **Appendix B**.

C. Responses to major concerns over the Bill

7. The Administration's response to major concerns over the Bill, covering clarity of the provisions, de minimis arrangements, cap on pecuniary penalty, infringement notice, private action and merger regulation, has been set out in Paper No. CB(1)91/11-12(01), which was considered by Members at the meeting on 25 October 2011.

D. Legal Aid

8. According to interpretations in section 2 of the Legal Aid Ordinance (LAO)(Cap. 91), a person to whom legal aid can be granted does not include a body of persons corporate or unincorporate. An enterprise that is a body of persons corporate or unincorporate is therefore not eligible for legal aid under LAO. For individuals, legal aid will be available subject to means and merits tests. Under section 1 of Part 1 of Schedule 2 to the LAO, the scope of the legal aid regime covers civil proceedings in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal [Note]; proceedings

[Note] The Legal Aid Scheme also covers certain coroner's inquests, landlord and tenant disputes under Part II of the Landlord and Tenant (Consolidation) Ordinance, as well as application to the Mental Health Review Tribunal.

brought before the Tribunal is therefore outside the legal aid system.

E. Other Issues

9. We will respond to Members' suggestion to adopt the concept of "dominance" and to specify the relevant criteria for assessing the degree of market power and abuse under clause 21 in a separate submission.

Advice sought

10. Members are invited to note the contents of the paper.

Commerce and Economic Development Bureau
November 2011

Separately, the LAO provides for a Supplementary Legal Aid Scheme (SLAS) which offers legal assistance to those passing the means and merits tests for claims involving personal injuries or death, or medical, dental and legal professional negligence where the damages exceeds or is likely to exceed $60,000. The SLAS also covers claims brought under the Employees' Compensation Ordinance irrespective of the amount of the claim.

COMMISSION REGULATION (EC) No 906/2009

of 28 September 2009

on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ([1]), and in particular Article 1 thereof,

Having published a draft of this Regulation ([2]),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 246/2009 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices between shipping companies relating to the joint operation of liner shipping services (consortia), which, through the cooperation they bring about between the shipping companies that are parties thereto, are liable to restrict competition within the common market and to affect trade between Member States and may therefore be caught by the prohibition contained in Article 81(1) of the Treaty.

(2) The Commission has made use of its power by adopting Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ([3]), which will expire on 25 April 2010. On the basis of the Commission's experience to date it can be concluded that the justifications for a block exemption for liner consortia are still valid. However, certain changes are necessary in order to remove references to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport ([4]) which allowed liner shipping lines to fix prices and capacity, but has now been repealed. Modifications are also necessary to ensure a greater convergence with other block exemption regulations for horizontal cooperation in force whilst taking into account current market practices in the liner industry.

(3) Consortium agreements vary significantly ranging from those that are highly integrated, requiring a high level of investment for example due to the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres, to flexible slot exchange agreements. For the purposes of this Regulation a consortium agreement consists of one or a set of separate but interrelated agreements between liner shipping companies under which the parties operate the joint service. The legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service.

(4) The benefit of the block exemption should be limited to those agreements for which it can be assumed with a sufficient degree of certainty that they satisfy the conditions of Article 81(3) of the Treaty. However, there is no presumption that consortia which do not benefit from this Regulation fall within the scope of Article 81(1) of the Treaty or, if they do, that they do not satisfy the conditions of Article 81(3) of the Treaty. When conducting a self-assessment of the compatibility of their agreement with Article 81 of the Treaty, parties to such consortia may consider the specific features of markets with small volumes carried or situations where the market share threshold is exceeded as a result of the presence in the consortium of a small carrier without important resources and whose increment to the overall market share of the consortium is only insignificant.

(5) Consortia, as defined in this Regulation, generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through

([1]) OJ L 79, 25.3.2009, p. 1.
([2]) OJ C 266, 21.10.2008, p. 1.
([3]) OJ L 100, 20.4.2000, p. 24.
([4]) OJ L 378, 31.12.1986, p. 4.

the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. For the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments in response to fluctuations in supply and demand. By contrast, unjustified limitation of capacity and sales as well as the joint fixing of freight rates or market and customer allocation are unlikely to bring any efficiency. Therefore, the exemption provided for in this Regulation should not apply to consortium agreements that involve such activities, irrespective of the market power of the parties.

(6) A fair share of the benefits resulting from the efficiencies should be passed on to transport users. Users of the shipping services provided by consortia may benefit from the improvements in productivity which consortia can bring about. Those benefits may also take the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services through the use of more modern vessels and other equipment, including port facilities.

(7) Users can benefit effectively from consortia only if there is sufficient competition in the relevant markets in which the consortia operate. This condition should be regarded as being met when a consortium remains below a given market share threshold and can therefore be presumed to be subject to effective actual or potential competition from carriers that are not members of that consortium. In order to assess the relevant market, account should be taken not only of direct trade between the ports served by a consortium but also of any competition from other liner services sailing from ports which may be substituted for those served by the consortium and, where appropriate, of other modes of transport.

(8) This Regulation should not exempt agreements containing restrictions of competition which are not indispensable to the attainment of the objectives justifying the grant of the exemption. To that end, severely anti-competitive restraints (hardcore restrictions) relating to the fixing of prices charged to third parties, the limitation of capacity or sales and the allocation of markets or customers should be excluded from the benefit of this Regulation. Other than the activities which are expressly exempted by this Regulation, only ancillary activities which are directly related to the operation of the consortium, necessary for its implementation and proportionate to it should be covered by this Regulation.

(9) The market share threshold and the other conditions set out in this Regulation, as well as the exclusion of certain conduct from its benefit, should normally ensure that the agreements to which the block exemption applies do not give the companies concerned the possibility of eliminating competition in a substantial part of the relevant market in question.

(10) For the assessment of whether a consortium fulfils the market share condition, the overall market shares of the consortium members should be added up. The market share of each member should take into account the overall volumes it carries within and outside the consortium. In the latter case account should be taken of all volumes carried by a member within another consortium or in relation to any service provided individually by the member, be it on its own vessels or on third party vessels pursuant to contractual arrangements such as slot charters.

(11) In addition, the benefit of the block exemption should be subject to the right of each consortium member to withdraw from the consortium provided that it gives reasonable notice. However, provision should be made for a longer notice period and a longer initial lock-in period in the case of highly integrated consortia in order to take account of the higher investments undertaken to set them up and the more extensive reorganisation entailed in the event of a member leaving.

(12) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption, on the basis of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1]. In that respect, the negative effects that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market are of particular importance.

(13) Furthermore, where agreements have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the block exemption in respect of that territory pursuant to Regulation (EC) No 1/2003.

(14) This Regulation is without prejudice to the application of Article 82 of the Treaty.

