

# **EU Law and Global Shipping Alliances**

some reflections

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# The anti-competitive effects of a globally concentrated, oligopolistic maritime market: from explicit to tacit collusion – an analysis based on the P3 network

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Does the P3 network compel the European Commission to extend Community law jurisdiction? This article argues that such will inevitably be the case. As a consequence, the Commission must adopt new guidelines in order to assist the liner shipping industry in its self-assessment of possible infringements of Articles 101 TFEU and 53 EEA within their newly established scope. In other jurisdictions, regulatory bodies face similar challenges. As a first step, this globalisation of anti-trust jurisdiction will lead to an intensified application of comity.

## The P3 network

On 18 June 2013, the three biggest shipping lines in the world, A P Møller-Maersk, MSC Mediterranean Shipping and CMA CGM, announced their intention to investigate the possibilities of close cooperation in the form of an alliance, under the name of the P3 Network. The P3 Network will make the activities of the three members more efficient and more competitive. It is their answer to the disappointing developments in world trade and the resulting overcapacity in the container industry. The alliance is scheduled to take effect in the 2nd quarter of 2014, subject to the approval of the relevant competition and regulatory authorities.

The P3 Network will operate a capacity of 2.6m TEU, initially 255 vessels on 29 loops, on three trade routes: Asia-Europe, Trans-Atlantic and Trans-Pacific. While the network vessels will be operated independently by a joint operating centre, the three lines will continue to have fully independent sales, marketing and customers services.

The market share of the Network will be considerable: on a global level the three lines will have a combined 37.6 per cent in April 2013 across the Asia-Europe, Trans-Atlantic and Trans-Pacific routes. The market share of the Network on each of these routes will be:

- Asia/Mediterranean: 55%
- Asia/Northern Europe: 46%
- Trans-Atlantic: 35%
- Trans-Pacific: 29%.<sup>1</sup>

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<sup>1</sup> [www.portcalls.com / P3-network-good-for-industry-if-not-abused-drewry/](http://www.portcalls.com/P3-network-good-for-industry-if-not-abused-drewry/).

In total, there are 100 container lines with a global market share of 97 per cent.<sup>2</sup> Should the Network be approved by the regulatory authorities, it will mean that there are still more than 15 competing carriers on most trade routes, with 13 of the top 20 lines being in a structured alliance on the main East-West trade routes, leaving UASC, Evergreen, CSLC and Zim out on a limb.<sup>3</sup>

	Total TEU deployed	Trade share	No. of services	No. of vessels
<b>Asia-N Europe</b>				
Maersk	590,769	23.3%	5	60
CMA CGM	268,860	10.6%	3	22
MSC	293,552	11.6%	2	22
<b>Totals</b>	<b>1,153,181</b>	<b>45.6%</b>	<b>10</b>	<b>104</b>
<b>Asia-Med</b>				
Maersk	215,893	17.0%	4	23
CMA CGM	163,302	12.8%	4	19
MSC	315,354	24.8%	2	23
<b>Totals</b>	<b>694,549</b>	<b>54.6%</b>	<b>10</b>	<b>65</b>
<b>Transpacific</b>				
Maersk	420,541	14.3%	6	55
CMA CGM	216,650	7.4%	5	30
MSC	200,365	6.8%	5	23
<b>Totals</b>	<b>837,556</b>	<b>28.5%</b>	<b>16</b>	<b>108</b>
<b>N Europe-America</b>				
Maersk	48,696	11.7%	3	15
CMA CGM	14,676	3.5%	1	14
MSC	80,653	19.4%	3	14
<b>Totals</b>	<b>144,025</b>	<b>34.6%</b>	<b>7</b>	<b>43</b>
<b>GRAND TOTALS</b>			<b>42</b>	<b>305</b>

Collective shares across all East-West trades

	Total TEU deployed	Trade share
Maersk	1,137,945	15.9%
CMA CGM	663,488	9.3%
MSC	889,924	12.4%
<b>Total</b>	<b>2,691,357</b>	<b>37.6%</b>

Notes: Snapshot as at 1 April 2013, and does not include vessels not attached to loops for temporary idling or if vessels are being phased in or out of a service. Basis vessels operated by Maersk, CMA CGM and MSC only in all services and does not include slot charter agreements. Maersk AE6/TP6 is a pendulum service which incorporates both the Asia-N Europe and transpacific trades and is not counted twice in this analysis.

Source: Drewry Maritime Research.

The members of the P3 Network have allocated roughly 50 per cent of their vessels to the Asia-Europe route and 50 per cent to the Trans-Pacific and Trans-Atlantic routes:

	Asia-Europe	Trans-Pacific/Trans-Atlantic
Maersk	83	70
CMA CMG	41	44
MSC	55	37 <sup>4</sup>

<sup>2</sup> Dynamar BV Liner Shipping Links.

<sup>3</sup> See *Drewry Container Insight* 2013-WK 40.

<sup>4</sup> See table p 420.

On the Trans-Pacific and the Trans-Atlantic routes, there are 65 conference and discussion agreements. The members of the P3 Network participate collectively in 4 and, alone or together with one other member, in 25 of these agreements.<sup>5</sup>

There can be little doubt that the attitude the members of the P3 Network will take within the conference and discussion agreements in which they participate will be the result of previous consultations amongst them. In view of the market position of the Network on the Trans-Atlantic and on the Trans-Pacific trade routes, this collective attitude will have an impact on the room to manoeuvre of the other participants, not only on these trade routes but, as a result, also on the Asia-Europe trade route. The gravity of this impact will be an important element in the assessment whether or not the P3 Network may be exempted from the prohibition of Article 101(1) TFEU by virtue of Article 101(3) TFEU.

In the EU, the legal framework for assessing the evidence that must be brought forward by companies in order for their cooperation to be free from the prohibition of Article 101(1) TFEU has recently changed. On 19 February 2013, the Commission decided not to prolong the Maritime transport anti-trust Guideline<sup>6</sup> and these so-called Maritime Guidelines lapsed on 26 September 2013.<sup>7</sup> As a result, the members of the P3 Network will have to rely on the general legal framework that is provided by the Horizontal Guidelines<sup>8</sup> and the block exemption for consortia agreements.<sup>9</sup>

The EU has adopted a strict attitude against exchanges of information that may have disadvantageous effects on the conditions of competition on EU markets. However, there are other jurisdictions under which the P3 network will have to be assessed that have adopted a more lenient attitude and allow for exchanges of sensitive information and even price fixing, which are prohibited under EU law. Usually, this conduct takes place within the framework of conference and discussion agreements, which are also allowed.

The main concern of the European Commission and the other competition and regulatory authorities regarding the effects the P3 Network will have on the conditions of competition is whether there will be a flow of information between the members' commercial departments and the independent operating centre that will be established to manage vessels' schedules, allocations and utilisation. The three members seem confident that they will be able to guarantee that this will not be the case and that each member will retain fully independent sales, marketing and customer services.<sup>10</sup>

The Commission will pay special attention to the evidence the members will provide to this effect. There is a growing concern that information exchange facilitates tacit collusion by reducing strategic uncertainty of competitors' behaviour without constituting explicit agreements. Multimarket contact<sup>11</sup> and frequent exchange of individual, disaggregated price and quantity information, as well as the sharing of strategic, future plans between competitors but not the public has the highest collusive potential.<sup>12</sup>

This article addresses two questions:

<sup>5</sup> These agreements are listed in the Appendix.

<sup>6</sup> European Commission IP/13/122 (10 February 2013).

<sup>7</sup> OJ C245/2 of 26 September 2013.

<sup>8</sup> OJ C11/1 of 14 January 2011.

<sup>9</sup> Commission Regulation (EC) No 906/2009 OJ L256 of 29 September 2009 at 31.

<sup>10</sup> See Vincent Clerk, Chief Trade and Marketing Officer of Maersk Line, quoted in *Drewry Archive Edition 2013-WK 25* (23 June 2013).

<sup>11</sup> F Ciliberto, J Williams 'Does multimarket contact facilitate tacit collusion? Inference on conduct parameters in the airline industry' (2012) *Munich Personal RePEc Archive*.

<sup>12</sup> Reena das Nair, Liberty Mncube 'The role of information exchange in facilitating collusion-insights from selected cases' [www.compcom.co.za/Uploads/events/10-year-review/parallel-3a](http://www.compcom.co.za/Uploads/events/10-year-review/parallel-3a).

- Does anti-competitive conduct between the P3 Network and other participants to one or more conference and/or discussion agreements, when directed at foreign markets and allowed under foreign jurisdictions such as the Singapore Competition Law, possibly lead to tacit collusion on the EU market?
- Are companies capable of answering this question themselves without specific guidance from the European Commission?

### Singapore competition rules on containerised liner shipping services

Exchange of information on the market of containerised shipping services under Singapore Competition Law

The port of Singapore is a very important hub in the Far East and is being considered as the main hub for the P3 Network:

200 of the world's shipping lines call at PSA Singapore Terminals, offering connections to 600 ports in 123 countries. This includes daily sailings to every main major port in the world.<sup>13</sup>

Singapore's location on the South China Sea affords it access to some of the main shipping routes to major Asian markets such as China and Japan. The country's position between the Indian and Pacific Oceans allows it access to shipping routes to and from the US. Singapore's ports feature as ports of call for the Maersk Line and CMA CGM services.<sup>14</sup>

Singapore has extended its block exemption for liner shipping conferences until 31 December 2015. Under this block exemption, liner shipping companies are allowed to cooperate on: (i) technical, operational or commercial arrangements; (ii) price; and (iii) remuneration terms. Such cooperation is exempted from the prohibitions contained in Article 34 of the Singapore Competition Act, on condition that the participating lines are allowed:

- to enter into individual confidential contracts, to offer their own service arrangements and to withdraw from the collective agreement on giving any agreed period of notice without financial or other penalty
- to deviate from the agreed tariffs, it being understood that the parties, and not the regulatory authorities, decide what the appropriate notice period should be
- to keep secret confidential information concerning individual service agreements.

When the aggregate market share of the parties exceeds 50 per cent (calculated by reference to the volume of goods carried, or the aggregate cargo capacity of the vessels operating in the market by freight tonnes or 20-foot equivalent units), the parties are required to file their agreement and any variation or amendment of it with the Competition Commission of Singapore (CCS).

Although not collectively, the three members of the P3 Network are party to conference and discussion agreements that are allowed under Singapore Competition Law, specifically the following agreements: ACTA (Asia to Caribbean Agreement); AWATA (Asia-West Africa Trade Agreement); AWCSA (Asia-West Coast America Freight Conference) and TSA (Trans-Pacific Stabilization Agreement).

Within these agreements, exchanges of sensitive information and the fixing of prices are permissible and frequently occur. An example can be found in the AWATA press notice of 1 April 2013, which announces an agreement between the participants to increase their rates with US\$250/TEU as at 1 May, 1 June and 1 September 2013.<sup>15</sup>

<sup>13</sup> [www.portnet.com/WWPPublic/pdt\\_shippers\\_corner.html](http://www.portnet.com/WWPPublic/pdt_shippers_corner.html).

<sup>14</sup> Business Monitor International Ltd, Singapore Shipping Report Q4 2009, including 5-year industry forecast.

<sup>15</sup> <http://www.scags.net/pn/africa/awata/130401.html>.

### **The anti-competitive effects of the P3 Network on EU markets as a result of permitted anti-competitive conduct under Singapore Competition Law**

The P3 Network will be active on the Asia-Europe, the Trans-Pacific and the Trans-Atlantic trade routes. On these trade routes, agreements will be concluded that are allowed under the jurisdictions that apply. This means that on trade routes where the Singapore Competition Law applies, the member(s) of the P3 Network and the other participants to the conference and discussion agreements which are allowed under that law will continue, directly or indirectly, in isolation or in combination with other factors under their control, to fix their prices and exchange sensitive strategic information when selling liner shipping services to third parties.

The price advocated by the member(s) of the P3 Network will no doubt have been set in advance by them collectively, and not by the member(s) individually. The market share of the P3 Network on the Trans-Atlantic and the Trans-Pacific trade routes, respectively 35 per cent and 29 per cent, is such that in the price-fixing consultations the other participants to the conference and discussion agreements will have no option but to follow this price or, at least, regard this price as a very important indicator. Furthermore, in these consultations each participant will have to explain its strategic reasons for agreeing or not agreeing with the price advocated by the member(s) of the P3 Network.

All of this demonstrates that when selling liner shipping services to third parties under the jurisdiction of Singapore, the creation of the P3 Network even further reduces uncertainty in the market by making the strategic variables of the other participants more transparent and their room to manoeuvre more restrictive.

The question then arises whether this explicit collusion on trade routes that fall within the jurisdiction of Singapore, forms 'a sufficient basis for the participating undertakings to concert their market conduct (on EU markets) and thus substitute practical cooperation between them for competition and the risks that that entail'<sup>16</sup> in that it makes it possible for lines to foresee with a sufficient degree of probability future developments that 'may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.<sup>17</sup>

The answer to this question is determining whether the European Commission has jurisdiction over anti-competitive conduct that is directed at foreign markets. In the event that the Commission does indeed have jurisdiction, this is an important yardstick for companies to decide whether or not to continue their participation in conference and discussion agreements that are allowed under foreign jurisdictions, such as that of Singapore.

In the following it will be argued that the Commission does have jurisdiction and that the shipping lines, following their obligation of self-assessment, cannot be expected to decide on the continuance of their participation in conference and discussion agreements that are allowed under the Singapore Competition Law without specific guidance from the Commission.

#### **Jurisdiction**

The starting point for determining Community law jurisdiction in the shipping industry is the definition of the relevant market.

For the vast majority of categories of goods and users of containerised goods, break bulk does not offer a reasonable alternative to containerised shipping.<sup>18</sup> Therefore, the relevant

<sup>16</sup> Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529 para 59.

<sup>17</sup> Case 42/84 *Remia and Others v Commission* [1985] ECR 2545 para 22.

