EUROPEAN COMMISSION
DG Competition

Case M.8472 - NIPPON YUSEN KABUSHIKI KAISHA / MITSUI OSK LINES / KAWASAKI KISEN KAISHA / JV

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 28/06/2017

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

To the notifying parties:

Subject: **Case M.8472 – NIPPON YUSEN KABUSHIKI KAISHA / MITSUI OSK LINES / KAWASAKI KISEN KAISHA & JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 19 May 2017, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004[3] by which Nippon Yusen Kabushiki Kaisha ("NYK"), Mitsui Osk Lines ("MOL") and Kawasaki Kisen Kaisha ("K Line"), all of Japan, acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of a Joint Venture (the "JV"), by way of a purchase of shares in a newly created company constituting a joint venture (the "Transaction").[4] NYK, MOL and K Line are together referred to as the "Parties".

1 OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

2 OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

3 OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

4 Publication in the Official Journal of the European Union No C 174, 01.06.2017, p. 13

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1. THE PARTIES

(2) NYK is a Japanese logistics provider that specializes in, among other things, international marine transportation, cruises, terminal and other shipping-related services. The activities of the NYK group can be broadly classified under the following areas of operation: (i) global logistics, (ii) bulk shipping, (iii) cruise lines, and (iv) real estate business. Through the Transaction, NYK will contribute to the JV its deep-sea container liner shipping activities worldwide as well as its shareholdings in all container terminal operators outside of Japan (including its shareholdings in terminal operators in Duisburg and Rotterdam).

(3) MOL is a Japanese multi-modal transport group specializing in ocean shipping. The services offered by the MOL group worldwide can be broadly classified into the following: (i) dry bulk transport; (ii) tanker transport; (iii) LNG carriers; (iv) crude oil and LNG offshore production; (v) car carriers; (vi) containerships; (vii) terminal services; (viii) logistics; (ix) cruise lines; and (x) ferries and coastal liners. Through the Transaction, MOL will contribute to the JV its deep-sea container liner shipping activities worldwide as well as its shareholdings in container terminal operators outside of Japan (including its shareholding in a terminal operator in Rotterdam).

(4) K Line is a Japanese shipping company operating a diverse fleet of ships to cater to a variety of marine transport needs. The services offered by K Line worldwide can be broadly classified into the following areas: (i) containership services; (ii) dry bulk transport; (iii) car carriers; (iv) LNG carriers; (v) liquid bulk transport; (vi) energy development services; (vii) heavy lifters; (viii) terminal operations; and (ix) logistics. Through this transaction, K Line will contribute to the JV its deep-sea container liner shipping activities worldwide as well as its shareholdings in container terminal operators outside Japan (including its shareholding in a terminal operator in Antwerp).

(5) The JV will include the global container liner shipping business and container terminal business (excluding terminals in Japan) of each of NYK, MOL and K Line.

2. THE OPERATION

(6) Pursuant to a Business Integration Agreement concluded between the Parties on 31 October 2016, NYK will establish a wholly owned subsidiary in Japan, the holding company ("HoldCo"). HoldCo will establish a wholly owned subsidiary in Singapore, the operating company ("OpCo"; HoldCo and OpCo together constitute the "JV").

(7) On 30 June 2017, the Parties will contribute funds to HoldCo in exchange for shares, leading to a shareholding in HoldCo of 38% for NYK, 31% for MOL, and 31% for K Line. The Parties will also invest funds into OpCo in exchange for non-voting preferred stock (with the same allocation of 38% for NYK, and 31% for each MOL and K Line). In this regard, HoldCo will remain the sole voting shareholder in OpCo, a company that will aim to start providing container liner shipping services as from 1 April 2018. By this date, the Parties will contribute also certain assets to OpCo.

3. THE CONCENTRATION

(8) According to paragraph 76 of the CJN, very exceptionally, joint control can occur on a *de facto* basis "*where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.*"

(9) In the present case, for a number of reasons, a strong commonality of interests exists among the Parties, notably as the JV will rely, among others, on funds invested by the parents, seconded key personnel and key assets such as (i) terminals and (ii) large and mid-size container vessels currently operated by the parents that will be (sub)chartered to the JV.[5] As the JV is dependent on its parents for these key inputs, the JV will only be able to successfully operate with the agreement of each of its parents on strategic decisions.

(10) First, the Parties will (sub)charter their […] vessels, which represent respectively […]% of NYK's total container shipping capacity, […]% of MOL's and […]% of K Line, to the JV […].[6][…] vessels are essential for the operation of some of the most important shipping routes, […] and therefore are vital for the operation of the JV. If any of the parents withdrew them as result of a dissent with the other parent companies, the JV would have severe difficulties to immediately find alternative vessels [details concerning the JV's vessel chartering strategy].

