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Working Party No. 2 on Competition and Regulation

COMPETITION ISSUES IN LINER SHIPPING

-- Note by South Africa --

19 June 2015

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

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-- South Africa --

1. Introduction

1. South Africa is an exporter and importer of many goods and products to and from various countries around the world. The majority of these products and goods may only be economically transported by sea from and to South Africa. Unfortunately, South Africa unlike many other countries does not have its own shipping companies which enable it to compete in the international market. This is mainly attributed to its relatively small size in the global space. South Africa therefore relies mainly on foreign owned shipping liners to transport goods from South Africa to elsewhere around the world and vice versa.

2. Notwithstanding the above, the majority of shipping companies have a presence in South Africa due to South Africa's importance in the African continent as well as the minerals and vehicles produced in South Africa.

3. Whilst the Competition Commission of South Africa ("the Commission") has in the past investigated cartel conduct as well as exemption applications relating to shipping liners, there has been no Commission or Competition Tribunal ("Tribunal") (collectively referred to as Competition Authorities) ruling in the liner shipping industry. Most of the abovementioned exemption and cartel investigations seem to have mainly been triggered by exemptions granted in other jurisdictions such as Europe. The Commission has also received and considered mergers in the liner shipping industry.

4. This paper therefore reflects the experience of the Commission and highlights the challenges it has encountered in its approach to the liner shipping industry from the different enforcement and merger cases it has handled.

2. The structure of the liner shipping industry

5. As mentioned, South Africa does not have its own liner shipping companies and is rather serviced by foreign owned shipping companies. The discussion below is therefore based on liner shipping services provided in South Africa by these companies in respect of specific product sectors.

6. The shipping liner services currently provided in South Africa can be categorized into: (1) liner shipping services and (2) non-liner shipping services. Liner shipping involves the provision of regular, scheduled services for the carriage of cargo on one or more trade routes. It is distinguishable from non-liner shipping, i.e. bulk shipping, primarily on the basis of the regularity and frequency of its service. A non-liner shipping service does not operate on a fixed schedule or route, but rather on specific voyages on the basis of short or long term contracts concluded with a customer, and with the shipped cargo mostly belonging to this one single customer. Liner shipping instead, provides regular services between specified ports according to time-tables and prices advertised well in advance.

7. With the liner shipping category, there is a submarket for containerised liner shipping and conventional break bulk. Container vessels accommodate metal containers of a standard size, normally 20-40 feet long, which are lined next to each other in spaces referred to as slots, and can be stacked on top of each other; whilst conventional/bulk vessels usually have open holds in which goods are stacked until the holds are full.

8. Goods and products in the mineral and energy sector are mainly if not all, transported by sea from South Africa to other markets around the globe. For example, 90% of the South African coal production is mined in Mpumalanga province and transported by road or rail to the Richards Bay Harbour in the KwaZulu-Natal Province for shipment to export destinations. These products are shipped using non-liner shipping. South Africa has vehicle manufacturing plants which produce vehicles for the local and export market. Below are some of the plants and types of vehicles produced at those plants. Approximately 80% of the vehicles on South African roads are imported from various countries around the world. These vehicles are transported by sea through specialized cargo carriers such as Pure Car Carrier and Roll-on-Roll-off. The kinds of products are transported using specialised conventional bulk vessels and specialised containers. Other general cargo such as gas, textile products, building equipment, car parts and refrigerated goods are also transported by sea between South Africa and the world using containerised liner shipping.

9. The Commission has not conducted a detailed study in the liner shipping industry with regard to the degree of concentration on the trade routes to and from South Africa and its evolution over time. However, in the shipment of automobiles the Commission has established that European liner shipping companies dominate the trade route between South Africa and Europe. In the same way, Japanese liner shipping companies are dominant on the trade route between Japan and South Africa. The Commission established that Japanese vehicle manufacturers issue tenders for the transportation of vehicles to South Africa mainly to Japanese liner shipping companies. Similarly, a Korean liner shipping company will be dominant on tenders issued by a Korean vehicle manufacturer. For example, Kia/Hyundai has a shareholding interest in Eukor Car Carriers Inc, which transports most of Kia/Hyundai vehicles.

10. Thus, it appears that since South Africa does not have liner shipping companies, the concentration levels of the liner shipping market in South Africa will precisely mirror that of the trade partners, that is, if South Africa is trading with Europe then the concentration levels relating to the European/SA trade route will be the same as the European concentration levels.

3. Competition concerns identified

3.1 Enforcement

11. In cartel enforcement, the Commission identified competition concerns in the market for the shipping of vehicles, construction equipment and machinery by sea to and from South Africa. Our investigations indicate that car carriers respect each other's customers, trade lanes, routes etc. They also appear to have fixed the rates they charge their customers. The Commission is of the view that the competition problems in the car carrier market have their genesis in shipping conferences such as Japan and Hong Kong / South Africa Shipping Conference (JAHOSAS). However, since the fixing of rates through JAHOSAS is not limited to car carriers, the Commission believes this conduct may also be prevalent in other markets. Although they have since resigned from JAHOSAS in 2014, the Commission is aware that Nippon Yusen Kabushiki Kaisha Ltd, Mitsui O.S.K Lines Ltd and Kawasaki Kisen Kaisha Ltd were members of JAHOSAS.