<sup>18</sup> Maritime Guidelines OJ C245/2 of 26 September 2008 point 19.

market is the market of containerised liner shipping services. This market can be further broken down into the market of services in the deep sea trade and other markets.<sup>19</sup> The relevant geographic markets are: (i) a range of ports in Northern Europe; and (ii) a range of ports in the Mediterranean.<sup>20</sup>

For the purpose of establishing Community law jurisdiction, it is sufficient that an agreement or practice involving third countries or undertakings located in third countries, is capable of affecting cross-border economic activity in the Community.<sup>21</sup> When the object of the agreement is to restrict competition inside the Community, the requisite effect on trade between Member States is more readily established than when the object is predominantly to regulate competition outside the Community.<sup>22</sup>

In determining whether Article 101(1) TFEU applies, account must be taken of the effect of the anti-competitive conduct and not of the location of that conduct.<sup>23</sup>

In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member states, are capable of being affected.<sup>24</sup>

Special regard must be had to the question of whether the agreement or practice affects the activities of other undertakings inside the Community.<sup>25</sup>

In the US, the case law which determines the jurisdiction of US courts on anti-competitive conduct directed at foreign markets has developed somewhat more clearly than in the EU. Under US law, Section 6a of the Foreign Trade Antitrust Improvements Act (FTAIA) follows the same concept as EU law and provides that the Sherman Act 'shall not apply to conduct involving trade or commerce ... with foreign nations unless such conduct has a direct, substantial and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations and such effect gives rise to a claim' under the Sherman Act.<sup>26</sup>

The U.S. Court of Appeals for the Second Circuit has interpreted this rule to mean that: 'anti-competitive conduct directed at foreign markets is only regulated by the Sherman Act if it has the "effect" of causing injury to domestic commerce by (1) reducing the competitiveness of the domestic market, or (2) making possible anti-competitive conduct directed at domestic commerce.'<sup>27</sup> The 'effect' of the conduct must be 'direct, substantial and foreseeable'.<sup>28</sup>

It is important to note that the Court of Appeals held that the domestic effect of the conduct need not be the same effect that causes the injury on the foreign market. This means that the anti-competitive effect on the domestic market need not give rise to a specific claim.<sup>29</sup>

The case law of the US courts falls within the general concept of Community law jurisdiction that has been provided by the ECJ. It seems likely that the ECJ, in refining its concept, will

<sup>19</sup> Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275 paras 781-883.

<sup>20</sup> Revised TACA Decision 2003/68/EC OJ L26 (31 January 2003) 53 at para 39.

<sup>21</sup> Commission Notice 'Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty' OJ C101/81 para 101.

<sup>22</sup> *Ibid* para 103.

<sup>23</sup> See eg Case 89/85 *A Ahlström Osakeyhtiö and Others v Commission (Woodpulp I)* [1988] ECR S193, judgment of 27 September 1988 and Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

<sup>24</sup> Note 21 para 106.

<sup>25</sup> *Ibid* para 107.

<sup>26</sup> Foreign Trade Antitrust Improvements Act 15 USC para 6a.

<sup>27</sup> *National Bank of Canada v Interbank Card Association*, 666 F.2d 6, 8 (2d Cir. 1981) and *Kruman v Christies International plc*, 284 F.3d 384.

<sup>28</sup> Note 26.

<sup>29</sup> *Kruman v Christies International plc* (n 27) 400.



follow the line of thinking of the US courts. Therefore, in discussing the question of whether the explicit collusion between the P3 Network and the other participants in conference and discussion agreements that are allowed under Singapore law may lead to tacit collusion on the EU markets that falls within Community law jurisdiction, account must also be taken of the US case law.

### Conflict of laws

The European Commission is of the opinion that the fact that price fixing and explicit collusion are permitted by (for example) the Singapore Competition Law, does not lead to a conflict of laws. This would only be the case if the Singapore Competition Law were to require carriers to participate in conferences: 'In such a situation, the restriction of competition is not attributable, as Article 101 implicitly requires, to the autonomous conduct of the companies and they are shielded from all the consequences of an infringement of that article'.<sup>30</sup> This remains the case, at least until a decision to disapply the national legislation has been adopted and that decision has become effective.<sup>31</sup>

The Singapore Competition Law does not contain an obligation for liner shipping companies to fix prices or to consult on sensitive competition issues. Therefore, the Commission standpoint entails that the question of whether price fixing and explicit collusion, which are allowed under this jurisdiction, and are caught by Article 101(1) TFEU, must be dealt with on the basis of the general principles of EU law.

In order to assist undertakings and associations of undertakings to assess whether their agreements are compatible with Article 101 TFEU, on 26 September 2008 the Commission published the Maritime Guidelines,<sup>32</sup> which were applicable for a period of five years, ie until 26 September 2013.

As mentioned above,<sup>33</sup> the Commission then decided to withdraw the Maritime Guidelines as from 26 September 2013 and not to replace them.<sup>34</sup> The Maritime Guidelines having been withdrawn, there will be no longer a legal vehicle for providing the maritime industry with specific guidance on whether the price fixing and explicit collusion that are allowed under the Singapore Competition Law will or may lead to tacit collusion on EU markets and, therefore, come within the scope of Article 101(1) TFEU.

The question now is whether the general Horizontal Guidelines and the consortia block exemption offer sufficient guidance to companies in this respect.

### EU competition rules on containerised liner shipping services

#### Historic overview

The governments of the EU Member States have always conducted a liberal approach towards international carriage by sea in general, and liner shipping in particular. This enabled shipowners to attempt to control their often murderous competition by entering into liner conferences, whereby they established a uniform tariff that was advertised well in advance,<sup>35</sup> secured reasonable profits and allotted sailings for each vessel. No public law was adopted to undo the anti-competitive effects of conferences. Outside competition from independent carriers and the common law actions taken by shippers were considered to be

<sup>30</sup> Horizontal Guidelines (n 8) para 22.

<sup>31</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, [2003] 5 CMLR 829 paras 54 ff (CFI).

<sup>32</sup> Note 18.

<sup>33</sup> Note 6.

<sup>34</sup> *Ibid.*

<sup>35</sup> J O Jansson, D O Shneerson *Liner Shipping Economics* (Chapman & Hall London 1987) 16.

sufficient guarantees to prevent the conferences from abusing their powers in an unreasonable manner.

The liberal approach towards liner conferences came partly to an end with Commission Regulation No 4056/86.<sup>36</sup> This regulation enabled the Commission to apply the EU competition rules to the maritime sector, whilst simultaneously safeguarding the ubiquitous arrangements on the fixing of rates and conditions of carriage in conference agreements.

This was the predominant feature of the regulation: it allowed for horizontal price-fixing arrangements in conference agreements which from the outset are not tolerated in any other industry,<sup>37</sup> where they are considered to create serious disadvantages for the unity of the single EU market and the abolishment of obsolete market structures.<sup>38</sup>

On 25 September 2006, the Commission repealed Regulation (EEC) No 4056/86,<sup>39</sup> which took effect on 18 October 2006 but allowed for a transitional period of two years for liner conferences that met the conditions of Regulation 4056/86, ie until 18 October 2008.

The decision to repeal was the result of a thorough review of the regulation based on the experience gained from its public enforcement.<sup>40</sup> This review demonstrated that:

- (i) the anti-trust immunity of conference price-setting has become increasingly irrelevant, since nowadays 80–90 per cent of general cargo traffic is carried under service contracts<sup>41</sup>
- (ii) it is very unlikely that the repeal of the block exemption will result in a significant increase in concentration on a global scale
- (iii) the effects of the repeal appear to correlate with the size of the trade: it will have considerable pro-competitive effects on the major East-West trades while the minor North-South trades are much less affected by a regulatory change<sup>42</sup>
- (iv) price fixing leads to the proliferation of inefficient operators, high profits for the most efficient ones and the lack of a need to innovate<sup>43</sup> and
- (v) the application of the EU competition rules to the maritime industry in the ordinary fashion 'will automatically remove the ... differences between this and the other industries'.<sup>44</sup>

The repeal of Regulation (EEC) No 4056/86 implies that as from 18 October 2008 liner carriers operating services to and/or from one or more ports in the European Union had to cease all liner conference activity contrary to Article 101 TFEU:

<sup>36</sup> OJ L378/4 of 31 December 1986.

<sup>37</sup> See eg Commission Decisions: *Wall and Floor Tiles* OJ 1971 L10/15; *Vereeniging van Cementhandelaren* OJ 1972 L13/34; *NCH* OJ 1972 L22/16; *Gas Water-heaters* OJ 1973 L217/34; *Papier Peints de Belgique* OJ 1974 L237/3.

<sup>38</sup> See August J Braakman (co-author and editor) 'The application of Articles 85 and 86 of the EC Treaty by national courts in the Member States' (European Commission 1997) para 150 [http://europa.eu.int/comm/competition/publications/art8586\\_en.pdf](http://europa.eu.int/comm/competition/publications/art8586_en.pdf).

<sup>39</sup> Regulation (EC) No 1419/2006, OJ L269 (28 September 2006) 1–3.

<sup>40</sup> See in particular the decisions and judgments in *Trans-Atlantic Agreement* OJ 1994 L376/4 decision of 19 October 1994 followed by the judgment of the Court of First Instance of 28 February 2002; Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II 875; *Far Eastern Freight Conference (FEFC)* decision of 21 December 1994 OJ 1994 L378/17 followed by the judgment of the Court of First Instance of 28 February 2002; Case T-86/95 *Compagnie générale maritime v Commission* [2002] ECR II-1011; Case No IV/35.134–*Trans-Atlantic Conference Agreement (TACA)* decision of 16 December 1998 OJ 1999 L95/7 followed by the judgment of the Court of First Instance of 30 September 2003; Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98 *Atlantic Container Line AB and Others v Commission* (n 19).

<sup>41</sup> Final Report of 12 November 2003 on public submissions received in response to the consultation paper by Prof Haralambides of Erasmus University, Rotterdam at 67.

<sup>42</sup> Discussion Paper on the Review of Regulation 4056/86 applying EC competition rules to Maritime Transport, ad hoc Advisory Committee Meeting (13 July 2005) 3.

<sup>43</sup> Note 41 at 2.

<sup>44</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of EC Treaty Commission Programme No 99/027 Brussels (28 April 1999) paras 133, 134.

This is the case regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conferences or discussion agreements. Moreover, conference members should ensure that any agreement taken under the conference system, complies with Article 101 TFEU as of October 18, 2008.<sup>45</sup>

## The Horizontal Guidelines

### General

Each economic operator must determine independently the policy which it intends to adopt on the market. The requirement of independence precludes any direct or indirect contact between economic operators whereby an undertaking influences the conduct on the market of its competitors or discloses to them its decisions or deliberations concerning its own conduct on the market, if as a result conditions of competition may apply which do not correspond to the normal conditions of the market in question.<sup>46</sup> This rule has been laid down in Article 101(1) TFEU, which contains a prohibition of all agreements that restrict competition. The notion ‘presupposes a common intention on the part of the companies involved to engage in a certain competitive activity’.<sup>47</sup> The companies involved must be legally distinct but do not necessarily have to be economically independent of each other. Agreements between companies belonging to the same group are therefore agreements. Whether they restrict competition is another matter which needs to be answered separately.<sup>48</sup>

Article 101(1) TFEU is not limited merely to direct exchanges between competitors but also applies to exchanges facilitated by third parties. Agreements do not have to take any particular form. They may be concluded orally or in writing<sup>49</sup> or may arise from the actual behaviour of the parties.<sup>50</sup> Settlements also constitute agreements.<sup>51</sup> The time at which an agreement takes effect is irrelevant. Contracts in the liner shipping service that were concluded before 18 October 2008, are caught by Article 101(1) TFEU if they have persisted beyond that date as a result of the deliberate coordination of the competitive behaviour of the companies concerned.<sup>52</sup>

Article 101(2) TFEU provides that agreements which fall within Article 101(1) TFEU are null and void. This means that the agreement is not binding nor can it be asserted in relation to third parties.<sup>53</sup> By the same token, it cannot be asserted before the courts either. Nullity for the purposes of Article 101(2) TFEU means complete invalidity. It is absolute in nature, especially as anyone can invoke it,<sup>54</sup> and unlimited in time, thereby catching all the past and future effects of the arrangement concerned.<sup>55</sup>

Once the existence of an agreement that restricts competition has been established, it has to be decided whether the part of the agreement that is null and void forms an indissoluble unit with the other parts of the agreement. If this is the case, the nullity of that part of the agreement entails the nullity of the entire agreement.<sup>56</sup>

<sup>45</sup> Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C245/2 of 26 September 2008.

<sup>46</sup> Joined Cases 40–48/73, 50/73, 54–56/73, 111/73, 113/73 and 114/73 *Sulker Unie and Others v Commission* [1975] ECR 1663 paras 173, 174.

<sup>47</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661 at 696.

<sup>48</sup> Note 38 para 64 with citation. See also Horizontal Guidelines (n 8) point 11.

<sup>49</sup> Case 28/77 *Tepea v Commission* [1978] ECR 1391 at 1412.

<sup>50</sup> Case 107/82 *AEG-Telefunken AG v Commission* [1983] ECR 3151 at 3195.

<sup>51</sup> Case 258/78 *Nungesser v Commission* [1982] ECR 2015 at 2080.

<sup>52</sup> Case 40/70 *Sirena v Eda* [1971] ECR 69 at 81.

<sup>53</sup> Case 22/71 *Béguelin Import Co v GI Import Export SA* [1971] ECR 949 at 962 para 29.

<sup>54</sup> Case 319/82 *Société de Vente de Ciments et Bétons de l’Est SA v Kerpen & Kerpen GmbH* [1983] ECR 4173, 4183f para 11.

<sup>55</sup> Case 48/72 *Brasserie de Haecht v Wilkin-Janssen (Haecht II)* [1973] ECR 77 at 89.

<sup>56</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235.

Agreements which fall within the scope of Article 101 (1) and (2) TFEU may benefit from an exemption from the prohibition on cartels. The criteria have been laid down in Article 101(3) TFEU:

- they must contribute to improving the production or distribution of goods or to promoting technical or economic progress
- consumers must be allowed a fair share of the resulting benefits
- the restrictions of competition must be indispensable to the attainment of the objectives
- the participants may not have the possibility of eliminating competition in respect of a substantial part of the products in question.