(11) Second, the Parties will (sub)charter […] to the JV the […] vessels they currently operate under lease agreements. Such […] vessels will represent the majority of the JV's total capacity, and the refusal or deliberate delay by one of the Parties to renew these (sub)charter arrangements as result of a dissent with the other parent companies, would cause significant disruption to the JV's business.[7] [Details of parents options related to their respective vessels].[8]

(12) In addition, to effectively disrupt the JV's services, the parent would not have to withdraw all its […] vessels [confidential details on cost of withdrawing vessels] to force the other two parents to take its position into account.

(13) Third, in addition to its own employees, funds and capital assets, the JV will also rely on a number of key crew personnel and management staff seconded by its parents. The seconded employees will fulfil key management functions at corporate and department level, as well as in investment planning, corporate planning and general headquarters operations; moreover they will have key expertise which might not be readily available on the job market.

(14) Fourth, the Parties have jointly agreed on the Shareholders Agreement ("SA") and the Business Integration Agreement with the goal of reducing fixed and operational costs and become more competitive on a sustainable basis and are

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5 [JV's decision making process].

6 [JV's vessel chartering strategy].

7 The Parties submit that it is not easy to find alternative […] vessels relatively quickly and on favourable commercial terms [Parties' commonality of interests and details concerning the JV's vessel chartering strategy].

8 [Parties' commonality of interests and details concerning the JV's vessel chartering strategy].

therefore well aware of the mutual benefit at stake should such a dissent occur. This argument is reinforced by the data contained in a [source of the data].[9] The Parties' joint agreements and negotiations resulting in the agreement reached in October 2016 reflect their mutual understanding and common interest in contributing their business to the JV to maximise their profits.

(15) On the basis of the above, there seems to be a strong commonality of interests between the Parties that will prevent them from acting against each other when deciding on strategic matters for the management of the JV.

(16) Each of NYK, MOL and K LINE will thus acquire joint control over the JV on a de-facto basis. Therefore the Transaction will give rise to a notifiable concentration within the meaning of Article 3(1)(b) and 3(4) the Merger Regulation.

4. UNION DIMENSION

(17) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[10] (NYK: EUR 17 441 million; MOL: EUR 11 985 million; K Line: EUR 8 707 million). Each of them has an EU-wide turnover in excess of EUR 250 million (NYK: EUR [>250] million; MOL: EUR [>250] million; K Line: EUR [>250] million). Each of the undertakings concerned does not achieve more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

(18) The notified operation therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

5. COMPETITIVE ASSESSMENT

(19) According to the information submitted by the Parties, the Transaction gives rise to horizontally affected markets in deep-sea container liner shipping only when considering the consortia market shares. The Transaction also gives rise to vertically affected markets between deep-sea container liner shipping and i) container terminal services, ii) inland transportation, and iii) freight forwarding.

5.1. Market definition

5.1.1. Deep-sea container liner shipping services

(20) In prior decisions, the Commission concluded that the product market for container liner shipping consists in the provision of regular, scheduled services for the carriage of cargo by container.[11] This market can be distinguished from non-liner shipping (tramp, specialised transport) because of the regularity and

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9 See attachment 2.4 to the Parties' reply to QP2 on 6 February 2017.

10 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p. 1).

11 See M.7908 – *CMA CGM/NOL;* M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd;* M.5450 – *Kühne/HGV/TUI/Hapag-Lloyd.*

frequency of the service. In addition, the use of container transportation separates it from other non-containerised transport, such as bulk cargo.

(21) A possible narrower product market would be the transport of refrigerated goods, which could be limited to refrigerated (reefer) containers only or could include transport in conventional reefer vessels. In prior decisions,[12] while leaving the market definition open, the Commission looked separately at reefer and non-refrigerated (warm or dry) containers only in the legs of trade with a share of reefer containers in relation to all containerised cargo of 10% or more in both directions; in those cases, the Commission also left open whether bulk reefer vessels are part of the same market as reefer container or not.[13] In any case, the Transaction does not give raise to any affected markets when considering a potential market for reefer container.[14]

(22) Whereas, in prior decisions, the Commission had left open whether the geographic scope should comprise trades, defined as the range of ports which are served at both ends of the service (e.g. Northern Europe – North America) or each individual leg of trade (e.g. westbound and eastbound within a given trade), in its most recent practice, the Commission has concluded that container liner shipping services are geographically defined on the basis of the legs of trade (e.g. Northern Europe – North America eastbound).[15] The Parties agree with this approach.[16]

(23) The relevant legs of trade for the Commission's assessment of the Transaction for the market of deep-sea container liner shipping services are those to/from Northern Europe and the Mediterranean.