12. The Commission also suspects that the conduct of market division, price fixing and collusive tendering in the maritime shipping of automobiles is perpetuated by customers of the shipping companies through their global sourcing system.¹ It has also been brought to our attention that Japanese vehicle manufacturers prefer to work with Japanese shipping companies (they refer to themselves as 3Js). Due to

A customer issues a tender for the shipment of vehicles produced in all its plants around the world. Because of limited capacity and different strength in different parts of the world, shipping companies are likely to coordinate their bid responses. For example company A may be strong on the route from South America to South Africa and company B may be strong on the route from Europe to South Africa.

these historical relationships, the shipping companies tend to respect each other's allocated businesses. Historically, Toyota Motor Corporation and Nissan had exclusive agreements with certain Japanese shipping companies. The Commission is uncertain as to whether these arrangements are still intact; however, it seems that shipping companies tend to keep to these historical arrangements.

13. Furthermore, the Commission identified limited competition concerns in the market for the transportation of citrus products by sea from South Africa to the United States of America. Our investigation revealed that the cartel conduct was limited to 2 players in the citrus fruit transportation market.

14. In 2005, the Commission received an exemption application from the Association of Shipping Lines ("ASL"). This association represents numerous shipping liners who sought an exemption from prosecution for contravening Chapter 2 of the Competition Act, 89 of 1998, as amended ("the Act").

15. In other words, the association requested the Commission to exempt the liner shipping industry from liability for engaging in, inter alia, the following conduct:

- Information exchange, discussions and evaluation between shipping lines servicing the same trade route;
- Consortium agreements between vessel-operating carriers providing international shipping services, which are stated as technical, operational and/or commercial agreements, with the exception of price-fixing.

16. This application was mainly based on industry designation. In August 2009, the Minister of Trade and Industry declined the application for designation. The Minister advised both the Commission and ASL that after he had consulted with the Minister of Transport, he could not find any economic basis to justify interfering in the liner shipping industry. The ASL subsequently withdrew its application following the refusal to designate the industry.

17. In 2014 the ASL lodged another exemption application with the Commission relating to certain category of agreements for the provision of containerised liner shipping services which is currently under review. The possible competition concerns that could arise from these arrangements include the potential negative impact of these consortia agreements and liner shipping conferences on smaller shipping liners.

3.2 Merger regulation

18. The Commission has recently considered a merger case² involving containerised shipping liners. The parties in this transaction (CSAV Germany Container Holding GmbH, Hamburger Gesellschaft für Vermögens und Beteiligungs Management mbH And Kühne Maritime GmbH And Hapag Lloyd AH) were members of a consortia and/or conference. The Commission found that the merger would not result in significant competition concerns as the parties' post-merger market shares would remain low.

4. The regulatory framework and the application of competition law to liner shipping

19. In South Africa, the liner shipping industry, as in most sectors, is not exempt from the application of competition law and any anti-competitive agreement between liner shipping companies is prosecutable under section 4(1) of the Act.

² Case number: 2014Aug0460.

20. South Africa has no separate industry regulatory bodies for the shipping industry; the Competition Authorities only regulate the shipping industry through merger review and enforcement proceedings. Further, no anti-competitive agreement that is exempt from cartel enforcement in another jurisdiction qualifies for automatic exemption in South Africa, nor does a merger transaction approved in other countries qualify for automatic approval in South Africa. Such anti-competitive agreements or mergers must be subjected to evaluation by the Commission, in the event that an application for exemption is sought or parties want to merger.

21. Therefore liner shipping conferences and consortia are considered in the normal process of merger regulation in cases where such conferences and consortia are likely to have the effect for example of enabling or strengthening collusion or substantially lessen or prevent competition. The Commission assesses the restrictions on competition and weighs them against potential efficiencies or pro-competitive gains likely to result.

22. With regard to exemptions, the Commission has powers to grant or refuse an exemption. According to section 10 (3)(b) of the Act, the Commission may grant an exemption only if the agreement or practice concerned, or category of agreements or category of practices concerned, contribute to any of the following objectives:

- The maintenance and promotion of imports;
- Promotion of the ability of small businesses or companies controlled or owned by historically disadvantaged persons to become competitive;
- Change in productive capacity necessary to stop a decline in an industry; or
- The economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

23. As mentioned, the Commission has not granted or refused to grant an exemption relating to the liner shipping industry. Thus, the Commission has not fully assessed the potential efficiencies and/or pro-competitive gains likely to result from such agreements. Notwithstanding the above, previously, exemption applicants have indicated that such an exemption would present the following efficiencies:

- Stimulation of competition in that shipping lines will be able to share capacity and thus reduce their overhead costs;
- Stimulation of competition in that small players (small shipping lines) will be able to service bigger clients which they would ordinarily not be able to service;
- Improve shipping frequency/regularity for the benefit of shippers (customers of the shipping lines. The automotive industry and other industries require frequency and this can be facilitated by the said agreements); and
- Economies of scale for industry participants.

