

Position Paper

Review of Regulation 906/2009 - Consortia Block Exemption Regulation

Introduction

CLECAT, the European Association for Forwarding, Transport, Logistics and Customs Services, represents national federations of European multinational, medium and small freight forwarders, logistics operators and customs agents. Freight forwarders and customs agents are clearing more than 60% of all cargo transported by sea and as such represent a large share of users of maritime shipping services. Therefore, CLECAT has a primary interest in the future framework for liner shipping consortia as the current Consortia Block Exemption Regulation (BER) will expire on 25 April 2020.

Summary

- The ability of shipping lines to enter into horizontal and cooperation agreements may be beneficial provided agreements meet the requirements of Art 81(3).
- A block exemption from competition law is not required for this purpose. In the interests of effective competition, the Regulation should not be renewed.
- In case the Regulation is renewed, consortia and alliances should receive clear guidance to avoid collusive actions in the maritime supply chain. For this purpose, the scope of the regulation should be limited, in particular with regards to the provision of services and data exchange.

Consortia and Competition in liner shipping

Shipping lines wishing to operate together can do so within consortia and alliances. Alliances are cooperation agreements between lines, which generally consist of vessel-and slot-sharing agreements with global coverage, covering several services. The difference between consortia and alliances is somewhat blurred and is sometimes treated as one and the same.

A consortium is an operational co-operation agreement between two or more liner shipping carriers with a view to providing a joint service on a trade, i.e. focusing on a single maritime service. While a consortium agreement allows its members to share space on the vessels used for the joint service, they market their services individually. Consortia focus on a single maritime service and can include vessel sharing agreements or slot sharing agreements, while alliances tend to generalise this practice over several services.

CLECAT is not opposed to the existence of consortia as joint-service agreement between liner shipping services with the aim of rationalizing their operations (by means of operational arrangements) can be beneficial to the provision of services. They may allow a range of lines to be present in trades that they would not otherwise enter and as such improve the services available to forwarders and shippers. In all probability, it has also increased the number of services on a given route.

Provided consortia meet the general guidelines of the European Commission regarding horizontal and cooperative agreements, they could continue in the future. Repealing the block exemption would



therefore not end consortia and alliances but would allow them to be more closely scrutinised for anti-competitive behaviour, which is particularly relevant at this time of greater consolidation in the liner shipping industry and other important structural changes.

The Commission has granted a block exemption from the competition rules for liner shipping consortia since 1995 and has renewed the exemption four times. Such horizontal agreements between competitors must be strictly governed by competition law in order to ensure operational and technical co-operation does not become anti-competitive through an excessive market share and dominance on any particular trade lane or specific market. The size of a consortium is limited by its share of the relevant market. Currently, the threshold is set at 30 per cent of the market (measured by TEU or tonnes) above which consortia need to self-assess their agreement.

As noted by the Commission's regulation on consortia, there should always be competition on price (both from within the consortia and with the 'outsiders'), service range and variety (i.e. ports of call, schedules and frequencies) and service performance. In effect, Recital 7 of the Regulation refers to the general view of CLECAT in this regard: *"Users can benefit effectively from consortia only if there is sufficient competition in the trades in which the consortia operate."*

CLECAT considers it vital that any revision to the consortia regulations maintains this principle: competition must be maintained between lines operating within and between consortia and non-consortia shipping lines. The concern is that on many trades there are no longer independent shipping lines operational. In view of this regard, CLECAT is concerned that the block exemption given to the liner shipping industry to establish consortia has not been closely adhered to in recent years.

Trends in the liner shipping industry

Since the last review of the BER the liner shipping industry has undergone a period of consolidation. As outlined in the recent ITF report on the impact on alliances¹, the three global alliances (2M, Ocean and THE Alliance) in which all major carriers are represented since early 2017 now account for [around 80% of overall container trade](#) and operate [around 95% of the total ship capacity on East-West trade lanes](#), therefore giving them a powerful position on the market.

The top 4 carriers accounted for 60% of the global container shipping market in 2018. The market share of the biggest carrier (19%) is larger than the market share of any global liner alliance before 2012, which signifies the different character of current alliances. This has also been underlined in the UNCTAD Reviews of Maritime Transport [2016](#) and [2017](#) which pointed to the risk of concentration leading to oligopolistic market structures impacting on the market and freight rates.

CLECAT has surveyed its members on the developments in liner shipping, and it has been generally noted that competition in liner shipping is of concern, given the insufficient choice of services and carriers, as well as sub-standard service in terms of punctuality, capacity and shipping lines' responsiveness.

