1. Introduction

This Article is meant as an introduction to the regulation of shipping in European competition law. We seek to point out what challenges and possibilities there are, especially with the recent expiry of the Maritime Transport Guidelines. Not paying attention to EU competition law can hurt undertakings substantially: the European Commission has the power to impose fines of up to 10% of the group’s total turnover, not limited to the undertaking that infringes the regulation. As an illustration, the European Commission imposed a fine of 1.06 billion euros on Intel for abuse of dominant position in 2009.

2. EU Competition law - a brief introduction to the general rules

The European Union has a strict competition law regime, to maximise consumer welfare. The three regulation principles of EU competition law are: (1) prohibition of anti-competitive agreements, (2) prohibition of abuse of dominant position and (3) merger control.

Article 101 (1) of the EC treaty prohibits agreements that are anti-competitive either as their object or effect. This goes for horizontal agreements; agreements entered into between actual or potential competitors, and vertical agreements; agreements between firms at different levels of the supply chain. Typical agreements that are restricted under Article 101 (1) regard price-fixing, co-operative purchasing, co-production, market sharing, information sharing and exclusivity.

Maritime transport services to be governed by general antitrust rules

Where a restriction of competition under Article 101(1) has been identified, Article 101(3) can be invoked as a defence. There are four cumulative conditions which must be met for the agreement to be exempted: the restrictive agreement must lead to efficiency gains; the
Restrictions must be indispensable to the attainment of the efficiency gains; consumers must receive a fair share of the resulting efficiency gains attained by indispensable restrictions; and the agreement must offer the parties no possible elimination of competition. Where these four criteria are met, the efficiency gains generated by an agreement can be considered to offset the restrictions of competition generated by it. The burden of proof is put on the undertaking that claims Article 101(3) as a defence. In addition there are a few block exemptions, but the policy of the European Commission is to govern every sector by a general regime. The Norwegian Competition Act § 10 transposes Article 101 into Norwegian law.

Article 102 of the EC Treaty prohibits abuse of dominant position. The Norwegian Competition Act § 11 is the equivalent in domestic law. The undertakings in a market are allowed to be in a dominant position; the restriction is on potential abuse. A 40% market share normally constitutes a dominant position. Typical abuse cases may include refusal to supply, loyalty discounts, bundling of products, pricing below cost, etc. In European case law there are many examples of abuse of dominant position within the shipping industry.

In accordance with the Merger Regulation (Reg. 129/2004), concentrations between undertakings are subject to merger control. The object of merger control is to block mergers that significantly impede effective competition. All mergers between undertakings over certain thresholds are subject to compulsory pre-merger notification. If the European commission or the national competition authority clears a merger, the merger is approved once and for all. Until such a decision has been made, the relevant undertakings have an obligation not to go through with the merger (standstill).

EU competition law will apply to undertakings that operate maritime services to and/or from a port or ports in the European Union. What flag the actual ship carries is irrelevant with respect to the application of European competition rules.

3. Competition law and the shipping industry

The shipping industry is a global and capital intensive industry and demand is generally derived from other sectors, such as commodities. The market is competitive and highly fragmented. This makes the industry vulnerable and brings about a need for undertakings to cooperate and diversify and share risks. Cooperation can typically be organised as pools, where different participants contribute with similar ships and have a common commercial management. Their earnings are pooled and distributed to the vessel owners according to a prearranged agreement. There are many benefits to such pool arrangements.

The newly announced P3 Network, an alliance on the major east-west trades between three of the largest container carriers, Maersk Line, Mediterranean Shipping Co. and CMA CGM, serves as an example of a pool agreement.

The P3 Network will operate a fleet of 255 ships with a total capacity of 2.6 million 20-foot-equivalent units on 29 service loops on Asia-Europe, trans-Pacific and trans-Atlantic routes. The European Commission is currently investigating the P3 Network under Article 101(1).

Large investments in harbour infrastructure may spark the need for exclusive access to the harbour, but if these arrangements are too extensive, they may be prohibited under both Article 101 and 102. An example is the fine of EUR 18.8 million imposed by the EFTA Surveillance Authority (ESA) on Color Line because of infringement of the competition rules in the EEA Agreement Articles 53 and 54 (equivalent to Article 101 and 102 in the EC Treaty). ESA concluded that Color Line’s long-term exclusivity in Strömstad harbour in Sweden restricted competition and constituted an abuse of Color Line’s dominant market position.

A distinction is made between tramp and liner trade. Ships that do not have a fixed schedule or published ports of call are in tramp trade and ships that pass between designated ports on a fixed schedule and at published rates are in liner trade.