(15) In view of the expiry of Regulation (EC) No 823/2000, it is appropriate to adopt a new Regulation renewing the block exemption,

[1] OJ L 1, 4.1.2003, p. 1.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

This Regulation shall apply to consortia only in so far as they provide international liner shipping services from or to one or more Community ports.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

1. 'consortium' means an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements;

2. 'liner shipping' means the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment;

3. 'transport user' means any undertaking (such as shipper, consignee or forwarder) which has entered into, or intends to enter into, a contractual agreement with a consortium member for the shipment of goods;

4. 'commencement of the service' means the date on which the first vessel sails on the service.

CHAPTER II

EXEMPTIONS

Article 3

Exempted agreements

Pursuant to Article 81(3) of the Treaty and subject to the conditions laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following activities of a consortium:

1. the joint operation of liner shipping services including any of the following activities:

   (a) the coordination and/or joint fixing of sailing timetables and the determination of ports of call;

   (b) the exchange, sale or cross-chartering of space or slots on vessels;

   (c) the pooling of vessels and/or port installations;

   (d) the use of one or more joint operations offices;

   (e) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;

2. capacity adjustments in response to fluctuations in supply and demand;

3. the joint operation or use of port terminals and related services (such as lighterage or stevedoring services);

4. any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for their implementation, such as:

   (a) the use of a computerised data exchange system;

   (b) an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;

   (c) an obligation on members of a consortium not to assign or charter space to other vessel-operating carriers in the relevant market or markets except with the prior consent of the other members of the consortium.

Article 4

Hardcore restrictions

The exemption provided for in Article 3 shall not apply to a consortium which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, has as its object:

1. the fixing of prices when selling liner shipping services to third parties;

2. the limitation of capacity or sales except for the capacity adjustments referred to in Article 3(2);

3. the allocation of markets or customers.

CHAPTER III

CONDITIONS FOR EXEMPTION

Article 5

Conditions relating to market share

1. In order for a consortium to qualify for the exemption provided for in Article 3, the combined market share of the consortium members in the relevant market upon which the consortium operates shall not exceed 30 % calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units.

2. For the purpose of establishing the market share of a consortium member the total volumes of goods carried by it in the relevant market shall be taken into account irrespective of whether those volumes are carried:

(a) within the consortium in question;

(b) within another consortium to which the member is a party; or

(c) outside a consortium on the member's own or on third party vessels.

3. The exemption provided for in Article 3 shall continue to apply if the market share referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one tenth.

4. Where one of the limits specified in paragraphs 1 and 3 of this Article is exceeded, the exemption provided for in Article 3 shall continue to apply for a period of six months following the end of the calendar year during which it was exceeded. That period shall be extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.

Article 6

Other conditions

In order to qualify for the exemption provided for in Article 3, the consortium must give members the right to withdraw without financial or other penalty such as, in particular, an obligation to cease all transport activity in the relevant market or markets in question, whether or not coupled with the condition that such activity may be resumed after a certain period has elapsed. That right shall be subject to a maximum period of notice of six months. The consortium may, however, stipulate that such notice can only be given after an initial period of a maximum of 24 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service.

In the case of a highly integrated consortium the maximum period of notice may be extended to 12 months and the consortium may stipulate that such notice can only be given after an initial period of a maximum of 36 months starting from the date of entry into force of the agreement or, if later, from the commencement of the service.

CHAPTER IV

FINAL PROVISIONS

Article 7

Entry into force

This Regulation shall enter into force on 26 April 2010.

It shall apply until 25 April 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 28 September 2009.

For the Commission

Neelie KROES

Member of the Commission

COMMISSION REGULATION (EU) No 1217/2010

of 14 December 2010

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices [1],

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (*) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object the research and development of products, technologies or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.

(2) Article 179(2) of the Treaty calls upon the Union to encourage undertakings, including small and medium-sized undertakings, in their research and technological development activities of high quality, and to support their efforts to cooperate with one another. This Regulation is intended to facilitate research and development while at the same time effectively protecting competition.

(3) Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements [2] defines categories of research and development agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(4) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition.

(5) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.

(6) Agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 101(1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 101(1) of the Treaty and should therefore be included within the scope of this Regulation.

(7) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

(8) Cooperation in research and development and in the exploitation of the results is most likely to promote technical and economic progress if the parties contribute complementary skills, assets or activities to the co-operation. This also includes scenarios where one party merely finances the research and development activities of another party.

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[1] OJ L 285, 29.12.1971, p. 46.

[2] OJ L 304, 5.12.2000, p. 7.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

(9) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms such as manufacture, the exploitation of intellectual property rights that substantially contribute to technical or economic progress, or the marketing of new products.

(10) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services, a quicker launch of those products or services, or the reduction of prices brought about by new or improved technologies or processes.

(11) In order to justify the exemption, the joint exploitation should relate to products, technologies or processes for which the use of the results of the research and development is decisive. Moreover, all the parties should agree in the research and development agreement that they will all have full access to the final results of the joint research and development, including any arising intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as the final results become available. Access to the results should generally not be limited as regards the use of the results for the purposes of further research and development. However, where the parties, in accordance with this Regulation, limit their rights of exploitation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, where academic bodies, research institutes or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results participate in research and development, they may agree to use the results of research and development solely for the purpose of further research. Depending on their capabilities and commercial needs, the parties may make unequal contributions to their research and development cooperation. Therefore, in order to reflect, and to make up for, the differences in the value or the nature of the parties' contributions, a research and development agreement benefiting from this Regulation may provide that one party is to compensate another for obtaining access to the results for the purposes of further research or exploitation. However, the compensation should not be so high as to effectively impede such access.

(12) Similarly, where the research and development agreement does not provide for any joint exploitation of the results, the parties should agree in the research and development agreement to grant each other access to their respective pre-existing know-how, as long as this know-how is indispensable for the purposes of the exploitation of the results by the other parties. The rates of any licence fee charged should not be so high as to effectively impede access to the know-how by the other parties.

(13) The exemption established by this Regulation should be limited to research and development agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products, services or technologies in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products, services or technologies capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into. However, there is no presumption that research and development agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the research and development agreement needs to be conducted under Article 101 of the Treaty.

(14) In order to ensure the maintenance of effective competition during joint exploitation of the results, provision should be made for the block exemption to cease to apply if the parties' combined share of the market for the products, services or technologies arising out of the joint research and development becomes too great. The exemption should continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the investments involved.

(15) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a research and development agreement. In principle, agreements containing certain types of severe restrictions of competition such as limitations on the freedom of parties to carry out research and development in a field unconnected to the agreement, the fixing of prices charged to third parties, limitations on output or sales, and limitations on effecting passive sales for the contract products or contract technologies in territories or to customers reserved for other parties should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties. In this context, field of use restrictions do not constitute limitations of output or sales, and also do not constitute territorial or customer restrictions.

(16) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.

