

MOFCOM Blocks “P3” Shipping Joint Venture

June 19, 2014

1. Summary

For only the second time since it began reviewing mergers and joint ventures in 2008, when China’s Anti-Monopoly Law (“AML”) came into effect, MOFCOM has blocked a proposed transaction rather than addressing its competition and trade policy concerns through some form of remedy. It did so notwithstanding the fact that both U.S. and European authorities had chosen not to challenge the joint venture.

The transaction involved a proposed operational joint venture by three large global shipping companies. The joint venture, to be known as P3 and announced in June of 2013, called for Denmark’s A.P. Moller-Maersk along with Swiss firm Mediterranean Shipping Company (MSC) and France’s CMA CGM to pool about 250 ships in order to utilize more efficiently their combined capacity and thereby reduce costs. Notwithstanding the parties’ efforts to structure its venture so as to leave pricing, sales and marketing functions to the individual shipping companies, rather than in the joint venture, MOFCOM chose to effectively treat the proposed P3 Network as a merger. This is in sharp contrast to the approach taken in the EU and the US¹, and has already engendered considerable speculation regarding the extent to which non-competition domestic concerns animated MOFCOM’s decision.²

2. Structure of the P3 Joint Venture

CMA CGM, Maersk Line and MSC Mediterranean Shipping Company SA agreed in June 2013 to establish a long-term operational alliance on East – West shipping routes, to be called the P3 Network. According to published reports, the P3 Network was intended to operate a capacity of 2.6 million TEU (initially 255 vessels on 29 loops) on three trade lanes: Asia – Europe, Trans-Pacific and Trans-Atlantic.

The P3 Network vessels would have been operated independently by a structurally separate “network operating center.” The three lines would have continued to have fully independent pricing, sales, marketing and customer service functions. Bearing some similarity to code-sharing arrangements between airlines, the three lines stated that the arrangement would permit them to cut billions of dollars in annual costs by using each other’s ships and port facilities.

¹ The U.S. Federal Maritime Commission (“FMC”) announced on March 20, 2014 that it would allow the P3 Network agreement to become effective in the US as scheduled on March 24, 2014. FMC, “P3 Agreement Clears FMC Regulatory Review,” Mar. 20, 2014, available at <http://www.fmc.gov/NR14-06/> (hereafter “FMC Decision”); see also [P3 Network Vessel Sharing Agreement, FMC Agreement No. 012230](#) for the Agreement (hereafter “P3 Agreement”). On June 3, 2014, the European Commission informed the P3 partners that it had decided not to open an antitrust investigation respecting the joint venture. “EU antitrust regulators will not probe Maersk alliance,” Reuters, June 3, 2014, available at <http://www.reuters.com/article/2014/06/03/eu-shipping-maersk-idUSL6N0OK40Q20140603>

² “China Sends Shipping Consolidation Adrift,” *Wall Street Journal*, June 18, 2014, available at http://online.wsj.com/news/article_email/heard-on-the-street-china-sends-shipping-consolidation-adrift-1403099233-IMyQjAxMTA0MDEwODExNDgyWj.

“Firewalls” designed to protect against the flow of competitively sensitive information were an important part of the structure and undoubtedly played a significant role in persuading both the FMC and the European Commission to clear the venture.³ The firewall was described as follows to the FMC:

Subject to the procedures set forth in this Agreement, the Parties are authorized to obtain, compile, maintain and exchange information related to any aspect of operations in the Trade including, not but [sic] limited to, forecasts/projections, records, statistics, studies, compilations, costs, cargo volumes, market share information and other data, whether prepared by a Party or Parties or obtained from outside sources. Notwithstanding the preceding sentence, no information which is commercially sensitive (customers (save as necessary to comply with the terms of a particular contract of carriage), customer pricing and other, similar commercially sensitive information) may be exchanged hereunder directly or indirectly between any of the Parties. In particular, no Party shall receive commercially sensitive information hereunder relating to another Party, other than as strictly necessary for the proper functioning of the P3 network. Notwithstanding this, where provided for by and in accordance with this Agreement, the NC shall provide the Management Committee with anonymised data limited to the issues under discussion.⁴

3. US and European Analysis

While both regulators considered the possibility of anticompetitive effects, they chose to monitor the operation of the venture rather than to block it, given the potential procompetitive efficiencies and consumer benefits of the venture. The alliance would have had more than 40 percent of Asia-Europe and trans-Atlantic trade and 24 percent of the trans-Pacific market, according to industry estimates.⁵ Nonetheless, the FMC allowed the alliance to proceed.

The FMC stated:

The Commission’s decision is based on a determination that the agreement is not likely at this time, by a reduction in competition, to produce an unreasonable increase in transportation cost or an unreasonable reduction in transportation service under section 6(g) of the Shipping Act. The Commission notes that there may be circumstances that could permit the P3 Agreement parties at some point in the future, to unreasonably reduce services or unreasonably raise rates that could raise concerns under section 6(g). To address these concerns, the Commission directed staff to issue alternative reporting requirements to the P3 Agreement parties to assist the Commission in its ongoing, close monitoring of the agreement.

³ A more detailed description of the structure of the joint venture as it was proposed to the FMC may be found on the Agency’s [website](#). See FMC Agreement.

⁴ FMC Agreement at Section 5.6(b).

⁵ “China MOFCOM Shocks With P3 Shipping Alliance Decision,” Reuters, June 18, 2014, available at <http://uk.reuters.com/article/2014/06/17/maersk-network-idUKL5N0OY2VQ20140617>.