Not paying attention to EU competition law can hurt undertakings substantially: the European Commission has the power to impose fines of up to 10% of the group’s total turnover, not limited to the undertaking that infringes the regulation.
4. The former block exemption for liner conferences

As the European authorities recognised the challenges for the shipping industry, liner conferences were previously exempted from Article 101 by Regulation No 4056/86. A liner conference is a form of cooperation between line operators that generally involves price fixing and capacity limitation to increase profits of the participants. A liner consortium, on the other hand, is focused on operational cooperation for the provision of a joint service. The previous block exemption for liner conferences was repealed by Council Regulation No 1419/2006, as the Council of the European Union took the view that liner shipping conferences no longer fulfilled the four cumulative conditions for exemption under Article 101 (3) of the EC Treaty. One of the reasons, the Council pointed out, was that carriers often participated in liner conferences and consortia on the same trade, thus cumulating the benefits and exchanging commercially sensitive information.

The repeal of the block exemption for liner conferences was the first significant step in the direction of subjecting shipping to general EU competition law.

5. Block exemption for liner consortia

By Commission Regulation 206/2009 liner consortium agreements were given a block exemption from Article 101, although within certain limits. This applies only to international consortia that sail from or to one or more European Community ports, cf. Article 1.

As pointed out in the preamble, consortia agreements vary significantly, ranging from those that require high levels of investment, to flexible slot exchange agreements. The exempted agreements are listed in Article 3 and involve; joint operation of liner shipping services, capacity adjustments in response to fluctuations in supply and demand, the joint operation of ports and other similar activities. Hardcore restrictions, such as; price fixing, limitation of capacity or

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sales and allocation of markets and customers, are never allowed, cf. Article 4. There is also a 30 % market share cap for both the consortium itself and its participants. If the market share is greater than 30 % the market is presumed to not have sufficient competition to warrant a block exemption to the consortium.

6. Shipping guidelines expired in September

The Guidelines on the application of Article 101 of the EC Treaty to maritime transport services entered into force on 26 September 2009 as a part of the European Commission’s general policy of phasing out sector-specific antitrust rules. The guidelines were part of the transition from the previous exemption of liner conferences to the general antitrust rules. The Guidelines expired on 26 September 2013, as the Commission decided not to prolong them, as they were, in the Commission’s opinion, no longer needed.

The Maritime Transport Guidelines covered market definition, information exchanges between competitors in shipping and pool agreements between tramp shipping operators.

The consequence is that the shipping industry must rely on general competition law, e.g. the general guidelines for horizontal agreements. The Commission pointed out that the Maritime Transport Guidelines were in essence a summary of relevant case law and the implementation of the general rules. This is true with respect to market definition and information exchange, but for tramp shipping pools the Maritime Transport Guidelines offered much needed guidance, as there was no case law or guidance for the tramp sector. It may prove more difficult for parties interested in forming tramp shipping pools to navigate under the general competition principles of Article 101 and 102.

7. Alternative to pool agreements

The block exemption for liner consortia will expire on 25 April 2015. It is likely that the Commission will not prolong the exemption. If so, there will be no sector specific regulationor guidelines for the shipping industry in European competition law. The consequences could be an undesired lack of clarity, as many, both among the shipping industry and transport users, believe liner consortia exemptions are crucial for safeguarding liner services. In any case, liner consortia organised in accordance with the block exemption must consider if the criteria in Article 101 (3) are met, before the potential expiry of the block exemption.

As an alternative to organizing the cooperation as a pool agreement, the parties may form a full function joint venture, which is regulated by the provisions of merger control. Such an option could prove beneficial to many operators, as a merger control proceeding is cleared once and for all, providing more comfort and predictability for the industry. The self-assessment regime under Article 101 (1) and 101 (3) may therefore in some cases seem less attractive.101 (1) and 101 (3) may therefore in some cases seem less attractive.

Recent opening of proceedings

On 22 November 2013 The European Commission confirmed that it has opened formal antitrust proceedings following an unannounced dawn raid inspection in 2011 against 14 container liner shipping companies to investigate whether they engaged in concerted practices, in breach of EU antitrust rules.

Danish liner Maersk, French CMA CGM, German Hapag-Lloyd and Swiss MSC among others is speculated to be among the companies investigated.

The Commission says it is looking into whether the companies have “engaged in concerted practices” since 2009 by regularly publicising price increases, either through their websites or in specialist media. The announcements occurred several times a year and contained information regarding the amount of a company’s price increase and the date of its implementation.

These actions “may allow the companies to signal future price intentions to each other”, which could harm competition by raising prices for consumers according to the Commission.

Apparently the case does not concern straight collusion or cartel behavior, but rather unilateral price signaling as a form of information exchange. Thereby the case seems to rest in the outskirts of the traditional scope of Article 101 of the TFEU. Although the opening of these proceedings by the Commission does not prejudge the outcome of the investigation, the question that needs to be answered is if the Commission is correct in assuming that such price signaling does violate Article 101.