Companies have a duty of self-assessment, ie they have to examine themselves whether they may benefit from the exemption from Article 101(3) TFEU:

An agreement that fulfils the conditions of the exemption rule ... is legal from the outset and enforceable by national courts. Conversely, a restrictive agreement which does not fulfil the conditions of the exemption rule under article 101 (3) of the Treaty, will be void and unenforceable from the beginning.<sup>57</sup>

The Commission has published a number of guidelines of which the following are relevant for the maritime industry:

- guidelines on the application of Article 81 of the EC Treaty (now Article 101 TFEU) to maritime services (the Maritime Guidelines)<sup>58</sup>
- guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (the Horizontal Guidelines)<sup>59</sup>
- guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) TFEU)<sup>60</sup>
- guidelines on the effect on the trade concept in Articles 81 and 82 of the Treaty<sup>61</sup>
- Commission Notice on the definition of the relevant market<sup>62</sup>
- Commission Notice on agreements of minor importance.<sup>63</sup>

For the maritime industry, two block exemptions are of particular importance. The first is the block exemption for consortia;<sup>64</sup> the other is the block exemption for specialisation agreements.<sup>65</sup>

The Guidelines and the block exemptions provide that the following restrictions of competition do not fall within a block exemption and are not likely to benefit from an individual exemption of the prohibition on cartels:

- discussing or fixing prices, surcharges, discounts and rebates
- agreeing levels of capacity and utilisation
- rationalisation of capacity
- allocating customers or regions
- discussing relations with particular customers or suppliers

<sup>57</sup> Cf. Consultation Paper on the Review of Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to Maritime Transport, Commission Services Document, (28 May 2004, p 9.

<sup>58</sup> Now extinct, see above text at n 7.

<sup>59</sup> OJ C11/1 14 January 2011.

<sup>60</sup> OJ C101 27 April 2004 p 97.

<sup>61</sup> OJ C101/81 para 101.

<sup>62</sup> OJ C372 9 December 1997 p 5.

<sup>63</sup> OJ C368 22 December 2001 p 13.

<sup>64</sup> OJ L256 29 September 2009 p 31.

<sup>65</sup> OJ 2000 L304/3.

- planned service launches and service characteristics
- exchanging confidential information that might be of influence on the competition position of the participants or third parties.

These are hard core restrictions of competition that, as a matter of principle, are null and void.

#### *Exchange of information*

The Horizontal Guidelines address information exchanges in excruciating detail. Exchange of information comes within the scope of Article 101(1) TFEU in case it leads to tacit collusion. Tacit collusion is likely to be achieved in markets which are sufficiently transparent, non-complex, stable and symmetric: 'Information exchange can facilitate tacit collusion by reducing uncertainty in the market and making the strategic variables of the various parties more transparent so that it makes it easier for them to tacitly collude'.<sup>66</sup>

There is no precise formula that indicates which role information exchange plays in determining whether a market is competitive or tacitly collusive.<sup>67</sup> This means that there is not a clear demarcation indicating whether price fixing and explicit collusion insofar as they are directed at foreign markets and are allowed under the Singapore Competition Law may lead to tacit collusion on EU markets and therefore come within the scope of Article 101(1) TFEU. In the absence of an economic theory, 'each case must be assessed on its own facts according to the general principles set out in these ... (Horizontal) guidelines'.<sup>68</sup>

Exchange of information that is most likely to be caught by Article 101 TFEU relates to strategic information concerning future commercial policy that reduces strategic uncertainty as to the future operation on the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour:

For example, mere attendance to a meeting where a company discloses its pricing plan to its competitors, is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.<sup>69</sup>

It must be assumed that undertakings take account of the information exchanged with their competitors in determining their conduct on the market. That is all the more the case where the undertakings act together on a regular basis over a long period. The ECJ has held that, subject to proof to the contrary, which the economic operators must adduce, such a concerted practice is caught by Article 101(1) TFEU, even in the absence of anti-competitive effects on the market.<sup>70</sup> In case the economic operators cannot adduce evidence to the contrary, it will be assumed that there exists a form of coordination between undertakings by which, without having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.<sup>71</sup>

Community law jurisdiction is limited to agreements and practices that are capable of having effects of a certain magnitude: the effects must be appreciable. Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned.<sup>72</sup>

<sup>66</sup> Horizontal Guidelines (n 8) para 77.

<sup>67</sup> Mike Walker in EMLO Roundtable Discussion (19 June 2012) 13 <http://www.emlo.org/>.

<sup>68</sup> Horizontal Guidelines (n 8) para 22.

<sup>69</sup> *ibid* para 62, with references to jurisprudence.

<sup>70</sup> Case C-199/92 *Höls AG v Commission* [1999] ECR I-4287 paras 161-63.

<sup>71</sup> *Suiker Unie and Others v Commission* (n 47) para 26 and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A Ahlström Osakeyhtiö and Others v Commission (Wood Pulp)* [1993] ECR I-1307 para 63.

<sup>72</sup> Note 21 para 44.

### The block exemption for consortia agreements

The block exemption for liner shipping services applies to consortia agreements relating to international liner shipping services from or to an EU port, exclusively for the carriage of cargo, on condition that the combined market share of the participants does not exceed 30 per cent. The block exemption allows the coordination of sailing timetables, the cross-chartering of space or slots on vessels, the pooling of services or port installations, the use of joint operation offices and the provision of containers etc. It also allows capacity adjustments in response to fluctuations in supply and demand, the joint operation or use of port terminals and related services, and other ancillary restrictions. However, it prohibits specifically 'hard core' restrictions, such as fixing prices with third parties, limitation of capacity or sales (other than temporary adjustments to deal with fluctuations in supply and demand) and allocation of customers.<sup>73</sup>

### Self-assessment of price fixing and explicit collusion directed at foreign markets and allowed under Singapore competition law

It has been demonstrated above<sup>74</sup> that the market of containerised shipping services is a globally concentrated, oligopolistic market where each shipping line takes its strategic decisions by considering the prospective conduct of its competitors from a global perspective. Hence, the question of whether price fixing and the exchange of sensitive information which is directed at foreign markets and permitted under the Singapore Competition Law is the only plausible explanation for parallel behaviour on the EU markets falling within Article 101(1) TFEU, must be answered from a global perspective.<sup>75</sup>

When it comes to establishing whether the anti-competitive effects of exchanges of information when directed at foreign markets leads to parallel behaviour that falls within the scope of Article 101(1) TFEU, the structure of the market must be analysed, even in the absence of structural links between the participants.<sup>76</sup> However, the structure of the market as such is not sufficient to conclude that parallel behaviour falls within the scope of the EU competition rules.<sup>77</sup> Possible facilitating practices such as exchange of information systems<sup>78</sup> and the effects thereof on past and present movements in market shares and prices<sup>79</sup> should also be taken into account.

The ECJ has made it clear that cooperative strategic interaction between shipping lines as such does not constitute a concerted practice under Article 101 TFEU<sup>80</sup> and that such parallel behaviour can be regarded as proving the existence of an agreement or a concerted practice only in cases where concertation constitutes the only plausible explanation for such parallel behaviour.<sup>81</sup> This is a difficult task since '... firms need not even communicate with each other to fix prices'.<sup>82</sup>

<sup>73</sup> McDermott, Will & Emory 'Maritime transport subject to EU general competition law guidelines from 26 September 2013' (25 February 2013) [www.mwe.com](http://www.mwe.com).

<sup>74</sup> See above p 419.

<sup>75</sup> Francesco Munari 'Competition in liner shipping' in J Basedow and others *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Springer-Verlag Berlin Heidelberg 2012) 7.

<sup>76</sup> OECD Policy Round Tables 'Oligopoly' (1999) 215.

<sup>77</sup> See Commission Decision in *Peroxygen Products* OJ 1965 L35/1. See also R Whish *Competition Law* (6th edn OUP Oxford 2009) 553.

<sup>78</sup> Note 21 at 214.

<sup>79</sup> *Ibid* 219.

<sup>80</sup> H Haupt 'Collective dominance under Article 82 EC and EC merger control in the light of the *Airtours* judgment' (2002) 23(9) *ECLR* 434.

<sup>81</sup> A Ahlström *Osakeyhtiö and Others (Woodpulp)* (n 71).

<sup>82</sup> G Monti *EC Competition Law* (1st edn Cambridge University Press Cambridge 2007) 309.

The Horizontal Guidelines recognise that information exchanges may have pro-competitive benefits.<sup>83</sup> The assessment of whether this conduct has pro-competitive effects that justify the application of Article 101(3) TFEU must also take account of the market structure and the market situation of non-EU markets.<sup>84</sup> In addition, as FMC Commissioner Thomas Rosch has pointed out, the Horizontal Guidelines 'cut too broad a swath', in that they are so detailed that 'the Guidelines nor the consumers may be able to realize the pro-competitive benefits of such exchanges. This is not the kind of outcome that public law enforcement officers should want to achieve'.<sup>85</sup>

## Conclusion

With regard to the question whether anti-competitive conduct between the P3 Network and other participants to one or more conference and/or discussion agreements, when directed at foreign markets and allowed under foreign jurisdictions such as the Singapore Competition Law, may possibly lead to tacit collusion on the EU market, on the basis of the analysis discussed above, I am of the opinion that this question must be answered in the affirmative. The global perspective from which lines take their strategic decisions, together with the fact that these decisions are being discussed and adopted in 65 conference and discussion agreements which relate to the Trans-Atlantic and the Trans-Pacific routes, ie to approximately 50 per cent of world trade, and are legally allowed under foreign jurisdictions such as the Singapore Competition Law, necessarily leads to a form of concertation between these lines on EU markets by which, without having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. This holds true in particular in case the ECJ accepts that the effect of anti-competitive conduct that is directed at foreign markets, does not have to give rise to a specific claim under EU law.

The second question is whether lines are capable of assessing themselves, without specific guidance from the European Commission, whether anti-competitive conduct that is directed at foreign markets, falls within the ambit of Article 101(1) TFEU.

I am of the opinion that this second question must be answered in the negative. The fact that companies must make their self-assessment on a case-by-case basis and have to refer to conditions of competition on foreign markets together with the risk of absolute nullity of the agreements concerned and private claims for damages under EU law in the event of a wrong assessment, necessitate specific guidance. This is the more so since the Horizontal Guidelines are so detailed that lines may not be able to realise and/or demonstrate the pro-competitive benefits of price fixing and the exchange of sensitive information directed at foreign markets, on EU markets.

In view of the above, it is all the more likely that lines who are party to conference or discussion agreements that are allowed under foreign jurisdictions, such as the Singapore Competition Law, will reconsider their position in case specific guidance from the European Commission remains absent, and will eventually decide to withdraw from these agreements. The risk that these agreements are caught by Article 101(1) TFEU, the obligation of self-assessment and the consequences of a wrong self-assessment in the form of absolute nullity of the agreement under EU law and of claims for private damages under that law, may prove to be too much of a deterrent.

<sup>83</sup> Paragraph 57.

<sup>84</sup> For an excellent report on the various markets and market structures see 'Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law' FMC Bureau of Trade Analysis (Washington DC, January 2012).

<sup>85</sup> J Thomas Rosch 'Antitrust Issues related to benchmarking on other information exchanges' ABA Section of Antitrust Law and ABA Center for Continuing Legal Education's Teleseminar on Benchmarking and Other Information Exchanges Among Competitors (3 May 2001) 14.

Although this risk already exists it will be seriously aggravated by the P3 Network, once it has been approved in its present form by the European Commission and/or other regulatory bodies.

### Postscript

This text was presented at the 19th Annual Conference of the European Maritime Law Organisation which took place in London on 25 October 2013. In November and December 2013, there were some important developments with regard to the assessment of the P3 agreement which are worthy of mention.

In its press release of 22 November 2013,<sup>86</sup> the European Commission announced it had opened formal proceedings against several container liner shipping companies, including the members of the P3 Network, to investigate whether they had engaged in concerted practices in breach of EU anti-trust rules.

The proceedings relate to the public announcements liner shipping companies make, on a regular basis, of price increase intentions, through press releases on their websites. The price increases are generally similar for all announcing companies and their announcements 'are usually made by the companies successively a few weeks before the announced implementation date'. However, clearly the Commission 'has concerns that this practice may allow the companies to signal future price intentions to each other and may harm competition and customers by raising prices on the market for container liner shipping transport services on routes to and from Europe'.

For the purpose of the above proceedings, the Commission defines container liner shipping as 'the transport of containers by ship at a fixed time schedule on a specific route between a range of ports at one end (eg Shanghai–Hong Kong–Singapore) and another range of ports at the other end (eg Rotterdam–Hamburg–Southampton)'. This definition demonstrates that the investigation does not go beyond the scope of EU anti-trust law as it is presently defined.<sup>87</sup>

On the non-Asia–Europe routes, ie on the Trans-Atlantic and Trans-Pacific routes, which together represent approximately 50 per cent of world trade, there are 65 conference and discussion agreements.<sup>88</sup> Within these agreements, exchanges of sensitive information and the fixing of prices are permissible and frequently occur. Price increases are announced by the administrators of the agreements on behalf of all the participants collectively.

All of the liner shipping companies against whom the proceedings have been initiated, and more particularly the members of the P3 Network, operate on a global scale and participate in one or more conference and discussion agreements that apply on the non-Asia–Europe routes. This implies that the price policy that is agreed upon for the non-Asia–Europe routes within the framework of these conference and discussion agreements, and which is widely advertised, necessarily has an impact on the price increase intentions for the Asia–Europe routes that are announced by the individual companies 'successively a few weeks before the announced implementation date'.

The question then is whether the Commission, by investigating the announcements of future price increases for Asia–Europe routes under EU anti-trust law, can disregard agreements on price increases for non-Asia–Europe routes. I am of the opinion that this question must be answered in the negative.

<sup>86</sup> IP/13/1144.

<sup>87</sup> See above pp 423 ff under 'jurisdiction'.

<sup>88</sup> See above p 419.



The fact that the liner companies that are under investigation, operate on a global scale necessarily implies that prices for Asia–Europe routes and for non-Asia–Europe routes are strongly interdependent. Therefore, agreements on prices for non-Asia–Europe routes are, if not the basis then in any case important indicators for the prices for Asia–Europe routes. As a consequence, in assessing whether the announcements of price increase intentions for Asia–Europe routes amount to concerted practices in breach of Article 101 TFEU and of Article 53 EEA, the Commission cannot disregard the price-fixing agreements for non-Asia–Europe routes.

In case the Commission accepts, or is forced to accept this conclusion, it implies that the Commission assumes jurisdiction over anti-competitive conduct directed at foreign markets and permitted under foreign jurisdictions. This extension of Community law jurisdiction may have important consequences, both on an economic and on a political level.

On an economic level, it means that the self-assessment lines are bound to make under Article 101(1) TFEU must include an assessment of the conditions of competition on foreign markets and also from an EU law perspective. Since the only guidelines available are the Horizontal Guidelines<sup>89</sup> and the block exemption for consortia agreements,<sup>90</sup> this is a very difficult if not impossible task.

On a political level, the major problems in making a trustworthy and reliable self-assessment and the consequences of this assessment being faulty may be such that liner companies will eventually decide to withdraw from conference and discussion agreements which fall within other jurisdictions and allow for price fixing and the exchange of sensitive information. This may lead to differences of opinion on a political level between the EU and countries that favour these distortions of competition.