24. As mentioned, the Commission is currently assessing an exemption application by the ASL for entering into the following category of agreements:

- Slot Charter Agreement/s³;
- Slot Exchange Agreement/s⁴;
- Vessel Sharing Agreement/s⁵; and
- Multi Carrier Service Contract/s⁶.

25. Although these agreements involve the sharing of commercially sensitive information, they are said to not involve price fixing or market allocation. The Commission is still assessing the possible impact and/or efficiencies that these agreements may present.

5. Differences in how competition law applies to liner shipping in different countries

26. The Commission is of the view that the difference in application of competition law in relation to the liner shipping industry in various jurisdictions has had minimal impact on the sector given that liner shipping companies are aware that an anti-trust exemption in one jurisdiction is not a global antitrust exemption in all the jurisdictions in which they operate. For example an exemption of JAHOSAS by the Ministry of Land, Infrastructure, Transport and Tourism under the Marine Transportation Act in Japan, will not result in an automatic exemption of the exempted conduct in South Africa. The liner shipping companies would still be required to file an exemption application under South African competition law and justify the need for such exemption. Failure to do so will render such anti-competitive agreements prosecutable if they have effects within the Republic of South Africa.

27. However, the Commission is of the view that given the nature of the industry, shipping liners in certain instances, consciously conduct themselves as if they have global exemptions. For example, where European shipping liner companies are allowed to share a vessel and slot charter when they deal with a customer located in South Africa with respect to a product coming from Europe, they may coordinate their conduct in Europe but the impact of such coordination may also be felt in South Africa, particularly by importers. This may imply that exemptions granted in other jurisdictions may have been applied into the South African market by various shipping liner companies given the nature of the liner shipping industry and its cross boarder effects. The Commission is aware that other jurisdictions have exempted the liner shipping industry for certain anti-competitive conduct relating to the specific originating jurisdiction, obviously to the exclusion of South Africa and presumably, other jurisdictions.

³ This is the sale of slots or/capacity by one shipping liner (the vessel provider) aboard one of its vessels on a particular route to another shipping liner (the charterer), or alternatively, to a third party which charters capacity aboard vessels.

⁴ This is a two- or/ multiple-way slot charter agreement involving reciprocal exchange of capacity between two (or more) carriers on respective routes serviced by them.

⁵ This is an agreement between two or more shipping liner companies, in terms of which these liner companies agree to provide certain of their vessels for joint use on specific routes.

⁶ This involves joint negotiation between multiple shipping liner companies and a customer, to service the various needs of the big customer where one shipping line would otherwise be unable to independently/individually service the needs of the customer due to frequency or capacity constraints.

6. Review of cases relating to liner shipping

6.1 *Competition Commissioner v Safmarine Container Line N.V (SCL), AP Moller-Maersk Group, Mediterranean Shipping Co (MSC), Malaysian International Shipping Corporation (MISC), Mitsui OSK Lines and Association of Shipping Lines under case number:2009Jul4573*

28. This investigation related to possible price fixing in the liner shipping industry against the above-mentioned companies. The case centred on possible increase or introduction of heavy weight surcharges for export bookings from South Africa to elsewhere around the world. The allegations were that, one shipping liner would raise or introduce the heavy weight surcharge first, and then others would follow.

29. The investigation was closed as a result of lack of sufficient evidence to prosecute. The Commission could not determine that the raising or introduction of heavy weight surcharges for export bookings was as a result of a collusive arrangement amongst the liner shipping companies.

6.2 *The Competition Commissioner v Capespan Group Limited and Seatrade Reefer Chartering NV under case number: 2012Oct0647*⁷

30. In this investigation the Commission is investigating possible market division between Capespan and Reefer Chartering for the transportation of citrus products from South Africa to the United States of America (USA). It is alleged that the respondents concluded a collusive agreement in terms of which one shipping liner would cease transporting citrus products to the USA to allow the other shipping liner to transport same to the USA in exchange for payment to the other shipping liner for exiting the market.

31. The Commission is still investigating the case.

6.3 *The Competition Commissioner v Mitsui OSK Lines, Nippon Yusen Kabushiki Kaisha, Kawasaki Kisen Kaisha, Compania Sud Americana de Vapores, Hoegh Autoliners, Wallenius Wilhelmsen Logistics and Eukor Car Carriers under case number:2012Sep0544*⁸

32. This investigation is linked to the other international liner shipping cases that have been or are being investigated by a number of jurisdictions around the globe including the USDOJ, Japan Fair Trade Commission and European Union. It relates to possible price fixing, market division and collusive tendering in the market for maritime shipping of automobiles to and from South Africa.

33. The Commission is still investigating the case.

⁷ This case is still under investigation.

⁸ This case is also still under investigation.