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2022 Evaluation of the Consortia Block Exemption Regulation (CBER)

- Contribution by the Bundeskartellamt -

The European Commission has launched an evaluation of the Consortia Block Exemption Regulation (Regulation 906/2009) which is due to expire on 25 April 2024. The Bundeskartellamt welcomes the opportunity to submit its observations according to the principles set out in the EU's better regulation guidelines.

According to the Bundeskartellamt's assessment, container liner shipping consortia meeting the CBER conditions no longer satisfy with a sufficient degree of certainty all four conditions of Article 101(3) TFEU under current and expected market conditions. Industry concentration has risen considerably over the past years. Given today's scale and resources of the largest carriers, it is unclear how their participation in a container liner consortium should give rise to efficiency gains according to Article 101(3) TFEU. Furthermore, carrier alliances and cross-alliance consortia have increased resulting in a thicket of cooperation agreements, whereas CBER evaluates each vessel sharing agreement (VSA) route-by-route and remains agnostic towards cooperation agreements on other routes. The largest carriers should no longer benefit from CBER's safe harbour, and the cumulative effect of consortia meshes should be taken into account.

1. Market developments

The Bundeskartellamt welcomes the Commission's intent to consider "(i) the trend towards consolidation between carriers, (ii) their vertical integration and (iii) cross-membership between consortia".[1] Indeed, these market trends have changed the economic context in which CBER applies.

[1] Cf. European Commission (2022), Ares(2022)5649105, p. 1.

Over the past years and decades, a constant trend towards horizontal concentration could be observed. The seven largest carriers today each operate several hundred vessels and account for approx. 75% of worldwide container shipping capacity.[2] Industry concentration has reached a level that made merger control remedies necessary in some more recent cases.

Moreover, container liner alliances have grown over the past years. The industry is characterized today by three major alliances which include all leading carriers and which cooperate on a broad range of routes within their alliance. However, each carrier also maintains route-specific consortia with carriers that are parties to other alliances ("cross-alliance consortia"). This has resulted in a thicket of cooperation agreements. It has been estimated that by 2021 each of the largest carriers maintained between 14 and 51 links to other major carriers through consortia, that approx. 50% of worldwide capacity was operated by consortia, and that almost all trade corridors throughout the world had at least one consortium with a market share of 30% or more.[3]

Over the past years, also a trend towards vertical integration, both upstream and downstream, could be observed. Container liners increasingly became (co-)owners of port terminals, typically forming terminal joint ventures with the port operator and/or with other container liners. Further M&A activities by container liners included the acquisition of freight forwarders, brokers, freight airlines, e-commerce logisticians and others.[4]

These market trends could already be observed when CBER was extended in 2014 and 2020, and have continued since then. The 2020 CBER extension was granted despite this constant deterioration of the competitive conditions, essentially because the Commission in its report had not found any corresponding deterioration in market outcome parameters such as freight rates, availability and reliability of services in 2014-2019.[5] However, market performance has deteriorated drastically since 2020. Freight rates have reached historical highs, whereas the availability and reliability of container liner services is at an all-time low. While the coronavirus pandemic seems to have been one main driver for these developments, the poor market outcomes may

[2] Cf. https://alphaliner.axsmarine.com/PublicTop100/
[3] Cf. Merk, O., Teodoro, A.; Alternative approaches to measuring concentration in liner shipping. Marit Econ Logist (2022).
[4] Cf. International Transport Forum (2022), Performance of Maritime Logistics, International Transport Forum Policy Papers, No. 106, OECD Publishing, p. 43.
[5] Cf. European Commission, Ares(2022)5649105, p. 1.

have been caused in part also by the multitude of alliances and VSAs among the largest carriers.

2. Relevance of carrier size for likely effects of a vessel sharing agreement

Like any other form of horizontal agreement, a consortium may entail anti-competitive effects as well as efficiency gains. These effects are assessed by comparing the market situation with and without the consortium in place. A consortium conforms with Article 101 TFEU if there are no or only minor anti-competitive effects, or if the positive effects of the efficiency gains exceed the negative effects caused by the loss of competition. The (relative) magnitude of these effects depends, inter alia, on supplier size.

Where a consortium operates on a (geographic) market, this entails only limited competition, if any, between the members of the consortium on that specific market. This is a direct result of the joint capacity planning that effectively restrains competition on capacities which is the decisive parameter of competition in the container liner industry. Whether and to what extent competition is lost due to the consortium depends on the likely situation without the consortium. If both members of the consortium supplied the market independently absent the consortium, then the consortium would lead to a loss of competition between these two suppliers. Even if only one of the two suppliers was likely to be active on that market, e.g. because the market is characterized by economies of scale and/or because the market is too small to accommodate another supplier, the other supplier may be a potential entrant to this market. In this scenario, the consortium would still restrict competition as it would eliminate the competitive threat emanating from the potential entrant.

Negative effects resulting from consortia of smaller carriers will in most cases remain behind those resulting from consortia encompassing large carriers since it is less likely that small carriers would (be able to) supply the market independently. In the container liner shipping industry, geographic markets are defined by trade routes (i.e. region pairs) adding up to more than 100 geographic markets. While smaller carriers have limited capacity and are only active on one or a few routes, the large carriers cover a broad range of routes. A small carrier’s presence on a given route may depend on its participation in a VSA. In contrast, where a large carrier is active on a route through a VSA, it is likely to be active on that route also without the VSA or it will be at least a potential competitor. As a consequence, a VSA among leading container liner carriers is more likely to restrict competition than a VSA among small carriers.