Within this context, it is important to note that on 17 December 2013 the US Federal Maritime Commission organised a conference to consider the evolving international maritime landscape. The conference was attended by maritime regulatory bodies from the United States, the People's Republic of China and the European Commission. Although no firm statements to that effect were made, it seems likely that an important part of the discussions were devoted to comity, ie to the possibilities of the courts in one jurisdiction to accede or give effect to the laws and decisions of another.

It is interesting to note that the Competition Commission of Singapore did not participate in the conference.

## Appendix

<i>Abbreviation</i>	<i>Conference or Discussion Agreements</i>	<i>Members (abbreviated)</i>
AADA	Asia Australia Discussion Agreement	ANL, China Shipping, Coscon, Gold Star Line, Hamburg Sud, Hanjin, Hapag-Lloyd, Hyundai, 'K' Line, Maersk Line, MOL, MSC, NYK, OOCL
ABC	ABC Discussion Agreement	Hamburg Sud, King Ocean, SeaFreight
ACTA	Asia to Caribbean Trade Agreement	CMA CGM, CSAV, Evergreen, Hamburg Sud, Maersk Line, MSC, ZIM
AEATA	Asia East Africa Trade Agreement	Delmas, Maersk Line, MOL, PIL
AFDA	Australia Fiji Discussion Agreement	CNCo, Hamburg Sud, Neptune Pacific Line, Pacific Line
AFDG	Asian Feeder Discussion Group	AvCL, Bengal Tiger Line, RCL, Samudera, Sea Consortium

<sup>89</sup> See above pp 427 ff.

<sup>90</sup> See above pp 430 ff.

Abbreviation	Conference or Discussion Agreements	Members (abbreviated)
ANSCON	Australia Northbound Shipping Conference	ANL, 'K' Line, MOL, NYK, OOCL, ZIM
ANZDA	Asia New Zealand Discussion Agreement	CNCo, Coscon, Hamburg Sud, Maersk Line, MISC, NYK, OOCL, PIL
ANZECs	Australian and New Zealand/ Eastern Shipping Conference	ANL, 'K' Line, MOL, NYK, OOCL, ZIM
ANZUSDA	Australia/New Zealand Discussion Agreement	ANL, CMA CGM, Hamburg Sud, Hapag-Lloyd, Maersk Line
AWATA	Asia-West Africa Trade Agreement	China Shipping, CMA CGM, Delmas, Gold Star, Maersk Line, MSC, MOL, NileDutch, PIL, Safmarine
AWCSA	Asia-West Coast South America Freight Conference	APL, CCNI, CSAV, CMA CGM, Evergreen, Hamburg Sud, Hanjin, Hapag-Lloyd, Hyundai, 'K' Line, Maersk Line, Maruba, MOL, MSC, NYK
BOBCON	Bay of Bengal/Japan/Bay of Bengal Conference	NYK, Everet Shipping, Bangladesh Shipping, Myanmar Five Star
BRAZIL	Brazil/Far East/Brazil Freight Conference	CSAV, NYK
CADA	Central American Discussion Agreement	APL, Crowley, Doie, Great White Fleet, King Ocean, Seaboard Marine
CALFO	Calcutta Feeder Operators	AvCL, Bengal Tiger Line, Orient Express Line, Megastar Shipping, PACC, Samudera, Sea Consortium
CANZDA	Canada Australia New Zealand Discussion Agreement	Hamburg Sud, Hapag-Lloyd
CFO	Chennai Feeder Operators	AvCL, Bengal Tiger Line, Orient Express Line, Samudera, Sea Consortium, Sea Services
CFTC	Chittagong Feeder Trade Committee	AvCL, APL, Orient Express Line, QC Container Line, Sea Consortium
CPWCSA	Canada Pacific West Coast South America Agreement	CCNI, CSAV, Hamburg Sud, Hapag-Lloyd
CSA	Caribbean Shipowners Association	Bernuth, CMA CGM, Crowley, Seaboard Marine, SeaFreight, ZIM
CTSA	Canada Trans-Pacific Stabilization Agreement	APL, Coscon, Evergreen, Hapag-Lloyd, Hyundai, 'K' Line, NYK, OOCL, Yang Ming, ZIM
CWTSa	Canada Westbound Transpacific Stabilization Agreement	APL, Coscon, Evergreen, Hapag-Lloyd, Hyundai, 'K' Line, NYK, OOCL
EMDA	East Mediterranean Discussion Agreement	China shipping, Coscon, ZIM
FEEA	Far East/East Africa Freight Conference	MOL (breakbulk only), NYK
FESAMEC	Far East/South Asia-Middle East Conference	IRISL, 'K' Line, Maersk Line, MOL, NYK, PNSC, SCI, UASC, WWL
FBSOA	Florida-Bahamas Shipowners and Operators Association	Bernuth, Crowley, Seaboard Marine, SeaFreight
HDA	Hispaniola Discussion Agreement	Crowley, Seaboard Marine
IADA	Intra-Asia Discussion Agreement	ANL, APL, Biendong, Cheng Lie, China Shipping, CMA CGM, Coscon, Emirates, Evergreen, Gold Star, Gemadep, Hanjin, Hapag-Lloyd, Heung-A, Hyundai, Interasia, 'K' Line, KMTc, MCC Transport, NYK, OOCL, PIL, RCL, Samudera, Sinokor, SITC, UASC, Wan Hai, Yang Ming

Abbreviation	Conference or Discussion Agreements	Members (abbreviated)
IRA	Informal Rate Agreement	APL, CMA CGM, Coscon, CSAV Norasia, Evergreen, Hapag-Lloyd, Hyundai, IRISL, Maersk Line, MOL, NYK, OOCL, PIL, UASC, Wan Hai, Yang Ming
IRSA	Informal Red Sea Agreement	ANL, APL, CMA CGM, Coscon, CSAV Norasia, Evergreen, Hapag-Lloyd, Maersk Line, PIL, UASC, Wan Ha
ISAA	Informal South Asia Agreement	APL, CMA CGM, Coscon, CSAV Norasia, Evergreen, Hapag-Lloyd, Hyundai, Maersk Line, MOL, NYK, OOCL, PIL, SCL, Samudera, TSK Line, UASC, Wan Hai, Yang Ming
ITC	Israel Trade Conference	APL, Maersk Line, ZIM
JAHOSAS	Japan & Hong Kong/South Africa Shipping Conference	'K' Line, MISC, MOL (breakbulk only), NYK
JCFC	Japan/Ceylon Freight Conference	'K' Line, MOL (Breakbulk only), NYK
JGARSPC	Japan/Gulf of Aden & Red Sea Ports Conference	ANL, CMA CGM, Egyptian International Shipping Co, Hapag-Lloyd, 'K' Line, MOL, NYK
JHSFA	Japan/Hong Kong & Japan/Straits Freight Agreement	Daiichi Chuo, Eastern Car Liner, 'K' Line, MISC, MOL, NYK
JLA	Japan-Latin America Eastbound Freight Conference	'K' Line, MOL (breakbulk only), NYK
JMEX	Japan-Mexico Freight Conference	'K' Line, MOL (breakbulk only), NYK
JRFC	Japan/Philippines Freight Conference	Daiichi Chuo, Easter Shipping, Everet Orient Line, 'K' Line, Kansai Steamship, NYK, Philippines President Lines, Tokyo Senpaku, Westwind Shipping
JSPFC	Japan/South Pacific Freight Conference	China Navigation Co, Kyowa Shipping, NYK
JTFC	Japan/Thailand Freight Conference	Jutha Maritime, Kansai Steamship, 'K' Line, NYK, Siam Paetra, Thai Maritime, T. J. Marine
JTJFC	Japan/Taiwan/Japan Container Freight Conference	'K' Line, NYK
JWAAC	Japan/West Africa (Angola/Cameroon Range) Freight Conference	Coscon, 'K' Line, MOL (breakbulk only), NYK
JWANS	Japan/West Africa (Nigeria/Senegal Range) Freight Conference	Coscon, Gold Star, 'K' Line, MOL (breakbulk only), NYK
JWCSA	Japan-West Coast South America Freight Conference (breakbulk)	CCNI, CSAV, 'K' Line, MOL, NYK
KNFC	Korea Nearsea Freight Conference	Coscon, CK Line, Dong Young, Dongjin, Hanjin, Heung-A, KMT, Namsung, Pan Continental, Pan Star, Sinokor, Sinotrans, STX Pan Ocean, Taiyoung
LAA	Latin America Agreement	APL, Bernuth, CMA CGM, CCNI, CSAV, Dole, Frontier Liner, Great White Fleet, Hamburg Sud, King Ocean, Libra, MSC, Seaboard Marine, Ecuadorian Line, ZIM
MIDA	The Middle East Indian Subcontinent Discussion Agreement	APL, CMA CGM, Hapag Lloyd, Maersk Line, Swire Shipping, NSCSA, UASC
NANZDA	North Asia/New Zealand Discussion Agreement	Coscon, Hamburg Sud, MOL, NYK, Tasman Orient Line
PDA	Pacific Islands Discussion Agreement	CMA CGM, Hamburg Sud, Hapag-Lloyd, Marfret, Polynesia Line
River Plate	Far East/River Plate/Far East Freight Conference	CSAV, NYK

<i>Abbreviation</i>	<i>Conference or Discussion Agreements</i>	<i>Members (abbreviated)</i>
SEASA/ ATFA	South East Asia and South Asia/ Australia Trade Facilitation Agreement	ANL, APL, Gold Star, Hanjin, Hyundai, Maersk Line, MISC, NYK, OOCL, MSC, PIL, RCL
SNZDA	Straits/New Zealand Discussion Agreement	CNCo, Maersk Line, MISC, NYK, PIL
TFA	Australia/North and East Asia Trade Facilitation Agreement	ANL, China Shipping, Coscon, Gold Star, Hamburg Sud, Hyundai, 'K' Line, MOL, MSC, NYK, OOCL
TFG	Australia/South East Asia and South Asia Trade Facilitation Agreement	ANL, APL, 'K' Line, Maersk Line, MISC, MOL, NYK, OOCL, PIL, RCL
TSA	Trans-Pacific Stabilization Agreement	APL, China Shipping, CMA CGM, Coscon, Evergreen, Hanjin, Hapag-Lloyd, Hyundai, 'K' Line, Maersk Line, MSC, NYK, OOCL, Yang Ming, ZIM
USADA	United States Australasia Discussion Agreement	ANL, CMA CGM, Hamburg Sud, Hapag-Lloyd, Maersk Line, Marfret
VDA	Venezuela Discussion Agreement	Hamburg Sud, King Ocean, MSC, Seaboard Marine, Seafreight Line
WAFEAC	West Africa (Angola/Cameroon Range)/ Far East Freight Conference	Coscon, 'K' Line, NYK
WAFENS	West Africa (Nigeria/Senegal Range)/ Far East Freight Conference	Coscon, Gold Star, 'K' Line, NYK
WCSADA	West Coast of South America Discussion Agreement	APL, CCNI, CSAV, Ecuadorian Line, Frontier Liner Services, Hamburg Sud, King Ocean Services, Maersk Line, MSC, Seaboard Marine, Trinity Shipping
WCSAFC	West Coast of South America/ Far East Freight Conference	CCNI, CSAV, 'K' Line, NYK
WTSA	Westbound Trans-Pacific Stabilization Agreement	Coscon, Evergreen, Hanjin, Hapag-Lloyd, Hyundai, 'K' Line, OOCL, Yang Ming
YLSC	Yellow Sea Liners' Committee	China Shipping, CK Line, Co-Heung, Coscon, CQH Line, CSC Line, DDCL, Dong Young, EAS Datong, Hanjin, Han Sung, Heung-A, Hyundai, KMTC, Namsung, NBOS Line, New Orient Lines, Pan Continental, STX Pan Ocean, Sinokor, Sinotrans



# Lloyd's List

## 2M: The Chinese conundrum

Monday 14 July 2014, 18:39 by August Braakman [Back to Lloyd's List Containers](#)



It is clear that the application of Chinese competition law is a tool for conducting the country's industrial policy.

### **Industry viewpoint: Reflections on the Chinese rejection of the P3 alliance and its aftermath**

*Dutch competition lawyer Guus Braakman, whose paper last year on the implications of the P3 Network was thought to have influenced Chinese regulators in their decision to prohibit the alliance, discusses the need for legal certainty and asks whether shipping should have a global set of antitrust rules as Maersk and MSC propose the 2M alliance*

CHINA's Ministry of Commerce rejected the [P3 alliance](#) on June 17. The main consideration for this decision was that the alliance was not compliant with "social public interest" and did not "promote a healthy development of the socialist market economy" in China.

The task to achieve these two objectives of Chinese competition law, however, is not only entrusted to MofCom; the Ministry of Transport has also played an important role in the decision-making process around P3.

Seen from this perspective, it is clear that the application of Chinese competition law is a tool for conducting the country's industrial policy. When reaching a decision, this highlights the

importance of considerations either indirectly or not at all relating to the realisation of a fair and undistorted competition that aims at the creation of a level playing field for all competitors.

The rejection of P3 is the first case in which it was ruled that an alliance between exclusively non-Chinese companies is contrary to Chinese competition law. Apparently, the effects that P3 admittedly would have had on Chinese industrial policy formed sufficient reason for China to intervene.

In my [previous article on P3](#), I have argued that the exchange of commercially sensitive information on for example pricing between participants to conference and discussion agreements that is allowed under Singapore competition law, for instance, may have anti-competitive effects in the European Union, also when directed at foreign markets. This being the case in the context of P3, EU competition law would have to be applied in order to squash these effects. This would require application of EU competition law beyond its present scope.

The guiding principle of EU competition law is the realisation of a fair and undistorted competition that aims at the creation of a level playing field for all competitors. This objective of creating open and competitive markets takes primacy over national interests.

As Chinese competition law is a tool for conducting industrial policy and is therefore based on completely different guiding principles, an extension of EU competition law jurisdiction to such conference and discussion agreements may well run counter to the said policy in the event of Chinese lines participating therein.

### **Lines appear confident**

On July 10, 2014, Maersk and Mediterranean Shipping Co announced that they had entered into the so-called [2M alliance](#). This operates on 21 strings, six of which will serve the Asia-north Europe trades and four will cover the Asia-Mediterranean trade lanes.

Both Maersk and MSC appear quite confident that the regulatory authorities will give their approval to the 2M alliance.

With regard to China, this optimism apparently stems from the fact that MofCom was in the first place unhappy with the market share of the P3 alliance.