5.1.2. Container terminal services

(24) In prior decisions,[17] the Commission has defined the product market of container terminal services by terminal operators as a separate market involving the loading, unloading, storage, and land-side handling for inland transportation of containerised cargo.

(25) As regards the geographic market definition, the Commission has considered in prior decisions that the relevant geographic market for container terminal services in deep sea ports is in essence determined by the geographic area the container terminal generally serves (catchment area). For example, concerning Northern Europe and terminals in Hamburg in particular, the Commission considered that the relevant geographical dimension of stevedoring services is in its broadest scope Northern Europe (for transshipment traffic) and in its narrowest possible

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12 See M.7908 – *CMA CGM/NOL;* M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd*; M.3829 - *Maersk/PONL.*

13 See M.7908 – *CMA CGM/NOL*; M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd AG*; M.3829 – *Maersk/PONL.*

14 See Parties' combined market shares for deep-sea reefer container liner shipping. See Form CO – Annex 6.3.A-2.

15 See M.8120 – *Hapag-Lloyd/United Arab Shipping Company.*

16 Form CO, paragraph 37.

17 See M.7908 – *CMA CGM/NOL*; M.7523 – *CMA CGM/OPDR*; M.5398 – *Hutchison/Evergreen.*

scope the catchment area of the ports in the range Hamburg – Antwerp (for hinterland traffic) or possibly even narrower, comprising the German ports only.[18] However, so far, the Commission has left the precise definition of the geographic market open.[19] From the Parties' point of view, the market should not be geographically defined narrower than regional (e.g. Northern Europe).

(26) For the purpose of this Decision, the geographic market definition can be left open. Given that the Parties have historically focused their activities on Japan, the Commission's assessment for container terminal services in this decision also includes an analysis of the plausible national market of Japan as well as potential catchment areas within Japan.

5.1.3. Inland transportation

(27) If a container liner shipping company provides door-to-door services, it also arranges for inland haulage for its customers to and/or from the harbour. In prior decisions[20], the Commission has concluded that inland transportation covers the physical movement of goods by using own (i.e. owned or leased) equipment. The Commission also indicated that the various means of inland transport probably constitute separate product markets but ultimately left the market definition open. The Parties agree with this approach.

(28) With regard to the geographic dimension, the Commission considered the market as either national or wider.[21] From the Parties' point of view, the exact geographic scope can be left open.

(29) For the purpose of this Decision, the geographic market definition can be left open, since the Transaction does not give rise to competition concerns in the market for inland transportation services regardless of the geographic scope considered.

5.1.4. Freight forwarding

(30) In prior decisions, the Commission has defined the freight forwarding market as "*the organisation of transportation of items (possibly including activities such as customs clearance, warehousing, ground services, etc.) on behalf of customers according to their needs*"[22]. The Commission subdivided the market into domestic and cross-border freight forwarding and into freight forwarding by air, land and sea while ultimately leaving the product market definition open.

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18 See M.8120 – *Hapag-Lloyd/United Arab Shipping Company*, recital 22; M.5450 – *Kühne/HGV/TUI/Hapag-Lloyd*, recital 16; M.5066 – *Eurogate/APMM*, recitals 15–20.

19 See M.8120 – *Hapag-Lloyd/United Arab Shipping Company*.

20 See M.8120 – *Hapag-Lloyd/United Arab Shipping Company.*

21 See M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd AG*; M.5450 – *Kühne/HGV/TUI/Hapag-Lloyd.*

22 See M.8120 – *Hapag-Lloyd/United Arab Shipping Company*.

(31) In prior decisions, the Commission considered the geographic scope of the market either as national or wider. Specifically, the Commission defined the market for sea freight forwarding as at least national.[23]

(32) The Parties agree with the approach taken by the Commission in its precedents and submit that the Transaction does not lead to any competition concerns under any market definition.

(33) For the purpose of this Decision, the precise market definition can be left open, since the Transaction does not give rise to competition concerns in the market for freight forwarding services regardless of the sub-segmentation or the geographic scope considered.

5.2. Competitive assessment

5.2.1. Methodology

(34) As it is common industry practice in the container liner shipping business, all the Parties are members of alliances. [24] Since 1 April 2017, the Parties are members of the same global alliance, THE Alliance.