In this regard, CLECAT is concerned that the effects of increased consolidation and concentration on the liner shipping market are amounting to de facto anti-competitive practices through a reduction in

¹ ITF, The Impact of Alliances in Container Shipping, 2018



choice, accompanied by decreased service quality. It has also been observed that alliances have attributed to an increase in market power.

The other ongoing trend is the over-reliance on mega-ships. Ships with a capacity over 17 00 TEU's represented around a third of the new-build container capacity during 2015-2018.² ITF concludes in another study on the impact of mega-ships that mega-ships have driven overcapacity in the sector which made it difficult for carriers to achieve the reduction in per-unit operating costs, and is the main cause of the lack of profitability of container shipping.

There is a perception that many problems, such as blank sailings (cancelling of a service), stem from the use of ever larger vessels. The increasing overreliance on ULCVs by the carriers on the Far East to Europe route create problems for parties such as port operators, which are hard pressed to handle the unloading/loading of the vessel within the allotted timeframe for the vessel being in port. As an example, the free storage period starts from the time that the rope lands on the quay, and it can take up to three days to discharge a container from the vessel, effectively reducing the free storage period.

It has become largely impossible to compete on price on the Far East Europe trade outside the alliance structure. There is no independent carrier offering ocean shipping services between Asia and Europe. This issue is creating a concertina effect in the supply chain with delays and costs. It has also been observed that alliances give very considerable bargaining power or "monopsony power" to carriers with regard to ports and terminals. This could raise competition concerns if dedicated terminals exclude other carriers and if carriers' terminal investments raise entry costs that make container shipping a less contestable market. The emerging digitalisation initiatives could potentially provide carriers with information on land-side transportation and logistics that they could use to strengthen their position as global integrator.

Suspicion has also been expressed that carriers are using their positions within integrated logistics groups to undercut forwarders by charging demurrage to merchants who arrange the transport in merchant haulage but waive the charge for merchants for which they arrange the transport in carrier haulage.

In summary, the main trends observed are:

- Market consolidation
- Reduction in meaningful choice and service³

² ITF The Impact of Alliances in Container Shipping 2018

³ ITF report on the impact of alliances page 26 'The newest generation of alliances is associated with declining weekly service frequencies and less direct port-to-port connections. The decline of weekly service frequency is the result of bigger ships and alliances and has been ongoing since at least 2006 (Notteboom et al., 2017). Over the last five years, the average weekly service frequency on the Asia-North Europe trade lane has decreased from 24 in 2012 to 15 in 2017 (Figure 5). With the currently expected annual capacity growth, one to two additional Asia-North Europe services are likely to be closed in 2018-2019, according to Sealntel (2018: 351). Alliances result in less direct port-to-port connections, via the rationalisation of service networks of different carriers'.



- Lack of real competition on either price or service
- The carrier's inability to balance supply and demand resulting in rate volatility
- Increasing overreliance on ULCVs by the carriers on the Far East to Europe route
- Poor service levels and schedule visibility⁴
- The lines using global systems have become over reliant on IT (resulting in poor quality when it comes to shipping knowledge)
- Lack of accountability by carriers in a commercial/legal sense (with regards to issues like bills of lading and invoicing)

Which line a forwarder chooses will then only depend on price and service performance; yet, as the lines are co-coordinating their schedules and frequencies, and the freight may actually be moving on a ship or through a terminal that belongs to another line rather than the one with which the booking was made, the customer has far less control or influence over certain aspects of service performance offered (e.g. schedule reliability, handling etc.).

Freight charges are a relatively small element of the total shipping costs. Shipping line's surcharges and their legitimacy has been challenged by many of CLECAT's members. Past attempts by lines to hike rates have included surcharges for equipment imbalance, peak season and currency, along with other fuel surcharges. The number of surcharges and fees continues to grow, many of them with no real explanation or justification, which makes it difficult to pass on these costs to forwarders' customers. Allowing for this plethora of additional fees and surcharges supports the view that the carriers are not competing on cost or service levels.

Another interesting trend is that carriers, some of which receive state aid (in the form of shipping funds, exemptions from taxes and social contributions) are increasingly moving towards integrated models and offer services, which brings them in direct competition with freight forwarders and service providers. Ultimately, the impact on the customer could be a reduction in competition and less choice. ITF has noted that 'customers could be locked into one holistic supply chain solution that does not necessarily represent best combination of different parts (which is what the freight forwarder would normally present) but that are chosen because they belong to the same company.'⁵

The Consortia Block Exemption Regulation

Market definition: The size of a consortium is limited by its market share on a given trade lane. Currently the threshold is set at 30 percent of the market (measured by TEU or tonnes). As noted above, the impact of the ongoing vertical and horizontal integration is that the relevant market is no

⁴ See also ITF report page 23: 'The new alliance structure has not had a favourable impact so far: the average schedule reliability of container carriers over 2017 ranged from 71%-81% which was considerably lower than the range of 82%-85% achieved in 2016 (SeaIntel, 2018; 360). Overall schedule reliability of carriers has decreased to 66.4% in the first quarter of 2018, 6% lower than in the first quarter of 2017 (SeaIntel, 2018; 360). This has been the lowest performance documented since the first data record in 2011.'

