ENDEMANN.SCHMIDT
Partnerschaft von Rechtsanwälten mbB

Liner Shipping and Competition Law in the European Union

Horizontal consolidation in Liner Shipping

EU Competition Law Policy vis-à-vis Liner Shipping Conferences, Consortia and Alliances

Around 90% of EU goods in international trade are transported by sea. Due to the fear of putting the own vessels at a disadvantage within the setting of international trade, the liner shipping industry has enjoyed special treatment and was largely exempt from competition law. Only in the later part of the 20th century did competition law start to be applied to this economic sector.

The main competition concern in liner shipping is horizontal cooperation between carriers. Over the years, cooperation has been the standard model of operation in liner shipping, first via “conferences”, then via “consortia”.

I. Competition Law Issues

1. The historic model of cooperation – „Liner Conferences“

In the 19th century, international trade developed rapidly and so did the number of vessels put to sea. This resulted in the creation of considerable overcapacity, with far more ships available than were needed to meet demand. With the aim to preserve their profits, many ship owners pooled their vessels, and agreed on their schedules and rates, organizing themselves in the form of “liner conferences”. Contracts included loyalty rebates, exclusivity, and the pooling of revenues and/or volumes according to a fixed quota, with a view to eliminating any remaining “internal” competition among them, e.g. in the quality of the services they rendered.

Conferences maintained a “secretariat”, which was responsible for preparing tariffs, providing shippers with general marketing and pricing information, canvassing and organising all relevant data, and checking compliance with the conference rules. As such, today in the EU, conferences are widely regarded as equivalent to cartels.

For political and economic reasons, these conferences remained unchallenged by regulators until well into the 20th century. However, changing political environments and the evolution from regular liner shipping to containerised liner shipping - which requires a different kind of cooperation between carriers - disrupted the old order.

Gradually, liner shipping was brought within the scope of European competition law.

2. The current model of cooperation – “Liner Consortia”

As “liner conferences” became unlawful, a new form of cooperation among liner shippers developed: “liner consortia”. Liner consortia are purely operational cooperation arrangements: members align their schedules but operate strictly independent pricing strategies. Capacity on container trade is rationalised and joint liner services are offered. This kind of cooperation is understood to bring along many benefits in terms of reduced costs, and a constant level of quality, reliability and coverage of services.

In the EU, liner consortia remain block exempted from the application of Article 101 Treaty of the Functioning of the EU (TFEU) and will remain so until 2020 (Commission Regulation (EU) 697/2014).

In recent years, there has been a growth in global “shipping alliances”, which are a type of consortium whose geographic scope is not limited to a single trade, but covers a global liner route. Until 2013 there had been two main alliances: the "Green alliance” and “G6”. In 2014, a wave of consolidation started, such that, from 2013 to 2015, there has been a radical change in the liner shipping seascape with a doubling of the number of alliances, aligning 16 of the world's top 20 carriers in one of four alliances: “CKYHE”, “G6”, “2M” and “Ocean Three”.

3. Trends

The liner shipping sector is still undergoing considerable consolidation. Vessels are getting larger and more efficient, being able to deliver significant savings. In order to ensure access to as much cargo as possible and maximize utilization rates, liner shipping companies continue to engage in cooperations in the form of consortia, alliances and through mergers.

Ideally, big alliances with ships of ever-increasing size will lead to gains in efficiency bringing along cheaper transport costs, ultimately benefitting consumers. However, this is only possible if consolidation does not reach a certain threshold beyond which alliances could be able to increase their rates and become hubs for anticompetitive information exchange.

Today, in the EU, information exchange as a vehicle for unlawful cooperation between competitors has become one of the main areas of competition law concern. In November 2013, the EU Commission opened antitrust proceedings in a liner shipping case for alleged "price signalling" in form of an exchange of future pricing intentions through public announcements.

In principle, alliances are beneficial and bring about important efficiencies. However, once a certain threshold is exceeded, consolidation is no longer about efficiency gains, but about achieving a monopolistic position. The difficulty for competition authorities and regulators worldwide, is determining where this fine line lies.

II. The Extraterritorial Application of EU Competition Law

Not EU-based companies need to be aware of EU competition law as it can be applied to non-EU undertakings as well.

1. Art. 101 and 102 TFEU

European competition law is applicable whenever the conduct in question has an appreciable effect upon interstate trade. This test is applied in a liberal way and there is no reason in principle that the conduct of non-EU undertakings might not satisfy this test.

EU competition law has been applied where non-EU undertakings had participated in anticompetitive practices through subsidiary companies located in the EU, but under control of the non-EU parents. Furthermore, the EU Commission became active when several non-EU undertakings implemented an agreement within the EU.

A final decision of the EU courts and competition authorities will often be served on a subsidiary within the EU, or directly to the non-EU undertaking by using diplomatic channels. Whenever a decision includes orders against and imposes penalties upon a non-EU undertaking, both the EU courts and competition authorities have recognised that it would not be possible to actually enforce the order in the territory of a foreign State. However, any assets owned by the undertaking and located in the EU could be seized.

2. EU Merger Regulation (EUMR)

According to Art. 1(2) of the EUMR, concentrations that have a Union dimension must be pre-notified to the EU Commission. A concentration has a Union dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million, and the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million.

This thresholds lead to the fact that even transactions far removed physically from the EU may have a Union dimension. For example, a joint venture between two substantial undertakings that leads to a merger in Singapore could be notifiable under the EUMR, even though it will have no presence or effect on the EU market, if the parents exceed the turnover threshold of Art. 1 EUMR. In these cases, however, a simplified procedure will apply.

Munich, 01.02.2016

Diana Ferri, LL.M.
(King's College London)

ENDEMANN.SCHMIDT
Partnerschaft von Rechtsanwälten mbB
Arnulfstraße 56
80335 München
+49 89 2000568 20
diana.ferri@es-law.de