What has also contributed to this optimism is the circumstance that the pricing and marketing of either partner will remain independent.

The actual differences between P3 and 2M seem smaller than suggested.

P3 was intended to operate 255 vessels with a capacity of 2.6m teu.

2M includes 185 vessels with an estimated capacity of 2.1 m teu.

The market share of the P3 participants on the Asia-North Europe trade lanes was 45.6%; for 2M this is 34.9%. Market shares on the Asia-Mediterranean trade lanes will drop from 54.6% in the case of P3 to 41.8% in the case of 2M. Also regarding P3 it was agreed that each partner's pricing and marketing was to remain independent, i.e. similar to 2M.

The only important organisational difference between P3 and 2M is that 2M will not have any jointly owned independent entity with executorial powers.

Rather than setting up a network centre, 2M will only have a joint co-ordination committee to monitor its daily operations.

The 2M partners take the view that the absence of a network centre implies that 2M is a purely operational vessel-sharing agreement and for that reason does not fall under the scope of China's Anti-Monopoly Law.

Therefore, the 2M alliance will not be filed with MofCom but only with the Ministry of Transport.

Irrespective of the legal validity of this argument, the question is whether the different organisational structure of 2M will make a difference with regard to the assessment thereof by the Chinese authorities in light of its industrial policy.

### **EU competition law**

Like the P3 alliance, also the 2M alliance, with or without a network centre, will substantially increase the risk of shipping lines being caught by EU competition law on account of exchanging commercially sensitive information that is allowed under foreign jurisdictions such as Singapore competition law, also in cases where this exchange of information is directed at foreign markets.

This means that also the 2M alliance may induce an extension of EU competition law jurisdiction.

In this context, it should be borne in mind that the biggest Chinese shipping company, Cosco, apart from being party to 18 conference and discussion agreements, also participates in the CKYH alliance, to which the 2M alliance will appear a severe competitor.

Cosco, moreover, is facing a very precarious financial position.

EU rulings that would prohibit conference and discussion agreements in which Cosco participates and that would govern competition between the 2M and the CKYH alliances therefore might adversely affect the position of Cosco, and thereby the realisation of the goals of



Chinese industrial policy.

I have little doubt that these considerations, and more in particular the position of Cosco, have played a role in the rejection of P3 and will play a role in the assessment of 2M.

In view of the above, I feel that a consistent attitude on the part of MofCom and the Ministry of Transport may induce them to conclude that the 2M alliance is not compliant with "social public interest" either and does not "promote a healthy development of the socialist market economy" in China.

In other words, this attitude may induce them to conclude that also 2M is contrary to Chinese industrial policy.

This viewpoint would likewise virtually kill the 2M alliance. Here, too, the underlying aim would be to steer around possible interventions by the European Commission, in areas that are important for Chinese industrial policy.

It should be noted that a similar reasoning holds with regard to US competition law and possible interventions by the FMC.

Irrespective of the attitude of MofCom and the Ministry of Transport towards the 2M alliance, I feel that their stance in P3, together with the European Commission's policy of "wait and see", which was also adopted, to a lesser extent, by the FMC, leaves the shipping industry with far too many uncertainties for it to be able to develop a commercially sound strategy.

In this context, it is important to note that the shipping industry not only consists of shipping lines. Ports also take great benefit from a clear and transparent set of competition rules as basis for the commercial strategies of shipping lines. This will enable ports to adopt and adapt their own commercial strategy.

### **Transparent set of rules**

In view of all this, there can be no doubt that the shipping industry is in need of a clear and transparent set of competition rules that will guide them towards formulating a sound commercial policy on a global level.

Without such rules, extension of the P3 approach adopted by MofCom and/or by the European Commission and the FMC to the 2M alliance and possible future forms of co-operation, may in the end result in a situation in which only the strongest lines survive. Surely this cannot be the goal of any regulatory body.

When formulating this set of rules, the characteristic position of the shipping industry should be

come in mind. At the time, the main argument for repealing the EU block exemption for conference agreements was that, over the years, the shipping industry had developed into an ordinary industry that should be governed by the same set of general rules as any other industry. An argument that still holds, in principle.

However, the various regulatory approaches towards P3 demonstrate that the specific characteristics of the shipping industry are such that it needs special rules that are fine-tuned in order to meet the demands of this industry.

The circumstance that shipping is a global industry, combined with the fact that it is improbable that a set of global competition rules will be agreed on at short notice, will oblige each individual regulatory body to apply this fine-tuning for its own jurisdiction. This, obviously, must be done from the perspective of a fair and undistorted competition which aims at the creation of a level playing field for all competitors, i.e. at the creation of open and competitive markets.

Until this (hopefully) temporary lack of a set of global competition rules can be provided for, the legal certainties that the shipping industry requires and is entitled to, must be acquired by way of recognition by the regulatory bodies of the validity and effect of each other's executive, legislative and judicial acts.

To arrive at this comity as soon as possible for the sake of acquiring legal certainty for the shipping industry, formulation and adoption of special rules by the various regulatory bodies that meet the demands of this industry should not be postponed.

*August Braakman is secretary-general of the European Maritime Law Organisation.*

Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/containers/article445059.ece>

Published: Monday 14 July 2014

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## Lloyd's List

# 2M — the Regulators' Conundrum

Tuesday 19 August 2014, 11:50 by August Braakman [Back to Lloyd's List Containers](#)



Regulatory bodies such as the EU Commission and China's MofCom cannot afford to lag behind. © 2014 Ng Han Guan, File/AP

**Dutch competition lawyer August Braakman calls for a global set of competition guidelines as he asks whether Maersk and MSC are safe to assume China won't question their planned alliance**

SLOWLY but steadily, the shipping industry is recovering from the P3 shockwave and arming itself against its 2M aftermath.

Shipping lines are looking for new alliances to counterbalance 2M.

Shipper groups are intensifying their call for deeper involvement of competition regulators.

Ports are beginning to tone down their traditional rivalry and to search for co-operation in order to counter the growing bargaining power of liner alliances.

Particularly since P3 and 2M have forced other lines and liner alliances to expand their geographic reach by also deploying ships of present-day size, the above initiatives will be taken and implemented from a global perspective.

For the sake of legal certainty and fair and undistorted competition between all parties concerned at a global level, regulatory bodies cannot afford to lag behind, and they must therefore take a global view as well.

The legal tools offered by the jurisdictions of the European Commission, Federal Maritime Commission and China's Ministry of Commerce are too limited in their geographical scope to enable them to take globally effective, predictable and consistent decisions that would in turn promote their transparency and accountability and instil confidence in them and the law they implement.

No regulatory body can resign itself to this situation.

The present lack of proper legal tools will cause the entire shipping industry to imitate the slalom techniques adopted by the 2M alliance. These are found in taking each gate by following an escape route that is furthest away from the applicable competition rules, yet still permitted by the jurisdiction concerned.

These techniques may be defended from 2M's point of view, since they may enhance its already dominant position in the global market of containerised shipping even further.

However, this does not hold from the point of view of competition. Therefore, it is mandatory that new legal tools be devised.

A global set of rules on which the EU Commission, the FMC and MofCom can agree would obviously provide the most preferable legal tools by far.

Under present circumstances, this seems — as yet — a bridge too far.

Therefore, in anticipation of a global set of rules, each of these regulatory bodies should draw up guidelines on the extra-territorial application of its competition rules to the shipping industry in general, i.e. to lines and liner alliances, shipper groups and ports.

These guidelines should be based on the principle of fair and undistorted competition.

All three jurisdictions offer sufficient scope for choosing this particular way forward.

Together with such guidelines, each of said regulatory bodies should set up a clear and transparent system, monitoring each and any form of global co-operation, and this on the basis of the parameters of its own competition laws.

The contents of these monitoring systems should be made public, to enable all parties concerned — not only lines and liner alliances, but also shipper groups and ports — to discern

and identify any distortion of competition occurring.

Possible statutory or administrative obstacles to compliance with investigatory requests from other regulatory bodies should be eliminated.

Exchange of evidence, and investigation of particular matters at the request of another regulatory body, should be secured.

Monitoring systems that meet these criteria will, among other things, enable all parties concerned to discern and identify whether lines participating in global alliances use information acquired within the framework of conference and discussion agreements they are party to and that are permitted in countries where laws are lax, in order to formulate and implement their global strategy.

The information assembled by these systems would facilitate a first assessment and the further monitoring of alliances like 2M.

This may be illustrated from the present uncertainties with regard to the assessment of the 2M alliance by the Chinese authorities.

The parties to 2M take the view that the 2M alliance is a VSA *pur sang* and, as such, *does not* need regulatory approval from China's MofCom.

Registration with the Ministry of Transport under the "Bei-An" or "filing for the record" procedure is always required.

In principle, this is a formality. However, the MoT may question participants to agreements, which are being registered, on rates and operational matters. If there is sufficient presumption of unfair competition, the MoT can carry out a probe.

In deciding whether or not to carry out a probe with regard to 2M, the MoT would certainly have benefited from the information assembled in a monitoring system, if there had been one.

In anticipation of monitoring systems and a closer co-operation between the three main regulatory bodies, the question is whether at present there is sufficient presumption of unfair competition for the MoT to carry out a probe.

In view of the following considerations, I feel this question may have to be answered in the affirmative.

Maersk and MSC combined are party to seven conference and discussion agreements, five of which relate to trade lanes involving China.

Singapore has extended its block exemption for liner shipping conferences until December 31, 2015.

Under this block exemption and provided certain conditions are being met, lines are allowed to co-operate on (i) technical, operational or commercial arrangements; (ii) price; and (iii) remuneration terms.

Hence, under the laws of Singapore, the two lines participating in the 2M alliance are allowed to intensify their co-operation to a stage that goes far beyond the scope of a VSA pur sang.

Would it be too far-fetched to assume the co-operation, as permitted under Singapore Competition Law, can be used by 2M as a substitution for a network centre and may fulfil more or less the same role as the one originally entrusted to the P3-alliance network centre?

In my view, this assumption could very well prove to be correct. If it can be underpinned by facts and the MoT carries out a probe, Maersk and MSC will have to make a reasonable case for demonstrating their co-operation, as permitted under Singapore Competition Law, is directed at non-Chinese markets and does not have a direct, substantial and foreseeable effect on economic activity, and thus on patterns of trade, inside the PRC.

If they do not succeed, this may be an indication that 2M is a close-knit alliance in disguise, in which case the main considerations for Beijing to oppose P3 would fully apply to 2M as well.

Therefore, a swift and inconspicuous implementation of 2M in China might not be a *fait accompli* at all.

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Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/containers/article447063.ece>

Published: Tuesday 19 August 2014

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## Lloyd's List

# Industry viewpoint: The commissioners have got it wrong on 2M

Thursday 09 October 2014, 16:28 by August J. Braakman [Back to Lloyd's List Containers](#)



The extra-territorial application of the US Shipping Act forms an indissoluble and important part of this Act.

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### **The FMC has failed in properly applying the US Shipping Act and has hampered the creation of legal tools to assess global alliances from a global perspective**

THE US Federal Maritime Commission has decided not to prolong the 45-day period of inquiry and has given the green light to the [2M alliance](#).

In my opinion, it can be argued that in doing so the FMC has not only failed in properly applying the US Shipping Act, but also has severely hampered the creation of the legal tools necessary for assessing global alliances from a global perspective.

My arguments are twofold.

The [notification of the 2M alliance with the FMC on August 27, 2014](#), provides a most telling proof of the need to assess global alliances from a global perspective.

In this notification, Maersk Line and Mediterranean Shipping Co take the view that the Asia-Europe trade and other non-US trades are not subject to the US Shipping Act and as a result do not come within the jurisdiction of the FMC. In their view non-US trades needed not to be reflected in the 2M vessel-sharing agreement that was notified with the FMC.

Therefore, the green light that was given to the 2M alliance implies that the assessment by the FMC was limited to trades that only include US ports.

In my opinion, this is an error.

Although not elaborated upon in sector specific guidelines, the extra-territorial application of the US Shipping Act forms an indissoluble and important part of this Act.

Therefore, anti-competitive conduct, even when directed at non-US trades and permitted under foreign jurisdictions, comes within the jurisdiction of the FMC if it has a direct, substantial and foreseeable effect on domestic US markets.

The chance of this happening especially arises in the case of 2M, since Maersk and MSC together are party to seven conference and discussion agreements where decisions are taken regarding anti-competitive conduct that is permitted under foreign jurisdictions such as Singapore Competition Law.

Singapore has extended its block exemption for liner shipping conferences until 31 December, 2015. Under this block exemption and provided that certain conditions are being met, lines are allowed to co-operate on (i) technical, operational or commercial arrangements, (ii) price and (iii) remuneration terms. Hence, under the laws of Singapore, the two lines participating in the 2M alliance are allowed to intensify their co-operation to a stage that goes far beyond the scope of a VSA pur sang.

Even when directed at non-US trades, this anti-competitive conduct may well have an effect on domestic US markets, since the shipping industry is a global industry.

The green light the FMC has given to 2M on the basis of the current notification has prevented it from acquiring from the parties themselves the information necessary for assessing the possible effects on domestic US markets of anti-competitive conduct of 2M directed at non-US trades.

Arrangements made within the framework of conference and discussion agreements permitted in safe havens such as Singapore have in particular escaped scrutiny.

Conversely, the green light has also prevented 2M from making, at an early stage, a reasonable case for demonstrating that its anti-competitive conduct directed at non-US trades and permitted under Singapore Competition Law, does not have a direct, substantial and foreseeable effect on

economic activity and consequently patterns of trade in the US.

The “wait and see” attitude the FMC has adopted is all the more serious since in cases where the anti-competitive conduct directed at non-US trades would indeed have an adverse effect on domestic markets, possible damage inflicted would probably be irrecoverable.

### Court action against FMC

On the whole, it may be argued that the decision of the FMC on 2M penalises the legal protection that the US Shipping Act is supposed to provide.

Hence, it may well encourage interested parties to take court action against the FMC for failure in properly applying the Act.

Apart from being a legal error, the decision of the FMC also hampers the setting-up of a monitoring system enabling not only the FMC, but also the entire shipping industry falling within US jurisdiction – so other alliances and lines, shipper groups and ports – to discern and identify anti-competitive conduct that distorts fair competition and has an effect on domestic US markets, from a global perspective.

Such a monitoring system must meet requirements such as an exchange of evidence with, and investigation of, particular matters by other regulatory bodies.

Co-operation between regulatory bodies in this regard is therefore a must.