(17) The possibility cannot be ruled out that anti-competitive foreclosure effects may arise where one party finances several research and development projects carried out by competitors with regard to the same contract products or contract technologies, in particular where it obtains the exclusive right to exploit the results vis-à-vis third parties. Therefore the benefit of this Regulation should be conferred on such paid-for research and development agreements only if the combined market share of all the parties involved in the connected agreements, that is to say, the financing party and all the parties carrying out the research and development, does not exceed 25 %.

(18) Agreements between undertakings which are not competing manufacturers of products, technologies or processes capable of being improved, substituted or replaced by the results of the research and development will only eliminate effective competition in research and development in exceptional circumstances. It is therefore appropriate to enable such agreements to benefit from the exemption established by this Regulation irrespective of market share and to address any exceptional cases by way of withdrawal of its benefit.

(19) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1], where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

(20) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

(21) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, for example, where the existence of a research and development agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere, where because of the particular structure of supply, the existence of the research and development agreement substantially restricts the access of third parties to the market for the contract products or contract technologies, where without any objectively valid reason, the parties do not exploit the results of the joint research and development vis-à-vis third parties, where the contract products or contract technologies are not subject in the whole or a substantial part of the internal market to effective competition from products, technologies or processes considered by users as equivalent in view of their characteristics, price and intended use, or where the existence of the research and development agreement would restrict competition in innovation or eliminate effective competition in research and development on a particular market.

(22) As research and development agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'research and development agreement' means an agreement entered into between two or more parties which relate to the conditions under which those parties pursue:

(i) joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;

(ii) joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;

(iii) joint research and development of contract products or contract technologies excluding joint exploitation of the results;

(iv) paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;

(v) joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties; or

(vi) paid-for research and development of contract products or contract technologies excluding joint exploitation of the results;

(b) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;

[1] OJ L 1, 4.1.2003, p. 1.

(c) 'research and development' means the acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;

(d) 'product' means a good or a service, including both intermediary goods or services and final goods or services;

(e) 'contract technology' means a technology or process arising out of the joint research and development;

(f) 'contract product' means a product arising out of the joint research and development or manufactured or provided applying the contract technologies;

(g) 'exploitation of the results' means the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;

(h) 'intellectual property rights' means intellectual property rights, including industrial property rights, copyright and neighbouring rights;

(i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified;

(j) 'secret', in the context of know-how, means that the know-how is not generally known or easily accessible;

(k) 'substantial', in the context of know-how, means that the know-how is significant and useful for the manufacture of the contract products or the application of the contract technologies;

(l) 'identified', in the context of know-how, means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(m) 'joint', in the context of activities carried out under a research and development agreement, means activities where the work involved is:

(i) carried out by a joint team, organisation or undertaking;

(ii) jointly entrusted to a third party; or

(iii) allocated between the parties by way of specialisation in the context of research and development or exploitation;

(n) 'specialisation in the context of research and development' means that each of the parties is involved in the research and development activities covered by the research and development agreement and they divide the research and development work between them in any way that they consider most appropriate; this does not include paid-for research and development;

(o) 'specialisation in the context of exploitation' means that the parties allocate between them individual tasks such as production or distribution, or impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties;

(p) 'paid-for research and development' means research and development that is carried out by one party and financed by a financing party;

(q) 'financing party' means a party financing paid-for research and development while not carrying out any of the research and development activities itself;

(r) 'competing undertaking' means an actual or potential competitor;

(s) 'actual competitor' means an undertaking that is supplying a product, technology or process capable of being improved, substituted or replaced by the contract product or the contract technology on the relevant geographic market;

(t) 'potential competitor' means an undertaking that, in the absence of the research and development agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;

(u) 'relevant product market' means the relevant market for the products capable of being improved, substituted or replaced by the contract products;

(v) 'relevant technology market' means the relevant market for the technologies or processes capable of being improved, substituted or replaced by the contract technologies.

2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.

'Connected undertakings' means:

(a) undertakings in which a party to the research and development agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights;

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the research and development agreement, the rights or powers listed in point (a);

(c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

(d) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

(e) undertakings in which the rights or the powers listed in point (a) are jointly held by:

(i) parties to the research and development agreement or their respective connected undertakings referred to in points (a) to (d); or

(ii) one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to research and development agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to research and development agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties or to an entity the parties establish to carry out the joint research and development, paid-for research and development or joint exploitation, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

Article 3

Conditions for exemption

1. The exemption provided for in Article 2 shall apply subject to the conditions set out in paragraphs 2 to 5.

2. The research and development agreement must stipulate that all the parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available. Where the parties limit their rights of exploitation in accordance with this Regulation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research. The research and development agreement may foresee that the parties compensate each other for giving access to the results for the purposes of further research or exploitation, but the compensation must not be so high as to effectively impede such access.

3. Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results. The research and development agreement may foresee that the parties compensate each other for giving access to their pre-existing know-how, but the compensation must not be so high as to effectively impede such access.

4. Any joint exploitation may only pertain to results which are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies.

5. Parties charged with the manufacture of the contract products by way of specialisation in the context of exploitation must be required to fulfil orders for supplies of the contract products from the other parties, except where the research and development agreement also provides for joint distribution within the meaning of point (m)(i) or (ii) of Article 1(1) or where the parties have agreed that only the party manufacturing the contract products may distribute them.

Article 4

Market share threshold and duration of exemption

1. Where the parties are not competing undertakings, the exemption provided for in Article 2 shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for 7 years from the time the contract products or contract technologies are first put on the market within the internal market.

2. Where two or more of the parties are competing undertakings, the exemption provided for in Article 2 shall apply for the period referred to in paragraph 1 of this Article only if, at the time the research and development agreement is entered into:

(a) in the case of research and development agreements referred to in point (a)(i), (ii) or (iii) of Article 1(1), the combined market share of the parties to a research and development agreement does not exceed 25 % on the relevant product and technology markets; or

(b) in the case of research and agreements referred to in point (a)(iv), (v) or (vi) of Article 1(1), the combined market share of the financing party and all the parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies, does not exceed 25 % on the relevant product and technology markets.

3. After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the parties does not exceed 25 % on the relevant product and technology markets.

Article 5

Hardcore restrictions

The exemption provided for in Article 2 shall not apply to research and development agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

(a) the restriction of the freedom of the parties to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development agreement relates or, after the completion of the joint research and development or the paid-for research and development, in the field to which it relates or in a connected field;

(b) the limitation of output or sales, with the exception of:

(i) the setting of production targets where the joint exploitation of the results includes the joint production of the contract products;

(ii) the setting of sales targets where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);

(iii) practices constituting specialisation in the context of exploitation; and

(iv) the restriction of the freedom of the parties to manufacture, sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results;

(c) the fixing of prices when selling the contract product or licensing the contract technologies to third parties, with the exception of the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);

(d) the restriction of the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies, with the exception of the requirement to exclusively license the results to another party;

(e) the requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation;

(f) the requirement to refuse to meet demand from customers in the parties' respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, who would market the contract products in other territories within the internal market;

(g) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.

