

Unclassified

DAF/COMP/WP2/WD(2015)9

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

05-Jun-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

COMPETITION ISSUES IN LINER SHIPPING

-- Costa Rica --

19 June 2015

This document reproduces a written contribution from Costa Rica submitted for Item IV of the 59th meeting of the Working Party No. 2 on Competition and Regulation on 19 June 2015.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>

Please contact Ms. Cristiana Vitale if you have any questions regarding this document [E-mail: cristiana.vitale@oecd.org]

JT03378013

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/WP2/WD(2015)9
Unclassified

English - Or. English

-- Costa Rica --

1. General Background

1. Maritime transport along the years has remained as the merchandise exchange system more relevant at international level, being a very important component when discussing the issue of global trade. Costa Rica as a country with an emerging economy and before the globalization has this system as part of the trade that operates with other jurisdictions to import and export merchandise, goods and supplies.

2. By not counting with the maritime transport service, intercontinental trade, the bulk transport of raw materials, the import, the food exports and manufactured goods they could not be carried out. This type of transport is characterized by respond to the transfer of significant amounts of goods and other large capacity as the volumes traded. This is because this type of transport responds special features depending on the transferred large quantities of products and other type of goods that could only be transported by ships, whereby transportation costs are diminished when compared with ground transport service or air.

3. It is important to note that international shipping cargo liner is organized through calls Liner Conferences and these correspond to a group of two or more shipping companies operating regular services of international cargo transportation and have reached an agreement to provide that service in a coordinated.¹

4. On this issue before assessing the fundamental aspects describing the situation of maritime transport in the country from the standpoint of competition, Needless to say, around 1975 our country ratified the Convention on Maritime Conferences Conduct adopted under the auspices of the Conference on Trade and Development (UNCTAD) the April 6, 1974 and this was ratified by Costa Rica through Law No. 6074 of July 22, 1977, under which the country joined the international system of regulation of such associations.

5. Following the ratification of liner conferences, in 1995, Costa Rica enacted competition law by creating the Law on Promotion of Competition and Effective Consumer Protection, Law No. 7472 (onwards Law No. 7472), in order to guarantee the process of free competition of economic agents, establishing a set of clear rules and precise that every economic operator must meet in order to enforce their rights and avoid engaging in anticompetitive practices that distort the market for goods and services.

6. This is how, with the Competition Law, the Costa Rican government moved from a protectionist economy to protect in a more proactive competition, in which a plurality of operators involved with clear rules on the market.

7. The issue of liner conferences can be approached from the perspective of competition policy, as the cooperation agreements that are made between shipping companies whose interests are directed to serve in a particular line of well-defined boundaries, common conditions to operate and freight transport, ensuring the regularity of their itineraries. However these type of partnerships allow pricing and volumes in the provision of international transport of goods.

¹ As defined in Article 1 of the Convention on a Code of Conduct for Liner Conferences, a maritime conference is: "A group of two or more carriers shipping companies providing regular services of international cargo on a particular route or a particular routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which it operate in a uniform or common freight rates and any other agreed conditions with respect to the provision of services regular. "

1.1 Scope for Liner Conferences as established in Article 46 of the Political Constitution.

8. With regard to the issue, in our legal system the Convention on the Code of Conduct for Liner Conferences was ratified, before the anti-monopoly laws were enacted, which although has an active Competition Law, this implies that the powers that shipping companies have who are operating in the Costa Rican market and which are associated to these conferences they hold a special treatment under the treaty subject to which they are associated.

9. According to the above, the Constitutional Court by resolution 2004-098363 indicated that it does not consider that the liner conferences can antagonize the precepts protected by Article 46 our Constitution and thus, which may affect the protection of competition. In this manner it was indicated, the determination of the correct application of the tariffs by shipping agents, obeyed to a matter of the Convention, by indicating the guidelines for their solution.²

10. As in other countries, some of the behaviors that are part of the Codes for Liner Conferences, are considered contrary to the existing laws of competition in Costa Rica, as in the case of agreements that exist between competitors for pricing and distribution of the markets, however, such conduct can not be punished in accordance with Article 11 of the Competition Act which protects the absolute monopolistic practices, considering that this type of behavior is allowed by an international treaty that is due to a higher norm which is above our Competition Act. With the results from the method described, the Competition Commission (COPROCOM) is unable to sanction cases under the rules of competition are anticompetitive practices.

2. Experience the Competition Authority regarding the existence of Liner Conferences in our jurisdiction and the application of competition laws.

11. For the purposes of assessing and analyzing the market for maritime transport, and the conditions under which it operates and the context in which the service is provided freight, it is necessary to consider the issue of liner conferences and scope of these regulations relating to Competition.

12. A number of major shipping companies providing transportation services internationally are attached to a protected group behaviors series Conferences, promoting agreements, cooperation agreements and other figures to govern the service, thus far to foster healthy competition it is what they bring harm to the dynamic nature of markets.

