Consolidation in container liner shipping — Merger control aspects

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In 2005, three acquisitions of container liner shipping companies were notified to the European Commission. The consolidation wave started with the public bid of the Danish company A.P. Moller Maersk (Maersk) for the Dutch-British shipping company Royal P&O Nedlloyd (PONL). Prior to the acquisition, Maersk was the leading global player, and by incorporating PONL, the fourth largest carrier in the world, it secured that position. Some months later, the German tourism and logistics company TUI with its shipping subsidiary Hapag-Lloyd presented a public offer for the Canadian shipping company CP Ships. The bid resulted in the creation of the fifth largest player in the world in terms of capacity. Finally, the French shipping company CMA CGM acquired the French company Delmas, which although relatively small globally, has important activities in the Mediterranean and Africa. Following the transaction, CMA CGM became the third largest global player. The European Commission approved all three transactions (1). However the acquisitions of PONL and CP Ships were subject to conditions.

Prior to these acquisitions the container liner shipping industry was considered to be non-concentrated at the individual carrier level. Even after the acquisition of PONL, Maersk’s worldwide capacity share remains below 20%. However, for the merger analysis the position of the parties on the relevant market is crucial. As will be shown below, containerised liner shipping does not constitute a worldwide market but has to be assessed on the basis of single trades, defined by the range of ports which are served at both ends of the service. Further, the co-operation of liner shipping companies in conferences, consortia and alliances has to be taken into account when analysing the competitive constraints on each trade.

Market definitions

The product market is that for the maritime transport of goods chiefly by container. Containerised liner shipping involves the provision of regular, scheduled services for the carriage of cargo by container on one or more trades. It can be distinguished from non-liner shipping, i.e. tramp and specialised transport, on account of the regularity and frequency of the service. In addition, unlike bulk shipping it uses containerised vessels.

A possible narrower product market is that for transport of refrigerated goods, which could be limited to reefer (refrigerated) containers only or could include transport in conventional reefer (refrigerated) vessels. From a demand side perspective, certain goods such as fruit, meat and dairy products must be shipped under refrigerated conditions. For this reason, non-reefer containers are not a substitute for reefer containers. As to the supply side, in principle each container ship can carry non-reefer containers as well as reefer containers. Reefer containers have their own cooling unit which depends on electric energy to be provided by the ship. However, on imbalanced trades with high volumes of reefer containers in one direction and relatively low volume in the other direction, the reefer capacity on the ships can be exhausted on the trade direction with high reefer volumes. Installation of additional plugs and power generation capacities on ships which are already operating on the trade entails time delays and additional investments. The redeployment of ships with higher reefer capacity also comes with time delays and additional costs. On these trades, supply side substitution is therefore more difficult.

As to the possible substitution between transport in reefer containers and transport in bulk reefer vessels, the market investigation produced some evidence that substitution is mainly one-way from bulk reefer to reefer containers, whereas substitution from reefer containers to transport in bulk reefer vessels seems to be relatively limited (2). The possibility of substitution depends on a number of factors, such as the product shipped, the volume shipped, the logistic chain, cooling techniques available and sanitary requirements. These factors may differ from trade to trade.

The geographical dimension of containerised liner shipping services consists of single trades. Each trade has specific characteristics depending on the

(1) M.3829 — Maersk/PONL — decision of 29 July 2005;
M.3863 — TUI/CP Ships — decision of 12 October 2005;
M.3973 — CMA CGM/Delmas — decision of 1 December 2005.

(2) See also judgment of the CFI of 30 September 2003 in Joined Cases T-191/98, T-212/98 and T-214/98, TACA, paragraph 790 ff.
volumes shipped, the types of cargo transported, the ports served and the length of the journey from the point of origin to the point of destination. These elements determine the types of ships deployed on a trade. Moreover, considering that in liner shipping supply has to be provided by a sufficient number of similar vessels to generate a scheduled service, these characteristics influence the level of barriers to entry that may be present on the trade. Relevant trades are those from Northern Europe to other non-European areas (1) and back and from the Mediterranean to other non-European areas and back.

The market conditions on the two directions of a trade can be different, in particular in the case of trade imbalances or different characteristics of the products being shipped (2). In these instances, a distinction between the two directions of a trade is justified. As regards substitution between Northern European and Mediterranean ports, the possibility of inland transport and transhipment between Northern Europe and the Mediterranean does not seem to lead to substitution to a considerable extent. On this point it was however not necessary to conclude on a precise definition of the geographic dimension of each trade because the competition analysis did not significantly differ under either alternative market definitions.

Principles of assessment

To assess non-coordinated effects of the transaction, the market power of the merged entity on a trade is relevant. As in other sectors, in container liner shipping market shares provide useful first indications of the market structure and competitive importance of both the merging parties and the competitors. Market share data is processed on the basis of volume actually carried (3) on the trade. In the case of trade imbalances, each trade direction must be analysed. On trades with high reefer shares, the competitive situation in the transport of reefer containers requires a separate assessment. With the exception of the Europe-South Africa trade in the Maersk/PONL case, such non-coordinated effects did not give rise to competition concerns in the notified transactions.