Article 6

Excluded restrictions

The exemption provided for in Article 2 shall not apply to the following obligations contained in research and development agreements:

(a) the obligation not to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the internal market and which are relevant to the research and development or, after the expiry of the research and development agreement, the validity of intellectual property rights which the parties hold in the internal market and which protect the results of the research and development, without prejudice to the possibility to provide for termination of the research and development agreement in the event of one of the parties challenging the validity of such intellectual property rights;

(b) the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies unless the agreement provides for the exploitation of the results of the joint research and development or paid-for research and development by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.

Article 7

Application of the market share threshold

For the purposes of applying the market share threshold provided for in Article 4 the following rules shall apply:

(a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;

(d) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above that level without exceeding 30 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded;

(e) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 2 shall continue to apply for a period of one calendar year following the year in which the level of 30 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years.

Article 8

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2659/2000.

Article 9

Period of validity

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14 December 2010.

For the Commission
The President
José Manuel BARROSO

COMMISSION REGULATION (EU) No 1218/2010

of 14 December 2010

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices [1],

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (*) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object specialisation, including agreements necessary for achieving it.

(2) Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements [2] defines categories of specialisation agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of specialisation agreements will outweigh any negative effects on competition.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.

(5) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

(6) Agreements on specialisation in production are most likely to contribute to improving the production or distribution of goods if the parties have complementary skills, assets or activities, because they can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. The same can generally be said about agreements on specialisation in the preparation of services. Given effective competition, it is likely that consumers will receive a fair share of the resulting benefits.

(7) Such advantages can arise from agreements whereby one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (unilateral specialisation), from agreements whereby each party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (reciprocal specialisation) and from agreements whereby the parties

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[1] OJ L 285, 29.12.1971, p. 46.

[2] OJ L 304, 5.12.2000, p. 3.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

undertake to jointly manufacture certain products or prepare certain services (joint production). In the context of this Regulation, the concepts of unilateral and reciprocal specialisation do not require a party to reduce capacity, as it is sufficient if they reduce their production volumes. The concept of joint production, however, does not require the parties to reduce their individual production activities outside the scope of their envisaged joint production arrangement.

(8) The nature of unilateral and reciprocal specialisation agreements presupposes that the parties are active on the same product market. It is not necessary for the parties to be active on the same geographic market. Consequently, the application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market. Joint production agreements can be entered into by parties who are already active on the same product market but also by parties who wish to enter a product market by way of the agreement. Therefore, joint production agreements should fall within the scope of this Regulation irrespective of whether the parties are already active in the same product market.

(9) To ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production entirely, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations or joint distribution. Supply and purchase obligations may, but do not have to, be of an exclusive nature.

(10) It can be presumed that, where the parties' share of the relevant market for the products which are the subject matter of a specialisation agreement does not exceed a certain level, the agreements will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits. However, where the products manufactured under a specialisation agreement are intermediary products which one or more of the parties fully or partly use as an input for their own production of certain downstream products which they subsequently sell on the market, the exemption conferred by this Regulation should also be conditional on the parties' share on the relevant market for these downstream products not exceeding a certain level. In such a case, merely looking at the parties' market share at the level of the intermediary product would ignore the potential risk of foreclosing or increasing the price of inputs for competitors at the level of the downstream products. However, there is no presumption that specialisation agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the specialisation agreement needs to be conducted under Article 101 of the Treaty.

(11) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a specialisation agreement. In principle, agreements containing certain types of severe restrictions of competition relating to the fixing of prices charged to third parties, limitation of output or sales, and allocation of markets or customers should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties.

(12) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.

(13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1], where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

(14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

(15) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003 where, for example, the relevant market is very concentrated and competition is already weak, in particular because of the individual market positions of other market participants or links between other market participants created by parallel specialisation agreements.

[1] OJ L 1, 4.1.2003, p. 1.

(16) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the parties, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'specialisation agreement' means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement;

(b) 'unilateral specialisation agreement' means an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;

(c) 'reciprocal specialisation agreement' means an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them;

(d) 'joint production agreement' means an agreement by virtue of which two or more parties agree to produce certain products jointly;

(e) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;

(f) 'product' means a good or a service, including both intermediary goods or services and final goods or services, with the exception of distribution and rental services;

(g) 'production' means the manufacture of goods or the preparation of services and includes production by way of subcontracting;

(h) 'preparation of services' means activities upstream of the provision of services to customers;

(i) 'relevant market' means the relevant product and geographic market to which the specialisation products belong, and, in addition, where the specialisation products are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products, the relevant product and geographic market to which the downstream products belong;

(j) 'specialisation product' means a product which is produced under a specialisation agreement;

(k) 'downstream product' means a product for which a specialisation product is used by one or more of the parties as an input and which is sold by those parties on the market;

(l) 'competing undertaking' means an actual or potential competitor;

(m) 'actual competitor' means an undertaking that is active on the same relevant market;

(n) 'potential competitor' means an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market;

(o) 'exclusive supply obligation' means an obligation not to supply a competing undertaking other than a party to the agreement with the specialisation product;

(p) 'exclusive purchase obligation' means an obligation to purchase the specialisation product only from a party to the agreement;

(q) 'joint', in the context of distribution, means that the parties:

(i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or

(ii) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking;

(r) 'distribution' means distribution, including the sale of goods and the provision of services.

2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.

'Connected undertakings' means:

(a) undertakings in which a party to the specialisation agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights;

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the specialisation agreement, the rights or powers listed in point (a);

(c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

(d) undertakings in which a party to the specialisation agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

(e) undertakings in which the rights or the powers listed in point (a) are jointly held by:

(i) parties to the specialisation agreement or their respective connected undertakings referred to in points (a) to (d); or

(ii) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to specialisation agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to specialisation agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

3. The exemption provided for in paragraph 1 shall apply to specialisation agreements whereby:

(a) the parties accept an exclusive purchase or exclusive supply obligation; or

(b) the parties do not independently sell the specialisation products but jointly distribute those products.

Article 3

Market share threshold

The exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on any relevant market.

Article 4

Hardcore restrictions

The exemption provided for in Article 2 shall not apply to specialisation agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

(a) the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution;

(b) the limitation of output or sales with the exception of:

(i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and

(ii) the setting of sales targets in the context of joint distribution;

(c) the allocation of markets or customers.

Article 5

Application of the market share threshold

For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:

(a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;

(d) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above that level without exceeding 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded;

(e) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 1 calendar year following the year in which the level of 25 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of 2 calendar years.

Article 6

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2658/2000.

Article 7

Period of validity

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14 December 2010.