On the other hand, the efficiency gains a carrier is able to achieve through a VSA is also likely to depend on carrier size. The efficiency arguments for shipping consortia generally brought forward in essence consist in (i) risk sharing for large investments and (ii) broader service offering and better capacity utilisation.[6]

As far as range of services and capacity utilisation are concerned, it is doubtful whether a VSA is the least restrictive means to achieve these benefits. As in other industries, the alternative to institutionalized, long-term joint ventures (such as VSAs or even alliances) is flexible subcontracts (such as ad-hoc charter or slot charter) which effectively enable the same level of capacity utilisation and service breadth without unnecessary restriction of competition.

The argument of risk sharing for large investments seems in principle plausible for small carriers, but less so for large carriers. Smaller carriers operate only a few vessels which means that each vessel (or route served) may represent a rather high investment in relation to its whole fleet. A small carrier could thus be willing to invest more if its investment risk is mitigated through participation in a VSA or alliance. For a large carrier, the risk of each vessel (or route served) levels out much more. If a single vessel or route does not perform well, this will typically be compensated by profits on other routes. It is thus unclear how alliances and VSAs may (further) reduce risk exposition of large carriers.

In summary, the positive effects of VSAs tend to dominate when the parties are small carriers, whereas the opposite is true for large carriers. Their participation in a VSA typically does not satisfy with a sufficient degree of certainty all four conditions of Article 101(3) TFEU, even if the market share of the parties to the VSA remains below 30% on that specific route. However, also the largest carriers worldwide currently benefit from CBER's safe harbour as it fails to capture global carrier size. This is contrary to the intention of CBER which has been a facilitation of cooperation between small carriers. Accordingly, a continued effectiveness of CBER it its current form is at least questionable.

[6] Cf. OECD (2015), Competition Issues in Liner Shipping, DAF/COMP/WP2(2015)3; European Commission (2019), SWD(2019) 411 final, p. 27-28.

3. Cumulative effects of alliances and cross-alliance consortia

Liner shipping alliances can mainly be described as VSAs that cover several trade routes, i.e. an alliance is a series of several VSAs between the same partners.[7] Typical alliance activities include planning of joint routes (which trade lanes to serve, alliance vessel capacity, service frequencies, port calls), modalities of mutual compensation, joint procurement of port services and various information exchanges.[8] Such intensive cooperation is likely to affect members' behaviour also in areas which are not explicitly covered by the alliance. In practice, it seems unlikely that members of the same alliance compete fiercely with each other on routes that are outside the alliance's scope. However, CBER implicitly assumes the contrary. CBER's 30% market share threshold is not evaluated on routes where two or more alliance partners operate in parallel without concluding a VSA for that route. Similarly, when evaluating the 30% threshold for cross-alliance consortia, the market shares of alliance co-members will be counted as competing with the consortium on that specific route. Furthermore, the 30% threshold also does not take into account how concentrated the (geographic) market is, e.g. whether other carriers have also formed a consortium on that same route. This means that CBER's 30% "safe harbour" threshold sometimes fails to fulfil its function which is to ensure that sufficient external competition to the alliance/consortium remains.[9]

The multitude of consortia with varying partners may also as such give rise to coordinated effects more generally. Liner shipping is an industry that displays many characteristics conducive to coordination such as high concentration, high market transparency, multi-market contacts, substantial entry barriers and low demand elasticity.[10] The proliferation of consortia aggravates this situation. Through consortia carriers gain in-depth information about their competitors/partners thus increasing market transparency further. Consortia also create ample opportunities for targeted - and thus relatively inexpensive and effective - retaliation if a competitor/partner engages in fierce competition on a route not served jointly. The improvement of retaliation mechanisms makes coordination more likely, notably also on routes not served by the consortium. CBER does not take into account these broader effects as it evaluates each VSA route-by-route and ignores the overall extent of cooperation agreements.[11]

[7] Cf. European Commission (2019), SWD(2019) 411 final, p. 6.
[8] Cf. International Transport Forum (2018), The Impact of Alliances in Container Shipping.
[9] Cf. recitals 7 and 9 Regulation 906/2009.
[10] Cf. e.g. European Commission (2004), Horizontal Merger Guidelines, 2004/C 31/03, para. 39-57.
[11] According to recital 12 Regulation 906/2009 this aspect is particularly relevant when considering a withdrawal of the CBER benefit.

4. Conclusion

As of today, the shipping liner industry is highly concentrated and operates plenty of consortia. Since 2020, the industry has been exhibiting high freight rates and low reliability. It is thus time for a systematic review of whether the existing alliances and VSAs conform with Article 101 TFEU. Similar exercises conducted in other sectors previously characterized by a plethora of joint ventures have proven successful.[12]

Some, but not all existing consortia are privileged by CBER. As these consortia no longer satisfy with a sufficient degree of certainty all four conditions of Article 101(3) TFEU, CBER should be phased out or amended. The largest carriers should no longer benefit from CBER's safe harbour. In this context, it is also important to recognize that CBER is one of the last sectoral block exemption regulations. It should be assessed whether sufficient legal certainty for small carriers is already reached via general antitrust provisions and the Horizontal Guidelines. If CBER is not phased out, a more appropriate outcome could also be achieved e.g. by introducing a (worldwide) fleet capacity limit for a carrier to benefit from CBER. Any CBER amendment should in addition also reflect the cumulative effect of consortia meshes, e.g. indirectly, by setting the fleet capacity limit at a sufficiently low level, or more directly, by adding 'consortia mesh' criteria to the cumulative conditions of CBER's safe harbour.

[12] Cf. Bundeskartellamt (2015), Report on joint venture dissolutions in the rolled asphalt industry, B1-100/12; Bundeskartellamt (2020), Case summary on the unbundling of joint ventures in the ready-mix concrete sector, B1-216/17.