The FMC has announced that it will set up a monitoring system for 2M.

It has also announced that it will consult with China's Ministry of Transport on the 2M alliance.

There can be hardly any doubt that the decision of the FMC on 2M will hamper these consultations when it comes to the creation of the common legal tools, which are necessary for setting up a monitoring system that enables the assessment of global alliances from a global perspective.

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Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/containers/article450094.ece>

Published: Thursday 09 October 2014

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## Lloyd's List

# Industry viewpoint: alliance and compliance — can the twain ever meet?

Tuesday 28 October 2014, 16:10 by August J Braakman\* [Back to Lloyd's List Containers](#)



Beijing's P3 rejection has wider repercussions for shipping.

### **Beijing's rejection of the P3 box alliance and its consequences raise questions for shipping**

SLOWLY but steadily the shipping industry is recovering from Beijing's rejection of the proposed P3 container shipping alliance and is bracing itself to cope with 2M, the planned alliance between Maersk and Mediterranean Shipping Co that replaces P3.

Apart from liner alliances and lines, shipper groups and ports must also address the consequences of global mega-alliances such as 2M.

The only option left to the industry is to take a global view, otherwise it will be unable to compete on an equal footing with other parties concerned.

Regulatory bodies must not lag behind and must devise the legal tools that will enable them to take a global view as well.

The informal consultations between the Federal Maritime Commission and the Chinese Ministry of Transport on the 2M alliance may be a major step forward towards devising the right legal tools.

### **The backdrop**

On June 17, 2014, the Chinese Ministry of Commerce rejected the P3 alliance.

This decision created a shock wave in the shipping industry, as the main consideration for the rejection was that Beijing felt the alliance was not compliant with "social public interest" and did not "promote a healthy development of the socialist market economy" in China.

Beijing's rejection of P3 can be seen as a corollary of China's industrial policy.

The two other major jurisdictions under which P3 has been assessed, ie the European Union and in the US, have taken a different approach, giving P3 the benefit of the doubt.

Both jurisdictions based that decision on considerations of fair competition.

The three regions' diverse conclusions highlight why shipping must understand the considerations underlying those decisions regarding P3 and to identify what must be done to deal with those decisions' aftermath.

*The demise of P3 makes it abundantly clear that shipping needs a system that allows regulatory bodies and other parties to assess global alliances from a global perspective.*

*The approach of Chinese anti-monopoly law to anticompetitive conduct differs so fundamentally to the equivalent EU and US approaches that Beijing will play a crucial role in creating such a system.*

### **Global thinking**

*The guiding star in devising a global system must be that the sheer size of an alliance can never be a licence for castrating fair and undistorted competition, by marginalising the role of the three main regulatory bodies and by playing them off against each other.*

*It must offer a global level playing field to all parties concerned.*

*Article 1 of China's anti-monopoly law states that one of its guiding principles is to protect fair competition in the market.*

*Besides fair competition, other guiding principles are "social public interest" and "promoting the*

*healthy development of the socialist market economy" in China.*

*The last two overly broad concepts allow for decisions that can only be explained from the point of view of industrial policy.*

*This highlights the importance of considerations that, only indirectly if at all, relate to the realisation of fair, undistorted competition that creates a level playing field for all parties.*

### **Precedent**

*The rejection of P3 is the first case in which Beijing has ruled that an alliance between exclusively non-Chinese companies is contrary to the country's industrial policy.*

*Clearly, in reaching this conclusion, Beijing was taking into account the situation of the biggest Chinese shipping company, Cosco.*

*Party to 18 conference and discussion agreements, Cosco also participates in the then CKYH alliance, to which the P3-alliance would have been a severe competitor.*

*Cosco, moreover, is in a precarious financial position.*

*The question, then, is what if the P3 alliance had allocated slots to Cosco; would this have affected Beijing's decision?*

*In all likelihood, allocation of slots to Cosco would have stimulated positive strategic and financial changes in the company.*

*Allocation of slots could have been deemed to be in the "social public interest" and beneficial to "promoting the healthy development of the socialist market economy" in China.*

*If so, the chances of P3 might have been better.*

*Obviously this does not mean that allocating slots to Cosco would have led Beijing to approve the P3 alliance, however.*

*It is worth looking now at the likely consequences of Beijing's P3 decision for other alliances, in the context of China's anti-monopoly laws.*

### **The 2M alliance**

*On July 10, 2014, three weeks after the rejection of P3 on June 17, Maersk and MSC announced that they had entered into the so-called 2M alliance, without launching administrative procedures or revising the original P3 proposal.*



*2M operates 21 strings, six on the Asia/north Europe and four on the Asia/Mediterranean trade lanes.*

*The 2M alliance aims to come on stream early in 2015 with a lifespan of 10 years.*

*Both Maersk and MSC appear confident that the three main regulatory bodies will give their approval.*

*With regard to China, this optimism stems from the fact that the ministry of commerce was unhappy with the market share of the P3 alliance in the first place.*

*What has also contributed to this optimism is the intention that instead of forming an independent network operator with powers of execution, 2M will have a joint co-ordination committee based in London to monitor its daily operations.*

*As was the case with P3, the partners plan to retain independent pricing and marketing.*

*The differences between P3 and 2M seem smaller than suggested by the parties to 2M.*

*P3 intended to operate 255 vessels with a capacity of 2.6m teu. Maersk was to contribute 153 vessels and MSC 92.*

*2M has 185 vessels with an estimated capacity of 2.1m teu. Maersk will contribute 110 vessels; MSC will put in 75.*

*Based on a snapshot from April 1, 2013, taken by Drewry with regard to P3, the market share of the 2M participants will drop on the Asia/north Europe trade lanes from 45.5% to 34.9%.*

*It will also drop on the Asia/Mediterranean trade lanes, from 54.6% to 41.8 %, on the transpacific trade lanes from 28.5% to 21.1% and on the north Europe-Americas trade lanes from 34.6% to 31.1%.*

#### *Full-blooded*

*The parties to 2M take the view that the alliance is a full-blooded vessel-sharing agreement and argue that such pur sang VSAs do not need regulatory approval from China's ministry of commerce.*

*Registration with the Ministry of Transport always requires the Bei-An — filing for the record — procedure.*

*Although this is a formality, the ministry may question participants about agreements under*

*registration on their rates and operational matters.*

*If there is a sufficient presumption of unfair competition, the ministry can carry out a probe, either at its own initiative or at the request of an interested party.*

*The ministry of transport is not an anticompetitive body in itself.*

*In carrying out a probe, it will have to co-ordinate with the ministry of commerce, the National Development and Reform Commission, which focuses on cartel behaviour, and the State Administration for Industry and Commerce, which looks into government-initiated monopoly.*

*Therefore, in cases where the ministry of transport carries out a probe, the other regulatory bodies will be involved as well.*

*Regarding the risk that Beijing may take the same view of 2M that applied in the case of P3, it is important to remember that Beijing's decisionmaking in competition cases takes account of public opinion.*

*China Central Television is one of the most influential propaganda tools in China.*

### *Influence*

*Although it does not directly represent the official view, the broadcaster plays an important role in forming public opinion.*

*CCTV's negative reporting on Volkswagen and Apple forced the two multinationals to recall products or to apologise.*

*On July 23, 2014, in a rare report about shipping, CCTV said that the 2M alliance could raise prices for Chinese customers and challenge Chinese shipping lines.*

*In the state broadcaster's view, fresh concerns lay with the combined market shares of 2M members Maersk and MSC.*

*Given that these were the arguments on which Beijing's rejection of P3 was based, the ministry of transport may have to consider a probe.*

*Fresh impetus to investigate may rest on the fact that the two lines participating in the 2M alliance are party to seven conference and discussion agreements, five involving China-linked trade lanes.*

*Each of these agreements functions under the the laws of Singapore.*

*Singapore has extended its block exemption for liner shipping conferences until December 31, 2015.*

*Under this block exemption, and provided that certain conditions are being met, lines are allowed to co-operate on:*

*technical, operational or commercial arrangements price and remuneration terms.*

*Hence, under the laws of Singapore, the two lines participating in the 2M alliance are allowed to intensify their co-operation to a stage that goes far beyond the scope of a VSA pur sang.*

### *Singapore angle*

*Would it be too far-fetched to assume that the co-operation permitted under Singapore's competition law can be used by 2M as a substitution for a network centre and may fulfil more or less the same role as the role originally entrusted to the P3 alliance network centre?*

*In my view, this assumption is not too far-fetched and could very well prove to be correct.*

*If it can be demonstrated that the 2M alliance will increase prices for Chinese customers and that 2M — itself and with the withdrawal by Maersk and MSC from all other VSAs in which they participate — poses a major challenge to alliances in which Chinese shipping lines participate, a probe seems the logical course of action.*

*In that case, Maersk and MSC will have to make a reasonable case that their co-operation, as permitted under Singapore competition law, is directed at non-Chinese markets and does not have the above consequences.*

*In more general terms, they will have to demonstrate that 2M will not have a direct, substantial and foreseeable effect on economic activity — and consequently on patterns of trade — inside China.*

*If they do not succeed, this may indicate that 2M is a close-knit alliance in disguise, in which case the main considerations for Beijing to oppose P3 would apply to 2M as well.*

*And that means that a swift and inconspicuous implementation of the 2M-alliance by Beijing may not be a fait accompli at all.*

### *G6 and CKYHE*

*So far, the Chinese authorities have not had any issues with VSAs pur sang.*

*As they have not had an issue with the G6 and the CKYHE alliance, it must be concluded that*

*these alliances qualify as VSAs pur sang in Beijing's view.*

*Therefore, if seen from a national perspective, the question whether the decision on P3 might affect G6 and CKYHE must probably be answered in the negative.*

*However, from a global perspective, the Chinese authorities might see reason to reconsider their position on the basis of the same arguments set out above with regard to 2M.*

*With regard to G6, such a step may be encouraged even further by the fact that this alliance has transferred its fleet control to Singapore, which, as mentioned previously, has extended its block exemption for liner shipping conferences until December 31, 2015.*

*In my view, one explanation — and perhaps the first — for the decision of G6 to transfer its fleet control to Singapore is its intention to exploit the opportunities that Singapore's extension opens with regard to co-operation on technical, operational or commercial arrangements, on price and on remuneration terms.*

#### *Going further*

*Hence, under the laws of Singapore, the lines participating in the G6 alliance probably intend to intensify their co-operation to a stage not covered by the G6 alliance agreement registered with the ministry of transport.*

*This goes far beyond the scope of VSAs pur sang.*

*Here the same applies. If there is evidence that, though directed at foreign markets and permitted under Singapore's competition law, the anti-competitive conduct of the G6 alliance may have a direct, substantial and foreseeable effect on economic activity and thus on patterns of trade inside China, the G6 would fall within the scope of the anti-monopoly law after all.*

*If so, the alliance will have to be re-assessed in accordance with the rules of this law.*

*The same approach may be taken with regard to CKYHE.*

#### *The Ocean Three alliance*

*On September 9, 2014, CMA CGM, United Arab Shipping Co and China Shipping announced that they had entered into a VSA under the name of Ocean Three, consisting of 129 vessels.*

*In addition to four services on the Asia-Europe route, two to be operated by CMA CGM and two by UASC and China Shipping, CMA CGM will operate two services on this route in partnership*

*with Evergreen.*

*Ocean Three will not have an independent network operator with full executional powers.*

*The parties will run their own vessels from Marseilles, Dubai and Shanghai. Although the alliance has an initial life span of three years, it is an open-ended arrangement that may be prolonged.*

*It is interesting to note that Ocean Three will focus on the ports of call where CMA CGM has an equity interest.*

*As the market share of Ocean Three on the Asia-Europe, transatlantic and transpacific routes will remain well under 30%, the parties will not seek clearance in the EU in view of the EU policy of self assessment.*

*Nor will they do so in China as, in the carriers' opinion, Ocean Three is a VSA pur sang.*

*In China, Ocean Three will only be filed with the ministry of transport under the Bei-An procedure.*

*In the US, it is the FMC where notification will be effected and clearance sought.*

*With regard to a global assessment of Ocean Three, the same approach may be taken that has been suggested with regard to 2M, G6 and CKYHE.*

*Another reason for considering this approach is the global co-operation agreed between UASC and Hamburg Süd on September 24, 2014.*

*The co-operation is initially in the form of slot exchanges.*

*It offers Hamburg Süd access to the South America trade, to become a real global carrier.*

*UASC was entitled to enter into this co-operation since the Ocean Three alliance does not preclude the parties from maintaining or entering into co-operative agreements with others.*

### ***Globalisation***

*Beijing's rejection of the P3 alliance and its aftermath has fundamentally and permanently changed the legal landscape of the shipping industry.*

*It has forced other alliances and lines, shipper groups and ports to address, from a global viewpoint, the consequences of global shipping alliances.*

*In addition to shipping lines forming 2M, CKYHE and Ocean Three, shipper groups have intensified their call for deeper involvement of competition regulators.*

*One way to do so has been to insist on liner alliances being submitted to regulatory bodies, monitoring their compliance with the competition rules and on the introduction of a centralised notification system to ensure that shippers get service modification.*

*The latter includes information on transit times and ports served, at a stage early enough to enable shippers to account for modifications in their transport plans.*

*Ports are beginning to tone down their traditional rivalry and to search for co-operation to counter the growing bargaining power of liner alliances.*

*Since P3 and 2M have forced other liner alliances and lines to expand their geographic reach by deploying ships of present-day size, these initiatives must and will be taken and implemented from a global perspective.*

*For the sake of legal certainty and fair and undistorted competition between all parties at a global level, regulatory bodies cannot lag behind, and must therefore take a global view as well.*

### *Urgency*

*From this global perspective, they will need to offset the benefits of cost savings and environmental efficiencies that VSAs may procure against possible distortions of competition as a result of concentration of decisionmaking power in terms of port coverage, sailing schedules and trade lane capacity.*

*The urgency for regulatory bodies to assess global alliances from a global perspective manifests itself all the more with regard to the each of the four mega-alliances.*

*With regard to each of these alliances, members participate together in the following conference and discussion agreements:*

#### *2M:*

*Asia-Australian Discussion Agreement*

*Asia to Caribbean Trade Agreement*

*Asia-West Africa Trade Agreement*

*Asia-west coast South America Freight Conference*

*Southeast Asia and South Asia/Australia Trade Facilitation Agreement*

*Transpacific Stabilisation Agreement*

*West coast of South America Discussion Agreement*

**G6:**

*Informal Rate Agreement*

*Informal South Asia Agreement*

**CKYHE:**

*Intra-Asia Discussion Agreement*

*Transpacific Stabilisation Agreement*

*Westbound Transpacific Stabilisation Agreement*

**Ocean Three:**

*Intra-Asia Discussion Agreement*

***Influence***

*It seems likely that these alliances will have a dominant influence on the strategic and other decisions taken in the conference and discussion agreements in which their members collectively participate.*