For the Commission
The President
José Manuel BARROSO

COMMISSION REGULATION (EC) No 772/2004

of 27 April 2004

on the application of Article 81(3) of the Treaty to categories of technology transfer agreements

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1], and in particular Article 1 thereof,

Having published a draft of this Regulation [2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 81(1).

(2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements [3].

(3) On 20 December 2001 the Commission published an evaluation report on the transfer of technology block exemption Regulation (EC) No 240/96 [4]. This generated a public debate on the application of Regulation (EC) No 240/96 and on the application in general of Article 81(1) and (3) of the Treaty to technology transfer agreements. The response to the evaluation report from Member States and third parties has been generally in favour of reform of Community competition policy on technology transfer agreements. It is therefore appropriate to repeal Regulation (EC) No 240/96.

(4) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify the regulatory framework and its application. It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market. It is also consistent with such an approach to make a distinction between agreements between competitors and agreements between non-competitors.

(5) Technology transfer agreements concern the licensing of technology. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

(6) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

(7) This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. It should not deal with licensing agreements for the purpose of subcontracting research and development. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

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[1] OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[2] OJ C 235, 1.10.2003, p. 10.
[3] OJ L 31, 9.2.1996, p. 2. Regulation as amended by the 2003 Act of Accession.
[4] COM(2001) 786 final.

(8) For the application of Article 81(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 81(1). In the individual assessment of agreements pursuant to Article 81(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.

(9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 81(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that do not constitute the primary object of such agreements, but are directly related to the application of the licensed technology.

(10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(12) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 81(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 81(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

(13) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restraints such as the fixing of prices charged to third parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.

(14) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations for severable improvements should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.

(15) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission should be able to withdraw the benefit of the block exemption. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.

(17) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1] empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of technology transfer agreements having effects incompatible with Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market. Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(18) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission should be able to declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

[1] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(19) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, for instance, requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements. Supply and distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.

(20) This Regulation is without prejudice to the application of Article 82 of the Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;

(b) 'technology transfer agreement' means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;

(c) 'reciprocal agreement' means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where these licences concern competing technologies or can be used for the production of competing products;

(d) 'non-reciprocal agreement' means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products;

(e) 'product' means a good or a service, including both intermediary goods and services and final goods and services;

(f) 'contract products' means products produced with the licensed technology;

(g) 'intellectual property rights' includes industrial property rights, know-how, copyright and neighbouring rights;

(h) 'patents' means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates;

(i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is:

(i) secret, that is to say, not generally known or easily accessible,

(ii) substantial, that is to say, significant and useful for the production of the contract products, and

(iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(j) 'competing undertakings' means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

(i) competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use,

(ii) competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use;

(k) 'selective distribution system' means a distribution system where the licensor undertakes to license the production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell the contract products to unauthorised distributors;

(l) 'exclusive territory' means a territory in which only one undertaking is allowed to produce the contract products with the licensed technology, without prejudice to the possibility of allowing within that territory another licensee to produce the contract products only for a particular customer where this second licence was granted in order to create an alternative source of supply for that customer;

(m) 'exclusive customer group' means a group of customers to which only one undertaking is allowed actively to sell the contract products produced with the licensed technology;

(n) 'severable improvement' means an improvement that can be exploited without infringing the licensed technology.

2. The terms 'undertaking', 'licensor' and 'licensee' shall include their respective connected undertakings.

'Connected undertakings' means:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

Article 2

Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings permitting the production of contract products.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1). The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret, except in the event where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement.

Article 3

Market-share thresholds

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.

3. For the purposes of paragraphs 1 and 2, the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees.

Article 4

Hardcore restrictions

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties;

(b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

(c) the allocation of markets or customers except:

(i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets,

(ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party,

(iii) the obligation on the licensor not to license the technology to another licensee in a particular territory,

(iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party,

(v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence,

(vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,

(vii) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:

(i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,

(ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group,

(iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,

(iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,

(v) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,

(vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;

(c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

3. Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to any of the following obligations contained in technology transfer agreements:

(a) any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its own new applications of the licensed technology;

(b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology;

(c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the common market, without prejudice to the possibility of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Article 6

Withdrawal in individual cases

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 81(3) of the Treaty, and in particular where:

(a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;

(b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees;

(c) without any objectively valid reason, the parties do not exploit the licensed technology.

2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 applies has effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

Article 7

Non-application of this Regulation

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 8

Application of the market-share thresholds

1. For the purposes of applying the market-share thresholds provided for in Article 3 the rules set out in this paragraph shall apply.

The market share shall be calculated on the basis of market sales value data. If market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned.

The market share shall be calculated on the basis of data relating to the preceding calendar year.

The market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

2. If the market share referred to in Article 3(1) or (2) is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

Article 9

Repeal

Regulation (EC) No 240/96 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 10

Transitional period

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 May 2004 to 31 March 2006 in respect of agreements already in force on 30 April 2004 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2004, satisfied the conditions for exemption provided for in Regulation (EC) No 240/96.

Article 11

Period of validity

This Regulation shall enter into force on 1 May 2004.

It shall expire on 30 April 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 April 2004.

For the Commission

Mario MONTI

Member of the Commission

II

(Non-legislative acts)

REGULATIONS

COMMISSION REGULATION (EU) No 330/2010

of 20 April 2010

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1], and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [2] defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

[1] OJ 36, 6.3.1965, p. 533.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

[2] OJ L 336, 29.12.1999, p. 21.

(6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.

(8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.

(10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.

(12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1], where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

(14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

(15) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may for example arise in the case of selective distribution or non compete obligations.

(16) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,

[1] OJ L 1, 4.1.2003, p. 1.

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;

(c) 'competing undertaking' means an actual or potential competitor; 'actual competitor' means an undertaking that is active on the same relevant market; 'potential competitor' means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;

(d) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;

(e) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(f) 'intellectual property rights' includes industrial property rights, know how, copyright and neighbouring rights;

(g) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(h) 'buyer' includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) 'customer of the buyer' means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms 'undertaking', 'supplier' and 'buyer' shall include their respective connected undertakings.

'Connected undertakings' means:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);

(c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

(e) undertakings in which the rights or the powers listed in point (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

Article 3

Market share threshold

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

Article 4

Restrictions that remove the benefit of the block exemption — hardcore restrictions

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

(ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,

(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and

(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;

(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

(a) the obligation relates to goods or services which compete with the contract goods or services;

(b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;

(c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;

(d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

Article 6

Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

Article 7

Application of the market share threshold

For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

(a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;

(d) if a market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;

(e) if a market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;

(g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

Article 8

Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

Article 9

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.

Article 10

Period of validity

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 April 2010.

For the Commission
The President
José Manuel BARROSO

CCS EXPLANATORY NOTE ON THE BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS

Introduction

1. This note explains the key features of the Competition (Block Exemption For Liner Shipping Agreements) Order 2006 as extended by the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2010 until 31 December 2015. The Competition (Block Exemption For Liner Shipping Agreements) Order 2006 should henceforth be read together with the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2010 (collectively "the BEO").