(35) The Parties are of the view that the Transaction should be assessed without taking into account their participation in THE Alliance, because membership in consortia generate efficiencies and each carrier remains independent from its consortia partners and in competition with them on essential parameters of competition, such as price, also within a given consortium.

(36) In its decisional practice in this sector, the Commission however considered that it was not appropriate to assess the effects of a concentration only on the basis of the Parties' individual market shares. Such an approach would not adequately take into account that a member of a consortium, even when carrying limited volumes, can have a significant influence on operational decisions determining service characteristics, in particular capacity, over a much larger part of the market, i.e. that corresponding to its consortia and consortia partners.[25] This influence can have a dampening effect on competition on those trades served by the consortium in question.

(37) Therefore, for the assessment of this case, the aggregate shares of the Parties' consortia will also be taken into account, thus reflecting the more limited competitive constraints that the Parties' consortia partners exert on them. Conversely, the part of the market, over which the Parties have no influence, i.e. corresponding to carriers that are not members to any of the Parties' consortia (the "free market"), will be viewed as fully competing with the Parties in the respective trade.

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23 See M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd*; M.5450 – *Kühne/HGV/TUI/Hapag-Lloyd.*

24 Alliances (or consortia) are vessel sharing agreements between shipping companies for the provision of a joint service on a trade. Consortia members jointly agree on the capacity offered in the service, on its schedule and ports of call. Alliances are vessel sharing agreements that cover multiple trades.

25 See M.7908 – *CMA CGM/NOL;* M.7268 – *CSAV/HGV/Kühne Maritime/Hapag-Lloyd*; M.8120 – *Hapag-Lloyd/United Arab Shipping Company*.

(38) In its assessment, the Commission has also taken into account that the container liner shipping sector is undergoing a wave of consolidation and since April 2017, it witnessed also a major reshuffling of its global alliances, which have been reduced from four to three, as well as regional and trade specific alliances.[26]

5.2.2. Horizontal overlaps

(39) The Transaction does not give raise to affected markets in deep sea container liner shipping on the legs of trade to/from Europe when adding up the individual market shares of the Parties. However, affected markets arise when, in line with the Commission recent decisional practice,[27] market shares of consortium partners of the merging entities are added, in this case of THE Alliance. More specifically, on the basis of THE Alliance market share, the Transaction gives rise to the following affected legs of trades (consortia market share in brackets):

a) Northern Europe – East Asia ([20-30] %)

b) Northern Europe – North America ([30-40]%)

c) North America – Northern Europe ([30-40]%)

d) Mediterranean – North America ([20-30]%)

e) North America – Mediterranean ([20-30]%)

f) Northern Europe – Middle East ([20-30]%)

g) Middle East – Northern Europe ([20-30]%)

h) Middle East – Mediterranean ([20-30]%)

(40) Addding the (volume based) market shares of consortia partners of the merging parties is a conservative approach since the consortia partners are not part to the Transaction. However, with this approach the Commission takes into account the fact that the Parties and their consortia/alliances partners agree on important parameters of competition, in particular the setting of capacity and the sailing schedule, which has a dampening effect on competition between them on those legs of trade the consortium operates.

(41) In the case at hand the Parties were already members of one and the same alliance, THE Alliance, prior to the notification, and therefore, there is no new link brought about by the Transaction nor a change with regard to the market shares as a consequence of the Commission's established approach. In any event, on all those affected legs of trade the "free market" exceeds 60% which indicates

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26 The market share estimates of the size of consortia and the "free market" in 2017 are done of the basis of shipping companies' 2015 market share, taking into account the 2017 market structure, including consortia restructuring, mergers implementation, etc.

27 Cases M.7908 – CMA CGM/NOL, recitals 28-29; M.7268 – CSAV/HGV/Kühne Maritime/Hapag-Lloyd AG, recitals 68–75, Cases M.8120 - Hapag-Lloyd/United Arab Shipping Company, recital 41.

sufficient independent competition not linked to the Parties via a consortium or alliance on those legs of trade.

(42) Based on the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of deep-sea container shipping services.

5.2.3. Vertical relationships

(43) The JV will also be active in the market for terminal services outside Japan while the Parties will retain their activities in terminal services in Japan. Moreover, the Parties will retain their activities in inland transportation and freight forwarding. Those markets are vertically linked to the deep sea container liner shipping market in which the JV will be active.

(44) In light of the moderate market shares both at the level of liner shipping and container terminal services, as set out below, the Transaction does not appear to be problematic with respect to these markets.