13. This industry is characterized by being concentrated, since most of shipping larger capacity are what their conditions become more involvement when compared to smaller shipping, which do not have extensive resources and bargaining power might be weakened relative to other.

14. In the case of Costa Rica, any shipping company or organization interested in providing international shipping services container must meet the minimum legal requirements for any company operating in the country, that is, you must register locally.

15. The possibilities of competition in this sector are spacious, since there are no barriers of consideration for a shipping company to provide services in the territory, however, the problem is that these companies be unionized these conferences have the possibility of fixing prices and volumes of service, among other things, which gives them a special qualification at market level.

² Judgment N° 09836 from the Constitutional Court of the Supreme Court of Justice of September 3, 2004.

16. Currently, around twenty two shipping companies offer their services in the country by vessels designed and adapted to provide the service of transportation of goods and passengers, in the ports of the Atlantic and Pacific.

17. Therefore, there are no impediments of consideration that limit entry to our ports of vessels dedicated to providing the service of shipping goods or persons, however, they must meet the operational requirements to dock at the respective springs, without any differences regarding the possibilities for a boat is the national and international levels to provide services using local ports.

18. For the Competition Authority is a reality that before the existence of the Code of Conduct for Liner Conferences, such regulations do not favor competition but rather promote monopolistic behavior, considering that some of its rules allow for the setting of rates to distribution market, in consequence, shipping companies for the very essence of its organizational structure, they have no incentive to compete with other agents as these can apply their prices on a given territory, exercising a domain that creates advantages over other agents as well as to lead its bid.

19. In addition to the comments as a result of the activity of shipping companies, they have generated some distortions regarding the hiring of land transport used to move goods from the port of landing to final destination. In this case, shipping companies may be exerting a power domain to hire these services by establishing contractual conditions that may generate some losses for carriers and service users in the end would be the most affected. The above, It is a result of the distortions caused in the market as a result of the benefits that are granted to these agents under cooperation agreements in this sector.

20. This body is clear that in a system of competition rules, the efficiency and effectiveness of its application is that these should be applied to all the agents making up the markets without exceptions that may hinder the objective of the competition process.

21. It is essential to avoid as well as through legal procedures and accurate, operating price agreements and distribution market in this sector, since such arrangements with damage to the users of these services are generated by increasing the costs to be covered for the transport of goods and that will be reflected in the price of products purchased by consumers. The above, under the international treaty still it remains in force.

3. Prior notification of concentrations in the case of shipping companies present in the Costa Rican market

22. The containership operators, HAPAG-LLOYD German origin and Chilean COMPAÑÍA SUD AMERICANA DE VAPORES INC., They reported in April 2014, the concentration that involved the integration of both under Articles 16, 16 bis y 16 ter of the Law No. 7472; legislation that was included by amendment to the Law No. 7472 in the year 2012 to monitor prior control of merger in a compulsory manner for companies that integrated the Costa Rican market according to the established thresholds.

23. This operation was analyzed, under which Costa Rica is concerned this negotiation because it is about companies with local subsidiaries that provide transport services to customers in the country. Among the services provided by these agents, was identified the transport of cargo and related support, resulting in handling procedures at ports, customs and recruiting service providers, including the hiring of land carriers which complete the transport service "door to door", among others.

24. In the analysis performed in this market, it was determined that it is possible to transport containers to other ports in Central America, but assuming significant time and investment expenses for agents. The above, considering that by the Costa Rican Caribbean 80% of its exports are handled, making it the main gateway to the United States and the European Union³

25. The report prepared by the Promotora de Comercio de Costa Rica (PROCOMER) in relation to exports and imports of our country it was established that for the year 2007 the 81% of exports are carried by sea and 79% of the country's imports used this means of transport mainly through the ports of Limón and Caldera. However, it was indicated that since 2002 to 2007 there was a 55% growth in imports via sea, which places seaborne exports as the main means of transport for our country.⁴

26. In the previous study, it was not able to determine the result of the concentration, the merged entity could acquire market power to give him the ability and incentive to raise prices and reduce quantities produced, or the levels of innovation, quality or variety it offers its customers.

27. Also, it was determined that it was unlikely the existence of an express or tacit coordination between competitors to the existence of multiple combinations between regions, routes, ports, products, and distinctions between the various inclusions insurance, freights, customs costs of different services "door to door or port to port" and combinations thereof.

28. Another reason to consider that competition would not be affected root in that given the amount and heterogeneity of goods can be transported appreciating distinctions weight, value and volume, it was unlikely that could strengthen incentives for tacit coordination between the agents. Another important aspect refers to the existence of major competitors, demonstrating that somehow the market is contestable and therefore there are various possibilities for national exporters and importers.