2. Section 34 of the Competition Act (Chapter 50B) ("Act") prohibits agreements, decisions and concerted practices that appreciably prevent, restrict or distort competition in Singapore ("the section 34 prohibition").

3. Section 36 of the Act provides that where the Competition Commission of Singapore ("CCS") is of the opinion that a particular category of agreements is likely to satisfy such requirements, it may recommend to the Minister for Trade and Industry to make a block exemption order exempting that category of agreements from the section 34 prohibition. Such an exemption is known as a block exemption and it only applies in respect of the section 34 prohibition. It does not apply to conduct amounting to an abuse of dominant position prohibited under section 47 of the Act.

4. The criteria for block exemptions are set out under Section 41 of the Act, which states that a category of agreements that fall within the scope of the section 34 prohibition may, on balance, have net economic benefit if they contribute to improving production or distribution, or promoting technical or economic progress, and do not impose on the undertakings/businesses concerned restrictions which are not indispensable to the attainment of those objectives, or afford the undertakings/businesses concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

5. This note is not a substitute for the BEO, the Act, the regulations or the orders. It may be revised should the need arise. The examples set out in this note are for illustration, and are not intended to be exhaustive, nor do they set a limit on the investigation and enforcement activities that may be undertaken by CCS. Persons in doubt about how they and their commercial activities may be affected by the BEO, the Act, the regulations or the orders may wish to seek legal advice.

Approach of the BEO

6. Agreements between liner operators may deal with operational aspects or involve discussion on the commercial aspects of liner operations. The BEO exempts all liner shipping agreements as defined in the BEO from the section 34 prohibition, subject to a list of specified conditions and obligations. This is consistent with CCS's general regulatory approach of focusing on competitive effects rather than the form of the agreement.

7. The BEO permits a wide range of liner activities including agreement between the liner operators on detailed capacity decisions and prices subject to certain conditions. The BEO applies regardless of the market share of the parties to the agreement. Where the aggregate market share of the parties to the agreement exceeds 50 per cent ("market share limit"), the parties to the agreement will need to comply with certain obligations relating to filing of the agreement, publication of information concerning tariffs and the structure and service levels of the liner shipping services under the agreement relevant to the market in which the market share limit is exceeded, and making available documents and details on such matters and other aspects to CCS.

8. Agreements that meet the conditions set out in the BEO are, prima facie, considered to have met the requirements under section 41 of the Act. CCS will generally not conduct an examination of such agreements. However, if there has been a breach of any of the condition(s) of the BEO, the exemption with respect to that agreement shall be cancelled from such date as CCS may specify. Where there has been a failure to comply with any obligation in the BEO, or where the agreement has effects on competition that are incompatible with section 41 of the Act, CCS may cancel the exemption with respect to that agreement from such date as CCS may specify.

Key Features of the BEO

Application of the BEO

9. A liner shipping agreement that meets the requirements of the BEO is exempt from the section 34 prohibition. The BEO effectively allows parties to liner shipping agreements to discuss and agree on the rationalisation and management of capacity and prices, subject to certain conditions and obligations.

10. A more detailed explanation on the conditions and obligations to be satisfied in order for a liner shipping agreement to qualify for exemption under the BEO is found in the sub-section on exempted agreements below.

11. Practices by liner operators that amount to an abuse of a dominant position are not exempt and will be considered by CCS under section 47 of the Act.

Commencement and Duration

12. The Competition (Block Exemption For Liner Shipping Agreements) (Amendment) Order 2010 will be gazetted before 31 December 2010 and will have the immediate effect of varying the Competition (Block Exemption For Liner Shipping Agreements) Order 2006 by extending it until 31 December 2015 .

Definitions

Liner operator

13. A liner operator is defined as an undertaking which (i) provides liner shipping services and (ii) is a party to a liner shipping agreement.

Liner shipping services

14. Liner shipping services are defined as the transport of goods on a regular basis on any particular route between ports and in accordance with timetables and sailing dates advertised in advance and made available, even on an occasional basis, by a liner operator to any transport user against payment. Such services include inland carriage of goods occurring as part of through transport.

Liner shipping agreement

15. A liner shipping agreement is defined as an agreement between two or more vessel-operating carriers which provide liner shipping services pursuant to which the parties agree to co-operate in the provision of liner shipping services in respect of one or more of the following: (i) technical, operational or commercial agreements; (ii) price; (iii) remuneration terms.

Market

16. The market is defined as any market for liner shipping services in which the parties to a liner shipping agreement operate under the agreement.

Price

17. The price is defined as the price for which a liner operator performs or offers to perform liner shipping services; and includes any charge, other than the base freight rate, that is incidental to or reasonably connected with the provision of liner shipping services, whether arising by reason of the provision of the liner shipping services or by reason of the occurrence of an uncertainty.

Remuneration Term

18. Remuneration term is defined as any term affecting payment of the amount of the price in relation to the provision of liner shipping services (including a reduction thereof).

Service Arrangement

19. A service arrangement is defined as an agreement concluded between one or more transport users and a liner operator under which, in return for an undertaking from the transport user to commission the transportation of a certain quantity of goods over a given period of time, a transport user receives an individual undertaking from the liner operator to provide an individualised service of a given quality, specially tailored to the needs of the transport user.

Tariff

20. A tariff refers to a list of prices and remuneration terms for which, pursuant to a liner shipping agreement, liner operators agree they may offer liner shipping services to transport users. A tariff does not include prices and remuneration terms under a service arrangement.

Through transport

21. Through transport is defined as the continuous transportation by a combination of sea and inland carriage between a point of origin to a destination which is undertaken by a liner operator, and performed by the liner operator undertaking the transportation (i) on its own; or (ii) partly on its own and partly through one or more other carriers; or (iii) through one or more other carriers, at least one of which is a liner operator, and for which a single amount is charged by the liner operator undertaking the transportation. The concept of through transport is included to ensure that liner shipping services as defined will, where relevant, include inland carriage.

Transport user

22. Transport user means an undertaking which has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a liner operator for the shipment of goods; or an association of shippers.

Exempted Agreements

Application to liner shipping agreements in general

23. To qualify for exemption, a liner shipping agreement, regardless of the aggregate market share of the parties to the agreement, must adhere to the conditions set out under paragraph 5(1) of the BEO. The agreement must allow the parties to the agreement:

    (i) to offer, on the basis of individual confidential contracting, their own service arrangements;

    (ii) to withdraw from the agreement on giving any agreed period of notice without financial or other penalty such as, in particular, an obligation to cease providing liner shipping services in a market, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed; and

(iii) the agreement does not require liner operators to mandatorily adhere to a tariff and disclose, whether to other liner operators or otherwise, confidential information concerning service arrangements.