*It follows that competition in global containerised shipping may be reduced to, or at least severely affected by, the competition between the above four mega-alliances.*

*Other lines will be reduced to second-tier players, irrespective of whether or not they participate in these or other conference and discussion agreements.*

*As each of the four mega-alliances has a global scope, one cannot deny the urgency for regulatory bodies to arrive at a global assessment of the conduct of these alliances within and outside the conference and discussion agreements in which their members collectively participate.*

*This especially applies to a situation in which members of two alliances together participate in the same conference and discussion agreement.*

*This is the case with the members of CKYHE and Ocean Three in the Intra-Asia Discussion Agreement and of CKYHE and 2M in the TSA.*

*It is clear that these two alliances will use IADA and TSA as vehicles for co-ordinating their competitive behaviour at a global level.*

### ***New legal tools***

*The question now is whether the jurisdictions of the three main regulatory bodies provide legal tools that are up to date and capable of being extended to arrive at a global balance.*

*In my view, this question must be answered in the negative.*

*The tools they offer for taking decisions in such matters are out of date and too limited in geographical scope to take globally effective, predictable and consistent decisions that in turn promote transparency and accountability and instill confidence.*

*The present lack of proper legal tools will cause liner alliances and lines to imitate the slalom techniques adopted by the 2M alliance.*

*These are found in taking each gate by following an escape route furthest away from the applicable competition rules, yet still permitted by the jurisdiction concerned.*

*These techniques may be defended from 2M's point of view since they may enhance its already dominant position in the global market of containerised shipping.*

*However, this does not hold from the point of view of competition.*

*Therefore, the regulatory bodies will need to act and devise legal tools that enable them to take a global view.*

*It is unacceptable that regulatory bodies acquiesce in slalom techniques by arguing that their legal tools are insufficient for them to take proper action from a global perspective.*

### ***Survival***

*Even in the short term, such acquiescence will produce unpredictable and inconsistent decisions.*

*That will lead to cut-throat competition between liner alliances and lines and, moreover, between other parties concerned, such as shipper groups and ports, which will eventually result in survival of the strongest only.*



*Surely a regulatory body cannot condone this.*

*In devising the tools to enable them to take a global view, the three regulatory bodies must take into account the characteristic position of the shipping industry.*

*At the time, the main argument for repealing the EU block exemption for conference agreements was that, over the years, the shipping industry had developed into an ordinary industry that should be governed by the same set of general rules as any other industry.*

*In principle, this argument still holds.*

*However, the diverging regulatory approaches towards P3 demonstrate that the specific characteristics of the shipping industry are such that it needs specific rules that are fine-tuned to meet its own demands.*

*The starting point for the achievement by the three main regulatory bodies of a common legal basis for taking a global view must be the concept of extra-territoriality as applied within their respective jurisdictions.*

*Each jurisdiction considers fair competition a cornerstone for implementation of this concept.*

*However, it is also true that each jurisdiction treats this cornerstone from a different perspective.*

*In addition, safe havens where the laws are lax, such as Singapore Competition Law, play an important role in the implementation of this concept of extra-territoriality.*

## **European Union**

### **Guiding principle**

*The EU envisages competition as essential to an economy whose characteristic features are free enterprise and free choice of place to work and method of consumption. Competition is therefore seen as an alternative to governmental economic planning.*

### **Enforcement**

*In principle, the EU Commission is disposed to leave responsibility for anticompetitive conduct in the shipping industry with alliances and lines through a policy of self-assessment and control afterwards.*

*The only guideline specifically geared to that industry, which is still applicable, can be found in the block exemption for consortia agreements.*

*However, this block exemption cannot in any way serve the purpose of providing a point of reference for analysing the competition issues of alliances and other agreements between lines from a global perspective.*

*As a result, the shipping industry is dependent on the general EU competition rules and the case-by-case approach that the EU Commission seems to favour.*

*So far, this approach has failed to demonstrate excellence as far as swift and decisive actions are concerned.*

*Consider for instance the statement of November 22, 2013, in which the commission announced that it had opened formal proceedings against several lines, including 2M participants Maersk and MSC, to investigate whether they had engaged in concerted practices in violation of EU competition rules.*

*Not a word has been heard from it since.*

### **Extra-territorial application**

*Anti-competitive conduct directed at foreign markets may come within the scope of EU competition law and therefore within the jurisdiction of the EU Commission, even when permitted under foreign jurisdictions.*

*Such is the case when the anti-competitive conduct affects crossborder economic activity inside the EU and consequently the patterns of trade between member states.*

*The effect of that conduct on other undertakings inside the EU must be accounted for; not the actual location of this conduct. This effect must furthermore be direct, substantial and foreseeable.*

*The EU does not offer specific guidelines for self-assessment of the extraterritorial application of its competition laws.*

*Hence, alliances and lines rely on the jurisprudence of the European Court of Justice and the case-by-case approach of the EU Commission.*

## **The US**

### **Guiding principle**

*Like the EU, the US envisages competition as a regulator of economic activity and an alternative to governmental economic planning.*

**Enforcement**

*Unlike the EU Commission, the FMC is disposed to prevent excessive concentrations by curbing mergers and terminating monopolies through a policy of pre-launch notification.*

*If the FMC fails to agree with the parties on amendments that would bring their alliance in line with US competition rules, and the commissioners vote against the alliance after their 45-day period of inquiry, the FMC will need to take court action to stop the alliance going ahead.*

*Under the US Shipping Act, the FMC must apply to a district court, which can either issue a temporary restraining order or preliminary injunction, or a permanent injunction if it concluded that the alliance was likely to damage competition by reducing its transport services or by applying unreasonable price increases.*

**Extra-territorial application**

*Applying US competition law to anticompetitive conduct directed at foreign markets, the FMC takes the same approach as the EU, also in cases where this conduct is permitted under foreign jurisdictions.*

*However, the US Courts have gone a step further than the EU Court of Justice and the EU Commission, indicating that the domestic effect of the conduct need not be the same effect that causes the injury on the foreign market.*

*This means that the anticompetitive effect on the domestic market need not give rise to a specific claim.*

*It seems likely that the EU Court of Justice and the EU Commission will adopt a similar attitude, where appropriate.*

**China****Guiding principle**

*Contrary to the EU and the US, China envisages fair competition as only one of the guiding principles of its economic policy.*

*Other guiding principles are "social public interest" and "promoting the healthy development of the socialist market economy" in China.*

*Therefore, the Anti-monopoly Law, which was not adopted until 2007, cannot be seen as an alternative to governmental economic planning.*

**Enforcement**

*The legal tools that the four Chinese regulatory bodies dispose of for applying and enforcing the Anti-monopoly Law were set out above.*

*Therefore, at this point, it suffices to reiterate that the overly broad concepts of "social public interest" and "promoting a healthy development of the socialist market economy" bring about considerations indirectly or not at all related to the creation of fair competition. These considerations sometimes appear out of proportion within the decision eventually taken.*

*The ensuing decisions can only be explained from the point of view of industrial policy.*

*However, the Anti-monopoly Law does not preclude decisions that can only be explained from the point of view of fair competition.*

### **Extra-territorial application**

*As far as the principle of fair competition is concerned, the competition rules and application of these in the EU and the US have served as a template for the Anti-monopoly Law of China.*

*Therefore, it may well be that in implementing the concept of extra-territoriality, the Chinese regulatory bodies will cast their nets as wide as their colleagues in the EU and the US in enforcing fair competition.*

*As only non-Chinese lines were involved in the P3 alliance, the rejection of that alliance may indicate that this route is likely to be taken.*

### **Safe havens**

*A particular problem that arises with regard to implementing the concept of extra-territoriality is that the global range of action of shipping alliances implies that no regulatory body acting alone can obtain reliable information on which to base decisions that are justified from a global perspective.*

*To make things worse, global alliances usually draw up and administer their agreements and keep their records in countries where laws are lax, even though the participants do little or no business in such a safe haven.*

*The transfer by G6 of its fleet control to Singapore may serve as an example.*

*An extension of the scope of the competition laws to these countries could very well create problems on a political level.*

*This may be the reason why, until now, regulators have attempted to interfere as little as possible in anticompetitive conduct directed at foreign markets and permitted under foreign jurisdictions.*

*However, the formation of global shipping alliances means that this approach is no longer acceptable within the shipping industry.*

*The shipping industry is a global and highly concentrated market, with large barriers to entry.*

*Liner alliances and lines fix prices and exchange strategically sensitive information on a regular basis and over a long period of time under the jurisdiction of safe havens like Singapore, where they are allowed to do so.*

*Given the global activities of the alliances, there can be hardly any doubt that this conduct is likely to stabilise prices and facilitate co-ordinated behaviour in markets outside the jurisdiction of Singapore, even when it is not directed at these last-named markets.*

*This being so, it can be argued that the transfer of the fleet control of G6 to Singapore is evidence of the wrongful intent of that alliance to realise the above results in jurisdictions that prohibit such anticompetitive conduct, such as those of the US and the EU.*

*Therefore, proper application of the concept of extra-territoriality should ensure this conduct comes within the scope of these jurisdictions.*

### **Concerted approach**

*The above is the perspective from which the three main regulatory bodies must find a common legal basis for assembling and exchanging data to take a global view on global liner alliances.*

*In my opinion, their guiding principle must be creating at a global level fair and undistorted competition that offers a level playing field to all parties, not only liner alliances and lines, but also shipper groups and ports.*

*A global set of rules on which the EU Commission, the FMC and MofCom can agree is obviously the preferable approach. However, under the present circumstances, this is a bridge too far.*

*Therefore, in my view and in anticipation of a global set of rules, each of the main regulatory bodies should draw up specific guidelines on the extra-territorial application of its competition rules to the shipping industry in general; liner alliances and lines, shipper groups and ports.*

*These guidelines should be based on the principle of fair and undistorted competition that provides for open and competitive markets and a level playing field for all parties concerned.*

*The jurisdictions of all three regulatory bodies permit this approach.*

*The guiding star in drafting these guidelines should be that anti-competitive conduct directed at foreign markets, which has a direct, substantial and foreseeable domestic effect, falls within the*

*scope of the competition laws of the EU, the US and China, even in cases where the anti-competitive conduct is permitted under foreign jurisdictions and/or where the effect on the domestic markets does not give rise to a specific domestic claim.*

*With such guidelines, each regulatory body should set up a clear and transparent system monitoring each and any form of global co-operation in the shipping industry.*

*The contents of these monitoring systems should be made public, to enable all parties — not only liner alliances and lines but also shipper groups and ports — to discern and identify from a global viewpoint any distortion of competition.*

*Confidentiality rings such as those imposed by the EU Commission in the case of air cargo, which made the decision available only to the claimants' external advisors, are no option.*

*Statutory or administrative obstacles to compliance with investigative requests from other regulatory bodies should be eliminated.*

*Exchange of evidence and investigation of particular matters at the request of another regulatory body should be secured.*

*Monitoring systems equipped with criteria permitting a global view will enable all parties to discern whether the conduct of global alliances is contrary to fair competition, in particular when use is being made of information acquired within the framework of conference and discussion agreements that are permitted in safe havens where laws are lax.*

*Regulatory bodies should use the information assembled by these systems to take swift and globally effective, predictable and consistent decisions that will in turn promote transparency and accountability and instill confidence in them and the law they implement.*

### ***The FMC and 2M***

*On October 9, 2014, the FMC decided not to prolong the 45-day period of inquiry and gave the green light to the 2M alliance.*

*In my opinion, in doing so the FMC has not only failed to properly apply the US Shipping Act but has severely hampered the creation of the legal tools necessary for assessing global alliances from a global perspective.*

*My arguments are two-fold.*

*The notification of the 2M alliance with the FMC on August 27, 2014, provides telling proof of the need to assess global alliances from a global perspective.*

*In this notification, Maersk and MSC take the view that the Asia-Europe trade and other non-US trades are not subject to the US Shipping Act and, as a result, do not come within the jurisdiction of the FMC.*

*In their view non-US trades needed not to be reflected in the 2M VSA that was notified with the FMC.*

*Therefore, the green light given to the 2M alliance implies that the assessment by the FMC was limited to trades that only include US ports.*

*In my opinion, this is an error.*

*Although not elaborated on in sector-specific guidelines, the extra-territorial application of the US Shipping Act forms an indissoluble and important part of this act.*

*Therefore, anti-competitive conduct, even when directed at non-US trades and permitted under foreign jurisdictions, comes within the jurisdiction of the FMC if it has a direct, substantial and foreseeable effect on domestic US markets.*

*The chance of this happening arises especially in the case of 2M, since Maersk and MSC together are party to seven conference and discussion agreements where decisions are taken regarding anti-competitive conduct that is permitted under foreign jurisdictions such as the Singapore Competition Law.*

### *Exemption*

*Singapore has extended its block exemption for liner shipping conferences until December 31, 2015.*

*As previously mentioned, under this block exemption, and provided that certain conditions are being met, lines are allowed to co-operate on:*

*technical, operational or commercial arrangements price and remuneration terms.*

*Hence, under the laws of Singapore, the two lines participating in the 2M alliance are allowed to intensify their co-operation to a stage that goes far beyond the scope of a VSA pur sang.*

*Even when directed at non-US trades, this anti-competitive conduct may well have an effect on domestic US markets, since the shipping industry is a global industry.*

*The green light the FMC has given to 2M on the basis of the current notification has prevented it acquiring from the parties themselves the information necessary for assessing the possible effects on domestic US markets of anti-competitive conduct of 2M directed at non-US trades.*

*Arrangements made within the framework of conference and discussion agreements permitted in safe havens such as Singapore have in particular escaped scrutiny.*

*Conversely, the green light has also prevented 2M making, at an early stage, a reasonable case for demonstrating that their anti-competitive conduct directed at non-US trades and permitted under Singapore Competition Law does not have a direct, substantial and foreseeable effect on economic activity and consequently patterns of trade in the US.*

*The wait-and-see attitude the FMC has adopted is all the more serious since in cases where the anti-competitive conduct directed at non-US trades would indeed have an adverse effect on domestic markets, damage inflicted would probably be irrecoverable.*

*On the whole, it may be argued that the decision of the FMC on 2M penalises the legal protection that the US Shipping Act is supposed to provide.*

*Hence, it may encourage interested parties to take court action against the FMC for failure in properly applying the act.*

#### *Hindrance*

*Apart from being a legal error, the decision of the FMC also hampers setting up a monitoring system enabling not only the FMC but the entire shipping industry falling within US jurisdiction to discern and identify anti-competitive conduct that distorts fair competition and has an effect on domestic US markets, from a global perspective.*

*Such a monitoring system must meet requirements such as an exchange of evidence with and investigation of particular matters by other regulatory bodies.*

*Co-operation between regulatory bodies in this regard is therefore a must.*

*The FMC has announced that it will set up a monitoring system for the 2M alliance.*

*It has also announced that it will consult China's Ministry of Transport on the 2M alliance.*

*There can be hardly any doubt that the decision of the FMC on the 2M alliance will hamper these consultations when it comes to creating common legal tools necessary for setting up a monitoring system that assesses global alliances from a global perspective.*

*August Braakman, an advocate based in Rotterdam, the Netherlands, is secretary-general of the European Maritime Law Organisation. The opinions expressed in this article are the author's*



*own and are not in any way to be attributed to Emlo.*

Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/containers/article450583.ece>

Published: Tuesday 28 October 2014

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## Lloyd's List

# Industry viewpoint: Will fair competition between ports be undermined by super-sized alliances and ships?

Wednesday 08 April 2015, 13:14 by August Braakman Back to Lloyd's List Containers



Container lines with ultra large boxships wish to berth in as few ports as necessary with as many containers as possible.

