

Competition - Israel

Parliament annuls antitrust exemption for shipping agreements

Contributed by [Tadmor & Co](#)

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The Israeli Parliament recently repealed the longstanding statutory exemption for agreements held between shipping carriers, thereby subjecting such arrangements to possible antitrust scrutiny under the Restrictive Trade Practices Act 1988. The amendment may have far-reaching implications for the shipping industry in general and for foreign shipping carriers in particular.⁽¹⁾

Shipping agreements and antitrust law

Shipping agreements have been an integral part of the shipping industry for at least half a century. They can be roughly divided into two main categories: conference agreements and consortia agreements. Conference agreements generally include understandings between contracting parties regarding the rates, charges, discounts and other relevant terms of the customer contracts. While such agreements were common in the past, today they are scarce. Consortia agreements typically involve the sharing of vessels in a way that enables each contracting carrier to offer its customers services to certain destinations served by consortia members, while remaining independent with respect to setting rates and other terms and conditions. Consortia agreements enable firms to:

- realise economies of scale;
- mitigate risks stemming from fluctuations in demand for shipping services; and
- provide lower-cost services, enhanced frequencies and a wide variety of destinations.

The gradual disappearance of conference agreements and the generally efficient and pro-competitive nature of consortia agreements may explain why most antitrust regimes still broadly exempt shipping agreements. However, in the course of the past decade, EU competition law has gradually been applied to shipping agreements: conference agreements have been banned, while consortia agreements have generally been allowed under a block exemption.

Amendment of antitrust law

Inspired by the EU precedent, the Israeli Antitrust Authority advocated the annulment of the exemption for shipping agreements which has been part of Israeli antitrust law since its enactment. The amendment stipulates that the existing statutory exemption for all shipping agreements be replaced by a block exemption for consortia agreements. During the course of the legislative procedure, the Antitrust Authority explained that the block exemption will resemble (although not necessarily be identical to) the current EU consortia block exemption. The amendment will become effective on January 1 2012 or two months after the date on which the Antitrust Authority issues a block exemption, whichever is sooner. These timelines can be extended under certain circumstances.

Comment

The shipping industry is a global business and one that is highly sensitive to regulation. In recent years, many countries have been reluctant to amend their antitrust laws, arguing that the benefits may be small and are outweighed by the dangers associated with such a move. The most prominent danger is that deviation from the highly permissive environment that generally governs these agreements around the globe will reduce the level of efficient collaborations in the relevant jurisdiction and may even deter certain carriers from providing services in that jurisdiction. The end result will be less competition and economic injury.

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In light of this, the amendment to Israeli antitrust law appears to be a daring move. Israel is a small economy and, for geopolitical reasons, its trade with other nations is almost entirely based on transport by sea.

Moreover, the Israeli law on restrictive arrangements is somewhat anachronistic and certainly less permissive than EU competition law. Unlike EU law, which condemns as restrictive only such arrangements that may have an "appreciable effect on competition in the relevant market", Israeli law often applies to agreements that threaten "competition between the contracting parties", even if no real danger is posed to competition in the overall market. The law establishes a licensing regime with regard to restrictive arrangements, in which any arrangement that falls within the scope of the broad definition of 'restrictive arrangement' set out in Section 2 of the antitrust law must be authorised in advance by the Antitrust Court or be exempted by the antitrust commissioner. Unless a statutory exemption or block exemption applies, failure to obtain authorisation renders the agreement illegal, unenforceable and a basis for criminal, administrative and civil liability. Criminal penalties include the possible imprisonment of officers for a maximum period of three years (five years in aggravated circumstances). Since under certain circumstances the antitrust law may apply beyond the borders of the state of Israel, it is highly recommended that foreign shipping carriers seek professional advice as to the possible implications of the amendment for their contracts, especially those that directly relate to Israeli trade.

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Endnotes

(1) Tadmor and Co provides antitrust consult to shipping carriers.

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