24. These conditions have been included in the BEO to facilitate competition between parties to a liner shipping agreement, and limit the extent of anti-competitive behaviour that liner operators can engage in through the liner shipping agreement.

Where parties to a liner shipping agreement exceed the market share limit

25. Where the aggregate market share of the parties to a liner shipping agreement exceeds the market share limit, the parties are required to comply with the obligations as set out under paragraph 5(2) of the BEO if they wish to enjoy the benefit of the exemption. These obligations are:

(i) filing their liner shipping agreement and any variation or amendment thereto with CCS in such mode and manner and within such period of time as CCS may specify;

(ii) where any variation or amendment is made to the agreement from time to time to the filing of the documents referred to in paragraph 26(i) are filed, filing such variation or amendment, the liner shipping agreement and all preceding variations or amendments thereto in such mode and manner and within such period of time as CCS may specify;

(iii) making available to CCS upon request documents and details relating to any tariff, the structure and service level, and other aspects of the liner shipping services under the agreement relevant to the market in such mode and manner and within such period of time as CCS may specify;

(iv) notifying CCS of the details of any variation or amendment to the documents and details in paragraph 26(iii) made from time to time in such mode and manner and within such period of time as CCS may specify;

(v) making available to transport users and within such period of time as CCS may specify information concerning any tariff and the structure and service level of the liner shipping services under the agreement relevant to the market as CCS may specify, by allowing for examination of such documents at the offices in Singapore of the parties or their agents, or at a publicly available internet website; and in any event, upon request at a reasonable cost in paper or electronic form; and

(vi) notifying transport users of the details of any variation or amendment to the information in paragraph 26(v) made from time to time in such mode and manner and within such period of time as CCS may specify.

26. These obligations have been included to ensure that transport users and CCS are kept aware of those liner shipping agreements where the aggregate market share of the parties exceed the market share limit.

27. There is no requirement to file a liner shipping agreement with CCS or notify the particulars of the liner shipping services under the agreement where the aggregate market share of the parties does not exceed the market share limit. CCS is of the view that such agreements, provided they fulfil the conditions set out under paragraph 5(1) of the BEO, pose minimal risks of appreciable adverse effect on competition.

Market definition and exceeding the market share limit

28. Under paragraph 4 of the BEO, the parties to a liner shipping agreement do not exceed the market share limit if they hold, in a market, an aggregate market share of not more than 50 per cent calculated by reference to:

    (i) the volume of goods carried; or

    (ii) the aggregate cargo carrying capacity of the vessels operating in the market measured by freight tonnes or 20-foot equivalent units.

29. As long as the aggregate market share of the parties to the liner agreement does not exceed the market share limit on either one of the two methods of measurement, the agreement will be considered to be below the market share limit.

30. Parties to a liner shipping agreement shall be deemed not to exceed the market share limit if they hold, in a market, an aggregate market share of not more than 55% for a period of not more than two consecutive calendar years. This provision recognizes that short term fluctuations in the aggregate market share of parties to the liner shipping agreement are unlikely to have a significant long term impact on the market.

31. The definition of the market is deliberately broad because the concept of a market for competition analysis differs from the standard commercial understanding of the market. The BEO will not specify how a market will be defined, i.e. the extent or geographic coverage of the market, as guidance has been provided by CCS on market definition (please refer to the CCS Guidelines on Market Definition, June 2007). However, consistent with its general approach on defining markets in a competition analysis, CCS will consider generally accepted competition law principles and case law when defining markets on a case-by-case basis. To provide some practical guidance, the definition of markets may include the following geographic definitions:

    (i) With respect to long-distance oceanic trades, the market may be defined as ‘trade’ between broadly defined geographical regions, for example, North Europe and East Asia;

    (ii) With respect to regional and feeder trades, the market may be defined as the provision of country-to-country shipping services (for example Singapore/Indonesia or Singapore/Thailand.

32. However, the markets may be wider (or narrower) than these definitions to the extent that either demand or supply side considerations may suggest a wider (or narrower) market. For example, if carriers can readily switch capacity from other regions without significant investment, the relevant market could be much wider than just the current 'trade'.

33. When dealing with new services, the use of these or similar definitions would greatly reduce the possibility that parties to a liner shipping agreement covering a new service linking a relatively minor port in a partner country to Singapore would breach the market share limit. CCS is of the view that there will generally be minimal competition concerns regarding service on new or thinly serviced routes unless there is concrete evidence of anti-competitive effects that are likely to be more than transitory.

34. It will be for the parties to assess, or to seek legal/expert advice on whether their aggregate market share exceeds the market share limit, and whether the agreement satisfies the conditions and obligations for exemption under the BEO.

Grace Period

35. A grace period is provided for parties to fulfil the obligations in paragraph 5(2) of the BEO if the market share limit is exceeded (please refer to paragraph 6 of the BEO).

Coverage is not restricted to the carriage of cargo by container

36. The BEO will apply to all forms of liner shipping agreements and is not restricted to liner shipping services in a particular form such as container cargo. This means that exempted liner shipping agreements can also cover carriage of cargo by means other than containers, for example, car carrier services. This approach reflects the view that it is desirable to have an exemption that allows liner operators participating in all forms of liner shipping to collaborate to bring about technical, operational and commercial improvements in their services.

Cancellation of the Exemption

37. Paragraph 7 of the BEO provides for the cancellation of the block exemption in respect of a liner shipping agreement. This is in line with the provisions of section 37(2) of the Act.

38. Where there has been a breach of any condition specified in the BEO, this shall have the effect of cancelling the exemption in respect of that agreement, from such date as CCS may specify.

39. Where there has been a failure to comply with any obligation specified in the BEO or where CCS finds in a particular case that the agreement has effects which are incompatible with the provisions of section 41 of the Act, CCS may cancel the exemption from such date as CCS may specify.

40. An example of a situation where an agreement would have effects incompatible with the provisions of Section 41 of the Act would be concerted behaviour (including tacit concerted behaviour) by the parties to an agreement whereby they effectively disclose confidential information. Therefore, individual voluntary disclosure of confidential information on service arrangements is allowed under the BEO, as this is not considered likely to have an appreciable anti-competitive effect. However, concerted behaviour including tacit behaviour that effectively amounts to disclosure of confidential information on service arrangements could substantially reduce the scope of independent contracting and pricing behaviour. This would be contrary to the intention of the condition for exemption, that the liner shipping agreement must not require disclosure of confidential information concerning service arrangements.

41. Whether or not the parties to a liner shipping agreement exceed the market share limit, the parties claiming the benefit of the exemption shall, upon notice being given by CCS and within such period of time as may be specified by CCS, demonstrate that the provisions of the BEO are satisfied.

Cancellation Procedure

42. If CCS proposes to make a decision for or in relation to the cancellation of the block exemption in respect of a liner shipping agreement ("cancellation decision"), CCS shall give notice of this to each person whom CCS considers is, or was, a party to the agreement. The notice shall contain information referred to in regulation 15(1) of the Competition Regulations 2007. Opportunities for representations and requests for access to file will also be carried out in accordance with regulation 15 of the Competition Regulations 2007.