The assessment of coordinated effects was of particular importance because shipping companies are members of a number of liner conferences, consortia and alliances. Conferences, consortia and alliances are arrangements between shipping lines that play an important role in the organisation of the liner shipping industry. They restrict competition between their members. In both the Maersk/PONL and the TU/CP Ships case, coordinated effects led to competition concerns on several trades.

Liner shipping conferences are groups of vessel-operating carriers which engage in price fixing and capacity regulation. These activities are exempted from the prohibition contained in Article 81 by Council Regulation 4056/86 (4). Conferences are required to set common or uniform freight rates and may make a common policy on the discounts or rebates, which may be offered to shippers in the geographical area covered by the conference. In addition, conferences fix surcharges (5) and ancillary charges (6) per trade, country, port or direction as relevant. Furthermore, conferences discuss capacity utilisation, volumes lifted by each member line, evaluate members’ market shares and carry out market forecasting through the elaboration of a business plan.

There is at present some internal price competition within conferences because individual rate fixing between carriers and shippers is allowed. In these cases the conference tariff is not applied but used as a benchmark to fix the price of individual or multi-carrier contracts. The percentage of the parties’ cargo that is carried under individual service contracts is an indication of the extent to which internal competition takes place. However it cannot be assumed that the other members of the conference also carry roughly the same percentage of cargo in individual services contracts as the parties to the transaction. As regards the other components of the price, surcharges and ancillary charges are still imposed by all conference members on cargo that transits under individual service contracts. This results in part of the price being fixed jointly. The percentage of surcharges in relation to the price of the sea leg of the journey varies from trade to trade with an average of about 20-30%. There is no competition between the members of a conference on this important part of the price.

(1) Such as North America, Far East, Indian Subcontinent, Middle East, East Africa, South Africa, West Africa, Caribbean/Central America, East Coast South America, West Coast South America and Australia/New Zealand.

(2) E.g. mainly technical products in one direction and food in the other.

(3) Expressed in TEU (Twenty foot Equivalent Unit), the size of a standard container.

(4) On 14 December 2005 the Commission adopted a proposal for a Council Regulation repealing Regulation 4056/86. The proposal has to be adopted by the Council by qualified majority after the EP has expressed its views before the liner conference block exemption can be repealed.

(5) E.g. bunker adjustment factor, currency adjustment factor, congestion surcharge and war risk surcharge.

(6) I.e. those charges triggered by or associated with the operation of moving containers.
Consortia and alliances are operational agreements between carriers on a trade-by-trade or global basis for the provision of a joint service. Unlike conferences, consortia do not price fix but carry out extensive co-operation. This co-operation ranges from vessel sharing, exchange of space or slots in vessels, equipment interchange, joint operation or use of port terminals and related services, temporary capacity adjustments to the participation in a revenue or a cargo pool, joint marketing and the issuing of a joint bill of lading. These activities are exempted from the prohibition contained in Article 81 of the Treaty by Commission Regulation 823/2000 as amended by Regulation 611/2005. The block exemption is based on the assumption that in order to fulfil Article 81(3), consortia are subject to internal or external competition (7). The extent to which competition amongst member lines takes place depends on the characteristics of the consortium. Exchange of commercially sensitive information takes place within consortia at least to the extent necessary for the provision of the joint service. This may include for example information on individual members lifting, actual and future, terms and conditions negotiated with third parties for the provision of port terminal services or customer information. The bundling of several consortia each operating in a different trade is known as an alliance.

The combined market position of the members of conferences and consortia on a trade can be substantial. Carriers are often members of a conference and of one or more consortia on the same trade. This enables them to cumulate the benefits of the Conference Block Exemption Regulation (price fixing) and of the Consortia Block Exemption Regulation (operational arrangements for the provision of a joint service). In line with previous merger decisions, the parties’ membership in conferences and consortia is taken into account in the assessment of the consequences of the operation on the affected markets (10). Therefore, market shares of the merged entity and those of relevant conferences and consortia are considered. The market share of a conference or a consortium is the aggregated market share of their members, calculated on the basis of the members’ volume which is carried under the conference or consortium agreement. However, in order to assess the risk of coordination between the members of a conference or a consortium and to evaluate the strength of the carriers interlinked due to their conference or consortium membership, it is appropriate to take into account the total volume transported by the conference or consortium members in the relevant trade.

Depending on the parties’ membership, the transaction may have different effects on conferences and consortia. The following scenarios may occur:

- In cases where the parties to a merger are in the same conference or consortium and the merged entity maintains its membership, the concentration would not change the total market share of the conference or consortium. Depending on the structure of the conference or consortium, however, this could lead to a strengthening of the internal cohesion and eventually lead to the merged entity controlling the conference.

- In some instances the purchaser (A) is in a conference or consortium, but not the target (B), even though it is active on the same trade. If A maintains its membership, B can be expected to be integrated into the conference or consortium, and the market share of the conference or consortium will rise. If only B is in a conference or consortium, the merger would create a link between A and the conference and/or the consortium. This link would enable A to take part in the exchange of information within the conference and/or the consortium. A could use the commercially sensitive information exchanged therein to adapt its conduct on the market over time, thus increasing the risk of market sharing or lessening of competition between itself and the other members of the conference or the consortium. Even without integrating itself into the conference or the consortium, A would no longer be an independent competitor because it controls a member of the conference or the consortium.