### **Competition lawyer Gus Braakman questions whether antitrust laws are up to the task of ensuring ports are free to compete in the new industry landscape**

OVER the past year, the landscape of ports of call for container carriers has been fundamentally changed by two interrelated events.

The first event involved the creation of two mega alliances, followed by the upgrading of two more global consortia.

Together, 2M, Ocean Three, G6 and CKYHE are now dominating the global containerised liner shipping market.

This is particularly true for the Asia-Europe trade, where these alliances control every available

service.

The second event involved the deployment of ever-larger container carriers.

As of today, the total number of carriers of over 18,000 teu on order is 66; more are expected to follow before long.

MOL has signed a contract with Samsung Heavy Industries on the construction of four 20,150 teu vessels, while CMA CGM has commissioned Hanjin Heavy Subic to build a trio of 20,600 teu ships.

There can be no doubt that these two events will fan competition between ports — fierce as it already appears — even further.

Container lines with ultra large boxships wish to berth in as few ports as necessary with as many containers as possible.

In order to retain and improve their drawing power, ports must satisfy this wish by accommodating their inner harbours to the draught of this new generation of ships, and their capacity ashore to the number of containers they carry.

Failure to do so may result in reduced visits and eventual defeat.

The financial and social impact of lines and shippers reducing their visits to a certain port of call is considerable.

Port activities contribute directly to employment, inward investment and growth of the gross domestic product of the country concerned.

Intra- and inter-port competition are among the main drivers imposing fierce competitive pressure on cargo-handling services provided by ports.

In order to achieve their objectives, ports will probably have to call upon their governments for financial support.

Positive governmental responses in this respect need to be assessed within the framework of competition law, more particularly the laws on state aid.

This in turn raises the question as to whether competition laws of the jurisdictions of the ports of call are sufficiently equipped, and whether regulatory bodies are sufficiently prepared.

These conditions are required to ensure that the measures and investments intended to improve the pulling power of a port of call are assessed from the perspective of fair competition.

Unfortunately, when pondering the question as to whether this is in fact the case, I think the answer is "No".

### **Joint-venture contracts**

In the first place, this would apply to countries that adopt a national ports policy and/or own the ports.

China is one of the examples here.

Communist regimes exclude private ownership and, in particular, ownership and investments of foreign companies.

During the past 10 years, China has been diluting this principle with regard to its sea ports.

Big international players in the transshipment of containers, such as Hutchison Ports Holding from Hong Kong, PSA from Singapore, and APM Terminals from the Netherlands, have made joint-venture contracts with local port companies and are thus actively involved in the development, financing and management of container terminals in China's most important seaports.

However, this does not mean these ports will enter into fierce competition with each other, which will be to the detriment — or even lead to the defeat — of one or more of them.

In China, competition issues are assessed under the Anti-Monopoly Law. This law envisages fair competition as only one of the guiding principles of its economic policy.

Other guiding principles are "social public interest" and "promoting the healthy development of the socialist market economy".

As a result, considerations relating only indirectly or not at all to the creation of fair competition and to be interpreted only from the point of view of industrial policy may form the base for assessment of measures and investments meant to improve the drawing power of Chinese ports of call.

As not only the ministries of commerce and transport but also the National Development and Reform Commission and the State Administration for Industry and Commerce are involved in the assessment of possible anti-competitive behaviour, this approach provides a perfect starting point for China to adopt and transpose a national ports policy.

To the financial and social situation of the country concerned, however, the impact of a reduction

of visits to a certain port of call is such that the Chinese approach may well constitute an example for other countries and their regulatory bodies; also if these countries should not have a national port policy and/or own the ports, and should consider fair competition as a regulator of economic activity and an alternative to governmental economic planning.

### **General competition laws**

In assessing the way ports rise to the challenge posed by the two events named above, it is not only competition laws on state aid that should be accounted for, but general competition laws as well.

The four mega alliances are party to 13 conference and discussion agreements.

If allowed under the jurisdiction of so-called safe havens, prices under these agreements are fixed, with strategically sensitive information being exchanged on a regular basis, and over a long period of time.

To alliances, this would more than likely constitute an important factor in their reconsiderations of traditional ports of call.

Singapore is one of the first ports to have risen to the new challenge, by constructing a new mega port in Tuas. This will double its container-handling capacity. The first phase of development is expected to be completed by 2023.

Interestingly, Singapore is one of the so-called safe havens.

Other ports, such as Seattle and Tacoma in the US, are trying to meet the challenge by stepping up and intensifying their co-operation with each other.

Although the fact that these two ports are vested in the same country clearly enhances their chances of success, at the same time it raises the question as to whether a form of co-operation between ports vested in different countries is conceivable.

Neil Davidson of Drewry believes this would only be feasible if national interests present a multitude of vested interests, as is the case with the North Atlantic Ports Association between the ports of Trieste and Venice (Italy), Koper (Slovenia) and Rijeka (Croatia).

In his opinion, co-operation between ports such as Antwerp and Rotterdam (Belgium and the Netherlands) would be far less likely.

### **Equity interest**

My main argument is that the future strategies of mega alliances will play a decisive role in determining whether the endeavours of ports will succeed or fail.

These strategies may well result in a situation in which parties to an alliance will focus on ports of call in which some — or all of them — take an equity interest.

In turn, this might result in a reduction of visits to traditional ports of call.

A first example of this development is Ocean Three, where parties agreed to focus on ports of call where CMA CGM takes an equity interest.

An economically thriving port is so important to a country that, out of sheer necessity, the only remaining alternative for ports and governments to avoid kowtowing to the strategies of mega alliances may be to seek and intensify co-operation with ports and governments of other countries.

This would make co-operation between ports such as Rotterdam and Antwerp a feasible option indeed.

The above reflections would inevitably lead to the conclusion that all interested parties would be well advised to carefully monitor the ways in which ports and governments and especially global mega alliances will follow up on the two events named above, and how to assess their follow-up under applicable competition laws.

Immediate action is called for, even in case of the slightest doubt as to whether their lawfulness is concerned.

Intentions, after all, are countered far more easily than their ensuing facts.

*August Braakman, an advocate based in Rotterdam, the Netherlands, is secretary-general to the European Maritime Law Organisation. The opinions expressed in this article are the author's own and are not in any way to be attributed to Emlo.*

Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/ports-and-logistics/article459843.ece>

Published: Wednesday 08 April 2015

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## Lloyd's List

# Piraeus privatisation opens legal can of worms

Wednesday 10 June 2015, 18:47 by August Braakman [Back to Lloyd's List Containers](#)



Control of Piraeus would strengthen China's influence on the maritime trade corridor between China and the EU.

### **Cosco's plans for Piraeus could expose weaknesses in EU competition law**

COSCO has emerged as the front-runner to acquire control of Piraeus, Greece's largest port, which is being privatised.

Should the state-controlled Chinese group gain a foothold in the Mediterranean, northern European ports could find themselves unfairly disadvantaged.

In March 2014, the board of directors of the Hellenic Republic Asset Development Fund decided to sell a 67% stake in Piraeus Port Authority, which runs the port.

Immediately after the January 2015 elections, Greek prime minister Alexis Tsipras and his left-wing Syriza government halted the sale, arguing this was "for the protection of the interests of the common Greek".

Considering the financial situation in Greece, however, they were forced to withdraw from this

position and state that all existing privatisation contracts would be honoured and all initiated procedures, such as the privatisation of PPA, continued.

China's state-owned, Communist Party-controlled Cosco Group is widely viewed as being the favourite in the privatisation of PPA.

If Cosco gains majority control of the port's container facilities, it will enhance the group's plans to develop Piraeus into a major logistics hub, especially for Asia-manufactured goods bound for the European Union.

Furthermore, the acquisition would strengthen China's influence on the maritime trade corridor between China and the EU.

### **The threat**

While this development will greatly benefit Piraeus and Greece's economy in general, there can be no doubt that it will also be detrimental to the position of north European hub ports such as Rotterdam, Antwerp and Hamburg as primary gateways into and out of the EU.

### **Factual reasons**

Cosco benefits from preferential access to credit provided by Chinese financial institutions. This will increase the group's financial ability to improve the drawing power of Piraeus as a hub port.

Second, there are indications that handling costs per teu in Piraeus are lower than those in other Mediterranean ports.

Last but not least, Cosco is part of the CKYHE alliance, which accounts for a 24% market share on Asia-north Europe routes. The five carriers within this alliance pool their vessels on the Asia-Europe trades and conclude joint contracts with terminals and ports, or at least co-ordinate their contracting efforts.

The acquisition by Cosco of the entire container handling facilities will probably lead to a further increase in traffic through Piraeus by the alliance partners, in particular for Asian-manufactured goods bound for European markets. This development will certainly affect the position of north European hub ports.

## Legal reasons

There is no clear and universally accepted demarcation of the roles of public and private sectors. Depending on the circumstances, these roles can vary greatly. As a result, neither is there any clear demarcation between non-economic activities, which are in the public interest and must be executed and financed by the state, and economic activities, which are in the private interest and must be executed and financed by private parties.

The ensuing uncertainty is strengthened by the fact that EU law provides for a specific regime for economic activities assigned to a private undertaking, but that are nonetheless in the public interest.

In principle, these activities come within the scope of EU competition law. However, an exemption is made in cases where application of this law would obstruct, either in law or in fact, specific tasks the government has assigned to the private undertaking.

This lack of legal certainty may — and, in my opinion, will — create ample room for disagreement on the possible application of EU competition law to future activities of Cosco in regard to the further development of the port of Piraeus.

This uncertainty will be detrimental to the legal protection this law is supposed to provide.

In addition to converting Piraeus into the main container hub port in the Mediterranean, Cosco clearly shows itself to be interested in developing the hinterland connections of Piraeus. To this end, it has concluded a separate contract with Greece's state-owned rail firm Trainose for the purpose of improving sea-rail intermodal services from Piraeus to southeast Europe.

Also in regard to the development of the hinterland, the above legal uncertainty and the ensuing room for disagreement on the possible application of EU competition law, applies.

## The customers

A first sign of the severity of the threat that developments in and around Piraeus pose to north European hub ports, is that an important group like Hewlett-Packard has decided to transfer a major part of its distribution activities from Rotterdam to Piraeus.

According to an agreement signed in 2013 between Hewlett-Packard, Cosco and Trainose, the company will use Piraeus as its main ocean gateway for cargo bound for southern, central and eastern Europe, and Central Asia, North Africa and some parts of the Middle East.

Chinese telecom equipment producer Huawei, ZTE — another major Chinese telecoms firm — and Samsung Electronics from South Korea, are said to follow suit and to establish major distribution centres in Piraeus.

Other major multinational companies such as Dell, Lenovo, IKEA and LG are also interested in choosing Piraeus as their regional distribution centre.

## Legal protection

European Union competition law does not offer the legal tools required to guarantee effective protection against unfair competition within and between ports.

The main reason is that as yet, the law does not provide for a specific legal framework for port services and port management.

So far, the European Commission has dealt with competition law issues in these areas on the basis of the general provisions of EU competition law and EU case law.

This approach originates from a conviction that EU competition law is disposed to leave responsibility for anticompetitive conduct by way of adopting a policy of self-assessment and control in arrears.

It is virtually impossible for ports and other interested parties to assess— all by themselves and without any guidance from the commission — the possible anti-competitive effects of aids granted by governments to competing ports in order to improve or maintain their drawing power, or to assess unfair conduct by these competing ports in general.

The EU institutions have recognised this and have undertaken various initiatives to develop a common port policy. So far these initiatives have failed, due to different views regarding the economic role of ports.

In May 2013, the commission made the most recent attempt in this regard, by submitting, for the third time in succession, a regulation to the European Parliament and the Council of Ministers introducing common rules on transparency of public funding and market access of port services. This regulation aims to provide better allocation of scarce public funding and an effective and fair application of state aid rules in ports.

In view of the role of “critical player” the European Parliament has adopted in the regulation, it could be some time before the regulation is adopted.

Pending EU regulation, north European ports and other interested parties like port users would be well advised not to sit back and wait for legal developments, but to take the initiative. A first step could be to facilitate direct access to information relevant for a technical analysis, available from all the stakeholders when they are urged upon to actively engage with each other and discuss the problems faced by their port(s).

At the April seminar of the European Maritime Law Organisation in Athens, Federal Maritime Commissioner William Doyle recommended this approach. In doing so, he referred to the recent US Pacific Ports Operational Improvements Agreement.

Mr Doyle takes the view that the agreement "is a major step toward having key parties cooperate and work together on a common goal of increasing the flow of goods throughout the west coast".

Although, under the agreement, parties cannot discuss, negotiate or agree upon freight rates or compensation, they can discuss joint operation matters.

A useful basis for discussion will be the report issued by the FMC in April entitled "Rules, rates and practices relating to detention, demurrage, and free time for containerised imports and exports moving through selected US ports".

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Article from Lloyd's List

<http://www.lloydslist.com/ll/sector/containers/article462880.ece>

Published: Wednesday 10 June 2015

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