29. Thus we conclude that even though the regulation on the subject for Liner Conferences is a reality in our jurisdiction there are other tools that have provided competition law to review these markets, which they can be studied through other legal figures such as the case of the prior notification of concentrations, avoiding those market structures that could facilitate anticompetitive agreements affecting the fluidity of markets, this being an important alternative measure to balance that can lead to the decisions taken at the organizational structures of the Conventions.

3.1 Relevant pronouncements from the Commission to Promote Competition

30. Once indicated the current shipping market situation, it should be noted that the Competition Authority has known several cases involving the issue of providing the service rendered by the shipping companies in the country, and the various situations under which these are operating.

31. One of the cases analyzed refers to the activities of the shipping company Demurrage Collection Services Inc, which he provided the service to a group of shippers. The question arose because the shipping fees charged to users for late return of containers this property. Moreover, It indicated that users were included on a list of defaulters and denied the possibility of hiring the services of transport of containers with other shipping lines to the company Demurrage Collection Services Inc lent them services collection of fines, among other situations. In this case, the Commission pointed out that the amounts of fines for late delivery of containers corresponding to an extension of the freight service that is part of the transport contract and to obey the uniformities of price agreements of the shipping companies, they would be

³ Note from the Newspaper La Nacion. The New Port on the Caribbean dated April 8th 2011.

⁴ Promoting Foreign Trade of Costa Rica: Characterization of the foreign trade volume of Costa Rica by ocean freight 2000-2007

covered by the scope of the Code of Conduct for Liner Conferences, as it has been interpreted by the Constitutional Court of our country.

32. With the above resolution, it has been indicated that the Commission could not meet the anticompetitive behavior resulting from the scope of the Convention, however, acts that could be qualified as anticompetitive acts and are not part of the activities allowed in the treaty, they could be object to be sanctioned.

33. Another experience in this sector, It refers to the complaint that was filed by the National Chamber of Coffee Exporters, against the shipping company Becker & Brammer and other shipping companies, for allegedly conducting monopolistic practices. In this case the Commission stated that given the existence of indications that the shipping companies may be performing rate agreements, for reasons of legal nature was not possible to initiate proceedings against the shipping companies investigated, since these could not be penalized under the argument that it is established that the tariff setting obeyed the scope of a special law and rank higher than the anti-monopoly-laws. In this statement the contrast is evident between the protection of anti-competitive practices and the upper range of an international treaty in relation to a special law in the case of the Competition Act.⁵

34. The Commission also heard the complaint that was filed against the shipping company Maersk Costa Rica Inc., which it offered its services through its division Maersk Logistic Costa Rica Inc. by implementing a policy alleged to impose a deposit to their customers by possible delays in returning containers, except for agents who have a credit line with the company. Complainant for the conduct could constitute an anti-competitive practice under Section 12 of the Law No. 7472, which protects relative monopolistic practices. In this case the Commission rejected the allegations on the grounds that the conditioning of the sale to pay a deposit to the delays for delivery of the containers did not constitute a practice of tied selling as established competition law, given that for this it was necessary to operate the service is made conditional on the purchase of other goods or services.

4. Final Considerations

35. Currently the Costa Rican jurisdiction has a Law for the Promotion of Competition and Effective Consumer Protection, which monitor the offenses that can operate in the market analyzed, however, there is an international treaty that is binding under the ruling of the Constitutional Court of Costa Rica, whose achievements are above those set out in the Anti-monopoly Law for those behaviors that are a result of the Convention.

36. The shipping market has no barriers consideration, however, competition that may occur in this depend on elements such as prices of services provided and the distribution of the goods transport market, obeying the rules of supply and demand, creating an atmosphere of healthy competition.

37. There is case law on cases involving anticompetitive behavior by shipping companies, as is the agreement on prices and volumes based on the service provided. However, these agents are outside the scope of the Law.

38. The Commission has the power to review acts that may be qualified as anticompetitive as long as their actions are not controlled by a standard range than the Competition Act, and they can prove the assumptions made. This implies that they should not differ from the agents that are part of the market that is to say, the application must be generally observed.

⁵ Ordinary Session 27-2006 of August 22 2006 of the Coprocom.

39. Actually, the Commission decided to carry out a preliminary investigation in the market of road freight containers, in order to meet market performance and identify procurement mechanisms that operate in this service and the possible behaviors. This considering that in this market it seems that there are some distortions to be reviewed under these could be the result of relations between operators on rates, costs and other aspects associated with service.⁶

40. Finally, it is a challenge for the country to achieve these practices can be governed by the laws of Competition, considering that they have not operated formal changes to be submitted to the investigation the agreements about prices and market distribution carried on by the shipping companies. Nonetheless, the exporting sector and other interested agents are interested that this situation changes, as have indicated to other government authorities about the need to generate reforms on this topic.

⁶ Administrative File IO-032-2014 from the Coprocom.