Application to cases

**Maersk/PONL**

On account of the global presence of both merging parties, the transaction led to affected markets on nearly all trades to and from Europe and strengthened the position of Maersk as the number one global carrier. The extensive investigation revealed competition concerns stemming both from coordinated effects and, in the case of one trade, from non-coordinated effects, which raised serious doubts as to the compatibility of the concentra-
As regards coordinated effects, on a number of trades, this merger created links between Maersk and the conferences and consortia to which only PONL was a member. In seven of these trades, the combined market share of these connected shipping lines was so significant that it gave rise to competition concerns. In most of these markets, Maersk was the most important individual competitor of the shipping lines grouped in conferences and consortia to which PONL was a member. Following the merger, competition between Maersk and these conferences and consortia would be significantly weakened. Furthermore, the market position of other shipping lines operating independently from these conferences and consortia was not strong enough to provide a sufficient competitive constraint. In order to remove the competition concerns identified by the Commission, Maersk proposed to withdraw PONL from these conferences and consortia thus severing the link that connected its activities to that of its competitors.

Another area of concern was the trade between Europe and South Africa, especially the transport of refrigerated goods in reefer containers where the parties’ combined market share was higher than 50%. The EU to South Africa trade is long and thin, in other words the distance to be covered is significant whilst the volume of cargo transported is not. Growth potential is also limited. More than 80% of the cargo transported northbound requires refrigerated transportation in reefer containers or in bulk reefers. The market investigation showed that for some shippers bulk reefer vessels are not a substitute for reefer containers on account of the types of fruits transported. Shippers were concerned about the impact of the merger on the availability of transport in reefer containers from carriers other than Maersk. Moreover, the parties were able to identify those shippers dependent on reefer containers and eventually to price discriminate against them. There were few competitive constraints because the only independent competitor was not deploying significant reefer capacity on the trade. In view of the strong position of the parties for the transport of reefer containers, the Commission concluded that the transaction raised serious doubts as to its compatibility with the common market. To meet the Commission’s concerns, Maersk offered to divest PONL’s business dealing with the transport of cargo from South Africa to Europe.

On 19 January 2006 the Commission approved the acquisition of PONL’s business on the trade between the EU and South Africa by Mitsui O.S.K. Lines (MOL).

**TUI/CP Ships**

The activities of Hapag-Lloyd and CP Ships are geographically largely complementary with the exception of the North Europe–North America and Mediterranean–North America trades. In these two trades the merger resulted in a creation of the most important individual shipping company. The market investigation confirmed serious doubts as to the compatibility of the transaction due to the coordinated effects in these two trades and could thus be approved in phase I of the proceedings only subject to commitments submitted by the parties which eliminated these concerns.

In the shipping trade lanes between Europe and North America, Hapag-Lloyd was a member of two conferences — TACA conference on the North Europe trade and USSEC on the Mediterranean trade. As CP Ships was not a member of these conferences, the merger would create a link between the leading players on the shipping trade lanes belonging to these two conferences and CP Ships. The combined market shares of these interlinked carriers were substantial, on both trades significantly exceeding 50%. Before the merger, CP Ships was the most important individual competitor not linked to these conferences and able to provide a competitive constraint. Following the transaction there would be only limited external competition faced by the carriers interlinked due to their membership in TACA and USSEC respectively. In order to remove the competition concerns identified by the Commission, TUI proposed to withdraw Hapag-Lloyd from these two conferences.

**CMA CGM/Delmas**

The transaction by which CMA CGM acquired Delmas and indirectly also joint control over the shipping company Sudcargo led to overlaps in container liner shipping on the Europe–East Africa trade and the South Europe–Maghreb trade. Furthermore, the parties were both active in Ro-Ro shipping services on the South Europe–Maghreb trade. Ro-Ro shipping services are defined as the regular transport of wheeled cargo (trucks, cars) with their load and can be distinguished from the transport of containerised or bulk cargo as well as

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(11) Namely North Europe–North America, North Europe/Mediterranean–Middle East, North Europe/Mediterranean–East Africa, North Europe/Mediterranean–Caribbean/Central America, North Europe/Mediterranean–East Coast South America, North Europe/Mediterranean–West Coast South America, North Europe/Mediterranean–Australia/New Zealand.
from the transport of new or second-hand vehicles which are for sale \(^{(12)}\). Ro-Ro shipping services are also liner services with conferences and consortia and thus the same principles apply for the merger assessment of these services as for container liner services.

The Commission found that although the transaction would result in an increase of the market share of the parties on some trade routes between Africa and Europe in the market for container shipping services and Ro-Ro services, this would not be sufficient to impede effective competition. Further, the transaction would not have the result of appreciably strengthening conferences or consortia to which the parties are members. The transaction was therefore cleared without conditions in phase I of the proceedings.

\(^{(12)}\) See for the transportation of vehicles M.2879 — Wallenius/Wilhelmsen.