5.2.3.1. Container terminal services

(45) Following the Transaction, the JV will be active also in the market for container terminal services outside Japan (as a result of the Parties' contributions to the JV) and the Parties will be active in container terminal services in Japan.[28]

(46) However, the JV does not exceed 30% market share in container terminal services under any plausible market, as set out below.

(47) The Parties jointly exceed 30% market share in container terminal services only in the following two catchment areas in Japan: i) Keihin region: [30-40]% and ii) Hanshin Region: [30-40]%; in the other plausible markets, i.e. national (Japan) and end of trade (East Asia), the Parties combined market share is [20-30]% and [0-5]% respectively. This reflects the historical background of the Parties and their relevant presence in Japan as compared with other geographic areas. Therefore the Transaction gives raise to vertically affected markets between the Parents' activities in container terminal services in Japan and the JV activities in deep sea container liner shipping to/from East Asia.

(48) Moreover, since the JV will have controlling stakes in a number of container terminals in North America[29] and the JV (including its THE Alliance partners)

28 The NYK Group owns, operates and/or participates in container terminals at 9 ports in Japan (Kobe, Nagoya, Yokohama, Otaru, Ishikari-bay, Osaka, Hakata, Kitakyushu, and Tokyo), and 12 ports overseas (Dalian, Kaohsiung, Laem Chabang, Jakarta, Duisburg, Rotterdam, Los Angeles, Oakland, New York, Halifax, New Orleans, and Montreal).The MOL Group owns, operates and/or participates in 4 container terminals in Japan, namely in Kobe, Osaka, Tokyo, and Yokohama, and 7 terminals overseas, namely in Laem Chabang, Cai Mep, Hai Phong, Rotterdam, Los Angeles, Oakland and Jacksonville. The K Line Group owns, operates and/or participates in container terminals at 4 ports in Japan, namely, Kobe, Osaka, Tokyo, and Yokohama, and 3 ports overseas, namely, Antwerp, Long Beach, and Tacoma.

29 The JV will receive form the Parties controlling shareholdings in North American container terminals, more specifically in Long Beach, Tacoma, Los Angeles, Oakland, Jacksonville, New Orleans, Halifax and Montreal.

exceeds 30% market share in the vertically linked market for deep sea container liner shipping on the two legs of trade Northern Europe – North America and North America – Northern Europe, it appears that the Transaction gives rise also to vertically affected markets between the upstream market for container terminal services in North America and the downstream market for deep sea container liner shipping to/from North America.[30]

(49) Given the limited market shares of the Parties in the upstream and downstream markets, it seems unlikely that they would have any ability and/or incentive in engaging in any foreclosure strategies.

(50) The Commission therefore concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of input or customer foreclosure on the market for container terminal services.

5.2.3.2. Inland transportation

(51) NYK and MOL are active in inland transportation in the EEA with a combined market share below [0-5]%, and in any case below 30% at national level regardless of the means of transportation considered.[31]

(52) As a result, the only vertically affected markets are those linked to the deep sea container liner shipping services where the JV market share is […] above 30%, namely Northern Europe – North America and North America – Northern Europe.

(53) Given the Parties' limited market shares in the upstream and downstream markets, it seems unlikely that they would have any ability and/or incentive in engaging in any foreclosure strategies.

(54) The Commission therefore concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of input or customer foreclosure on the market for inland transportation services.

5.2.3.3. Freight forwarding

(55) The Parties are active in freight forwarding in the EEA with a combined market share below [0-5]% and in any case below 30% at national level regardless of the means of transportation (air, land or sea) or split into domestic and cross-border freight.

(56) As a result, the only vertically affected markets are those linked to the deep sea container liner shipping services where the JV market share is […] above 30%, Northern Europe – North America and North America – Northern Europe.

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30 In the EEA the JV will have a controlling shareholding only for D3T in the Duisburg harbour which is a harbour for inland water transport, therefore not linked to the JV deep sea container liner shipping activities. The JV will have other non-controlling shareholdings of terminals in the EEA which are not taken into account in assessing the existence of affected markets.

31 At national level, NYK and MOL inland transportation activities would overlap only in the UK through their subsidiaries Yusen Logistics (UK) Ltd and MOL Logistics (U.K.) Ltd respectively.

(57) Given the Parties' limited market shares in the upstream and downstream markets, it seems unlikely that they would have any ability and/or incentive in engaging in any foreclosure strategies.

(58) The Commission therefore concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of input or customer foreclosure on the market for freight forwarding services.

6. CONCLUSION

(59) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission
(Signed)
Margrethe VESTAGER
Member of the Commission