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Study on Economic Regulation of Collaborative Strategies among Container Shipping Companies Following Repeal of European Union Regulation 4056/86

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ABSTRACT

The European Union removed the block exemption granted under Regulation 4056/86, to liner shipping companies to provide scheduled services on a collaborative basis effective October 2008. This has also been followed by the proposed P3 alliance with participation of Maersk, MSC and CMA CGM. This paper explores, the arguments adopted by the US Federal Maritime Commission, the European Commission and the Ministry of Commerce of China, in rejecting the case proposed by the P3 alliance. The findings of this paper will inform on understanding strategies adopted by major Competition Regulatory authorities in their interpretation of horizontal collaboration in the industry.

1. Background

The global container shipping industry witnessed a major shift in economic regulation when the European Union removed the block exemption that had been granted to collaborative agreements since 1987 under EU Council Regulation EC No. 4056/86. This Regulation (Official Journal No 378/4 of 31.12.86) had laid down detailed rules for applying the competition principles of the European Union Treaty to liner shipping transport services. However, by EC Council Regulation (EC) No 1419/2006 of 25 September, the EU repealed Regulation (EEC) No 4056/86, with effect from 18 October 2008. The removal of this block exemption and shift towards application of the provisions on competition in the Treaty on Functioning of the European Union (TFEU) has raised international interests. This was apparent for example, when there followed a major study of the implications of the decision carried out by the US Federal Maritime Commission. In their report, the FMC came to the conclusion that the US would continue to apply the US Shipping Act of 1984 and allow collaboration among liner shipping companies to continue regardless of the stance taken by the European Union (FMC, 2012). It is interesting that there were also emerging at this time

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perspectives from other jurisdictions on how the future would be on whether strategies similar to the EU should be adopted. In this regard there were reviews on the application of competition law regimes on the container shipping industry in other major jurisdictions including China, Japan, Australia, New Zealand and Canada. The period following the repeal of the EU Council Regulation, therefore led to reviews worldwide from regulatory authorities worldwide, on how best to interpret the legal implications of competition of an industry that provided for transport of global seaborne trade in containers.

In order to place the regulatory regimes in context a unique opportunity emerged in a case which explored the relevance of competing economic regulations in June 2014. This case, reported in the media since 2013, was the P3 alliance which provided an opportunity to explore the approach of three major jurisdictions on the same set of facts with regard to the interpretation of the meaning of an acceptable alliance as a form of horizontal collaboration, which was proposed for the three main arterial services (Lloyd's List, 2014; FMC, 2014; European Commission, 2014). In this case, the top three shipping companies in the industry, i.e. MSC, CMA-CGM and Maersk had in early 2013 declared their intention to form an operating alliance called the P3 Service Network and had made applications to seek approval or clarification with regard to compliance with the competition laws in a number of jurisdictions which would be covered by their services. The jurisdictions relevant here included the US Federal Maritime Commission, the European Commission and the Ministry of Commerce of China.

Interestingly, the application from these carriers, also came at about the time when there were a number of developments in the industry which included for example, when in June 2013 there was the launching of the latest 18,000 teu capacity triple-E Maersk ships. This single move alone would bring the size of ships deployed in the container shipping sector into the ultra-large ship sector. Interestingly the entry of mega ships by Maersk had begun much earlier with the 1996 built, 6,400 teu ship followed by the 2006 built 15,000 teu ships, entering into service to potentially exploit economies of scale with larger ships. The very nature of scheduled services would on the one hand be effective through the deployment of larger ships that offer the scope to exploit economies of scale (Gardner et. al., 2002). However, on the other hand, considering the fleet of ships needed for scheduled services, had to consider, as they have done historically, to do this by working through the mechanism of horizontal collaboration including since 1875 with price and supply as the core components of these agreements (Marx, 1953, Gardner, 1999; Nair 2008). While these collaborative agreements were basically anti-competitive, they have been allowed to operate through the facility of exemptions from anti-competition laws of several international jurisdictions since 1916 (FMC, 2012; Nair, 2009; Marx, 1953)

These regulatory authorities however have not all proceeded on the same basis in providing the framework of exemptions for collaborative agreements in the container shipping industry. While the industry had evolved within these multiple international jurisdictions, the continued regulatory challenges to the efforts by these shipping companies to provide scheduled services remain in varying degrees under their economic regulation (Nair, 2009; Marlow and Nair, 2010; Gardner et al, 2002; Davies, 1980;) It was evident that even from the perspective of these economic regulators, there was a variety of interpretations to the application of diverse competition law regimes on the same set of facts in this very high capital intensive industry. At the same time, it is important to note that the industry continued to display features of concentration seen from the supply of capacity that was held by a few, coupled with the structure of actual fleet of larger ships also with the few carriers at the top of the table (FMC, 2012; Nair, 2009). Following all this, a unique opportunity emerged in mid-2013, when there was the announcement of these three world's largest container shipping companies declaring their intention to form a horizontal collaboration through the alliance called the P3 Network service. This study will explore the wider international debate that followed the decisions of major economic regulatory jurisdictions on the proposal by the top three carriers to collaborate through an alliance called the P3 service to ports in the main arterial routes.

2. Research Method

In this study the perspectives of relevant stakeholders who include not only regulatory authorities but also shipping companies and shippers, are explored as they respond to the P3 alliance in relation to the application of legal principles in a public law domain. These perspectives, from different global jurisdiction are on the similar facts, and in doing so the empirical facts as disclosed in the public domain of the P3 is selected as the case study method. The analysis will be on the basis of an interpretation on the statements of key stakeholders engaged in the phenomena under study as they are expressed in major professional media sources including Lloyd's List. The statements and other published material are then discussed in order to draw any rationale or perceptible idea that may be emerging to explain the view that the global scenario is becoming hugely complicated. It is about a group of shipping lines who perceive in their wisdom that their services are best offered in a way that would require them to collaborate with other carriers in the groups although they are basically in competition with those other carriers. Their perception, as seen in the model they present to and the response of these competition authorities, provides a unique case study experience to see the way that the economic regulatory regimes interpret the perception of these shipping lines. This is explored through highlighting the decision process involving stakeholders who are making sense of the case submitted by business entities within the P3 network.

2.1 *Case Study*

This study will firstly provide an outline of the P3 alliance, which is the collaboration agreement that has now reported to have been discontinued following, the international regulatory scrutiny. In order to explore issues from a wider perspective, the frame of the P3 will be compared to the G6 alliance which has also been referred to by regulatory authorities as having distinctly different collaboration format. A starting point for the analysis will be the approach taken by the US Federal Maritime Commission, when the case first entered the public domain in 2013. This will then form the basis for the analysis of the diverse interpretation to rules on competition as adopted by other selected regimes which are the European Commission and the Chinese Ministry of Commerce. The study will explore theoretical constructs on the rationale adopted by regulatory authorities when exploring horizontal collaboration within the framework of scheduled services and will then provide the format for the discussion for the study. This will then explore the likely future scenario to determine, if the regulatory frame presently applied appears to be hostile to the