43. When CCS has made a cancellation decision, it shall give notice of the decision to each person whom CCS considers is or was a party to the agreement and such notice will set out the facts on which CCS bases the decision and CCS's reasons for making the decision. This cancellation decision will also be published.

Appeals

44. A cancellation decision may be appealed to the Competition Appeal Board. Such an appeal must be brought within the specified time period.

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No. S 768

COMPETITION ACT
(CHAPTER 50B)

COMPETITION
(BLOCK EXEMPTION FOR
LINER SHIPPING AGREEMENTS) (AMENDMENT)
ORDER 2010

In exercise of the powers conferred by section 36 of the Competition Act, the Minister for Trade and Industry hereby makes the following Order:

Citation

1. This Order may be cited as the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2010.

Amendment of paragraph 2

2. Paragraph 2 of the Competition (Block Exemption for Liner Shipping Agreements) Order (O 1) is amended by deleting the words ''31st December 2010'' and substituting the words ''31st December 2015''.

Made this 14th day of December 2010.

OW FOONG PHENG
Second Permanent Secretary,
Ministry of Trade and Industry,
Singapore.

[CCS/100/611/10; AG/LLRD/SL/50B/2010/3 Vol. 1]

Lion Rock Institute's enquiries on
costs of preparing and implementing the Competition Bill in Hong Kong

	Questions raised by Lion Rock Institute	CEDB's responses
1.	The total amount spend since Jan 1, 2008 on external professional advice to the Hong Kong government on competition law-related advice.	Since January 2008, the total fees paid to the external consultant engaged by the Government for the provision of competition law-related advice (hereafter referred to as "the Consultant") amounted to $12.8 million. The consultancy services were offered by a team of legal professionals and economic experts appointed by the Consultant (King & Wood) advising on issues relating to the implementation of competition law in Hong Kong. These advices were provided under a consultancy agreement between the Consultant and the Government spanning over a period, and the expertise and costs involved for each advice cannot be itemized.
2.	A detailed break-down of the lawyers, law firms, economic advisers and any other external advisers or consultants that have been used by the CEDB on competition law issues since Jan 1, 2008. Please indicate what they were each paid and the nature of the work they performed.	
3.	An estimate of the total number of man hours that have been devoted to the proposed introduction of the competition law since Jan 1, 2008 and the number of staff from the CEBD that currently have responsibilities for this matter.	The staff responsible for the preparation of the Competition Bill in the Commerce and Economic Development Bureau (CEDB) form part of the establishment of the CEDB. In addition to their work on competition, they have other duties. The total number of man hours devoted to the competition subject cannot be itemized separately.
4.	The amount Hong Kong government has paid for the staging of various competition law meetings and	The Government had not organized or sponsored any competition law-related meetings and conferences in Hong Kong since January 2008. We supported

	Questions raised by Lion Rock Institute	CEDB's responses
	conferences in Hong Kong since Jan 1, 2008 including grants or other payments to Hong Kong universities, professors or other persons or institutes which the CEDB should reasonably have anticipated would have been used on competition law related projects.	four conferences organized by local universities or institutes on competition law by fielding speakers, hosting dinners in honour of conference speakers and meeting with the visiting scholars and heads of overseas competition agencies.
5.	The number of overseas competition law-related conferences that the Secretary for the CEDB or any CEDB staff have attended since Jan 1, 2008 and the cost of such conferences	Since January 2008, CEDB officials had attended two competition law-related conferences in Singapore and Australia. The total expenditures involved were $60,000, covering registration fees, travelling expenses and other related allowances of the officers.
6.	An estimate by the CEDB of the compliance costs on Hong Kong business will be as a result of the introduction of this law on an annual basis. If none has been conducted, please indicate.	We note that competition jurisdictions overseas do not normally undertake *ex ante* assessment on the compliance cost and efficiency arising from the implementation of competition law, which will likely to involve a myriad of assumptions and uncertainties as a result of the dynamic changes of the economic landscape of each sector. Rather, a number of jurisdictions conducted impact assessment, in qualitative or quantitative terms, to evaluate on the enforcement of the competition law after it came into operation. For details of some of these studies, please refer to our previous responses to the Legislative Council (LegCo) Bills Committee on Competition Bill (Paper No. CB(1)2420/10-11(02), CB(1)2127/10-11(02) and CB(1)2018/10-11(02)).

	Questions raised by Lion Rock Institute	CEDB's responses
		As shown in our LegCo brief issued in July 2010, our assessment is that by providing a level-playing field, the Competition Bill would help contribute to the free play of market forces and enhance competition. It would also strengthen the implementation of our stated policy objective for competition, which is to enhance economic efficiency and the free flow of trade, thereby benefiting consumer welfare. The economic benefits would likely be higher output, lower prices and more choices of products. Experience from other jurisdictions suggests that small businesses would not face a significant increase in compliance costs, given that they would unlikely be targeted by competition regulation. Large businesses might look to engage additional resources to help ensure compliance, especially at the initial stage. Multi-nationals, which already have to comply with competition regulatory regime elsewhere, should be able to adapt to the new legal regime in Hong Kong. For the economy as a whole, any additional cost to businesses should be more than offset by the longer-term benefits of a more effective and credible competition regime.
7.	An update on what the CEDB estimates the cost of establishing the proposed competition commission and tribunal will be as well as the estimate of the annual	In the 2011-12 financial year, the Government has earmarked $45.23 million for the establishment and initial operation of the Competition Commission (Commission), and $10 million for the establishment of the Competition

	Questions raised by Lion Rock Institute	CEDB's responses
	budget.	Tribunal (Tribunal), should the Competition Bill be enacted within 2011-12. The actual expenditure and the timetable will depend on the legislative progress of the Bill. Based on overseas experience and local circumstances, the rough full-year cost for operating the Commission at the initial stage is estimated to be $67 million. As for the Tribunal, the annual recurrent expenditures for its operation initially are around $15 million.
8.	An estimate of the additional cost to the Hong Kong court system that will be incurred in handling any competition law related disputes. If no estimate has been conducted, please indicate.	The Tribunal would be established under the Competition Bill as a specialist court within the Judiciary to handle competition cases. For the estimated cost of setting up and operating the Tribunal, please refer to response in (7).
9.	Whether any other government departments have incurred costs related to the proposed introduction of a cross-sector competition law in Hong Kong.	The Competition Bill is aimed at providing a legal framework to effectively implement the Government's competition policy, which all government departments have to observe and abide by currently. The financial implications of the proposal arising from the proposed introduction of the competition law are set out in responses in (1), (2) and (7) above.
10.	Any other costs which have been incurred by the CEDB which you think might be of interest to the Hong Kong public or those involved in the competition law debate.	