⁵ ITF report on the impact of alliances Page 46



longer a port-to-port maritime transport service but rather a door-to-door service. CLECAT would question allowing the carriers to exchange date on land transport.

The BER 906/2009 exempts certain activities of consortia from normal competition rules as follows:

1. the joint operation of liner shipping services including any of the following activities:
 - a. the coordination and/or joint fixing of sailing timetables and the determination of ports of call;
 - b. the exchange, sale or cross-chartering of space or slots on vessels;
 - c. the pooling of vessels and/or port installations;
 - d. the use of one or more joint operations offices;
 - e. the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;
2. capacity adjustments in response to fluctuations in supply and demand;

CLECAT comment: as capacity is the key competition parameter which drives prices on the market, such consortia are generally found to restrict competition. Capacity adjustment provides carriers with a tool to collude and has an impact on price.
3. the joint operation or use of port terminals and related services (such as lighterage or stevedoring services);

CLECAT comment: CLECAT believes that this provides carriers with negotiation powers – any future legal framework should make it clear that carriers should not be allowed to have joint negotiations.
4. any other activity ancillary to those referred to in points 1, 2 and 3, which is necessary for their implementation, such as:
 - the use of a computerised data exchange system;
 - an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;
 - an obligation on members of a consortium not to assign or charter space to other vessel-operating carriers in the relevant market or markets except with the prior consent of the other members of the consortium.

All these joint operations and exchange of information can provide alliances with opportunities to collude as they provide carriers with in-depth insights on the cost structures of their competitors. In case the Commission decides to extend the BER, CLECAT would recommend the following given the issues currently encountered with service quality and accountability from carriers:

- limit the scope of the activities of the agreements to ensure that carriers do not have the possibility to favour and give preferential treatments to own subsidiaries involved in the door to door movement of containers. Such preferential treatment may refer to terminals, freight forwarders, trucking companies, inland terminals etc; Equally this should ensure that carriers



- do not abuse their dominant position by joint purchasing of terminal services.⁶
- attach certain obligations to the exemption. In this respect, provision should be made for a minimum period of notice to be given to forwarders before substantive changes are made to the provision of the maritime transport services of the consortium or any agreement it has entered into with other consortia and non-consortia shipping lines;
 - add for minimum service levels, in order to avoid de facto anti-competitive practices from emerging through alliance cooperation. However, it remains to be seen whether this would be practicable, as such an approach would require clear, enforceable criteria and KPIs to be laid down in law. The reality is that service levels are variable and subject to contractual agreements.

Coherency with other EU/international initiatives

The general policy of the European Commission has been to harmonise competition rules. Phasing out automatic sector-specific exemptions would be consistent with the Commission's policy of phasing out all sector-specific block exemptions. The horizontal guidelines and article 101(3) offer self-assessment guidance. CLECAT appreciates that there is ultimately a need for consistency with competition policies in other parts of the world but would encourage the Commission to take a leadership role and to take the recent recommendations from the ITF into account, in line with the growing trend in countries to limit special treatment of shipping.

Conclusion

Maintaining competition and choice based on price and service differentiation remain the key measures of what will be acceptable to freight forwarders. CLECAT maintains that consortia represent a legitimate business mechanism for otherwise competing liner shipping companies to improve their offer. Liner shipping companies can co-operate in consortia if they believe this gives them greater scope for providing a range of services. CLECAT reiterates that the block exemption itself is not necessary and reduces competition by giving carriers a free pass to reduce service offerings. We would therefore urge that it is not renewed and that consortia are treated under the same general competition legislation as other business interests.

General guidelines exist for regulating horizontal industry agreements, and further guidelines could clarify to what extent consortia could provide benefits to users and outline restrictions on practices related to data exchange and the purchase of port services. CLECAT maintains that an effective oversight and monitoring of consortia and strategic alliances may be needed to ensure effective implementation of these guidelines. This should ensure enforcement of competition rules in the changed landscape of the liner shipping industry to enhance the accountability of the shipping lines.

⁶ Recent substantive changes to the Shipping Act have been adopted by law (4/12/18) primarily address antitrust issues related to recent consolidation in the maritime industry and the emergence of ocean carrier alliances. The Act protects these service providers by limiting ocean carriers from engaging in excessively anti-competitive strategies when collectively negotiating with terminal service providers.