“The Commission’s action on the P3 Agreement takes into account the comprehensive, competitive analysis conducted by the FMC staff and comments received from shippers and other stakeholders. While the agreement is expected to produce operational efficiencies for the benefit of the U.S. consumer, the new reporting requirements specifically tailored to this agreement’s unique authority will ensure we have timely and relevant information to act quickly should it be necessary,” said Chairman Cordero.⁶

Several months later, the European Commission announced:

“At this stage, the commission does not intend to open proceedings in relation to P3...”, said Antoine Colombani, commission spokesman for competition policy. “The commission will follow market developments and will remain vigilant as regards any risks for competition that may arise from the implementation of P3.... The commission will consider intervening if necessary.”⁷

4. MOFCOM Analysis

In the wake of these rulings, it was widely reported that MOFCOM was expected to approve the transaction.⁸ But at the end of the day, MOFCOM declined to do so. For reasons not clearly explained, MOFCOM effectively treated the joint venture as a merger despite the parties’ effort to separate pricing, marketing, and sales from the “network operating center.” In this respect, the MOFCOM analysis sharply differs from that of the US and European authorities.

Following its common practice, MOFCOM “solicited opinions from relevant government authorities, industry associations and relevant enterprises.”⁹ Unsurprisingly, it defined the relevant product market as the international container liner shipping service market and the relevant geographic markets as the Asia-Europe, trans-Pacific and trans-Atlantic routes. Its decision focuses on the Asia-Europe routes, one of the geographic markets which also would have been the subject of EU scrutiny.

MOFCOM concluded that the P3 alliance would “result in closely-coordinated joint operations, which is different in substance from traditional loosely-structured shipping alliances” approved in the past.¹⁰ Unlike previous alliances, MOFCOM noted that here the shipping capacity of the three lines would be integrated. According to MOFCOM, the P3 Network would have a combined capacity on the Asia-Europe routes of almost 47 per cent.¹¹ This increase in concentration, MOFCOM reasoned, “may restrict development of

⁶ FMC Decision.

⁷ “EU regulators clear Maersk, Nippon Yusen shipping alliances,” Reuters, June 3, 2014, available at <http://in.reuters.com/article/2014/06/03/eu-shipping-maersk-idINL6N0OK42Z20140603>.

⁸ See, e.g., “China Set to Follow EU in Approving Giant Global Shipping Alliance,” *Wall Street Journal*, June 4, 2014, available at <http://online.wsj.com/articles/eu-approves-giant-global-shipping-alliance-says-maersk-line-1401870441>.

⁹ *Announcement of the Decision of Anti-monopoly Review of Concentration of Undertakings by MOFCOM on Prohibition of the Establishment of a Network Center by A.P. Møller - Maersk A/S, MSC Mediterranean Shipping Company S.A. and CMA CGM S.A.*, June 17, 2014 (hereafter “MOFCOM Decision”).

¹⁰ *Id.*

¹¹ Interestingly, MOFCOM confirmed that it had hired an “independent third party” to conduct legal and economic analysis of the venture, which included using the Herfindahl-Hirschman Index to calculate market concentration: “The HHI index on the Asia-Europe route container liner shipping market is 890. However, following the completion of this Transaction, the HHI index would increase to 2240 with HHI delta of of 1350, as a result of the decrease in the number of major market competitors due to the closely-
(cont.)

other competitors, which would further [place] such competitors in an inferior position in future competition.”¹² MOFCOM also expressed the concern that this increased concentration could result in reducing the bargaining power of shippers and ports, presumably with the Chinese players in mind.

MOFCOM did not explain why, in its view, the cost savings and other procompetitive synergies emphasized by the parties did not outweigh the anticompetitive concerns it expressed. Similarly, the MOFCOM decision does not address the parties’ efforts to structure a joint venture which, while it integrated capacity, left marketing, sales, and pricing decisions to the three entities acting independently. In short, the parties structured an alliance which was not a complete merger, but MOFCOM treated the P3 alliance as if it were a complete merger. No explanation is provided for why the separate pricing and marketing mechanisms did not adequately address concerns about increased concentration and about increased bargaining power *vis a vis* customers and ports.

Finally, MOFCOM revealed that the parties had put forth proposals to address the allegedly anticompetitive aspects of the proposed joint venture, but the remedies offered were deemed insufficient to alleviate MOFCOM’s concerns. No details were provided as to the remedial measures discussed.

5. Conclusion

MOFCOM’s decision is a dramatic illustration of the extent to which its application of the AML sometimes diverges from the approach taken by sister competition agencies. Both the European Commission and US competition authorities focus on weighing likely anticompetitive aspects of a joint venture or merger against procompetitive benefits which cannot be achieved by alternative means. The parties claimed, without contradiction from MOFCOM, that the cost savings which would result from their joint effort to deal with excess shipping container capacity would result in billions of dollars of cost savings that would redound to the benefit of their customers and which could not be achieved absent the joint venture. And they structured their venture in an effort to address any concerns which reviewing regulators might otherwise have had regarding anticompetitive effects. In light of MOFCOM’s failure to address the effort to adopt a structure which would preserve competition among the would be alliance partners, its decision already has been interpreted in some quarters as driven by an effort to protect domestic shipping companies from what would have been three more efficient rivals.¹³

(cont.)

coordinated joint operations among the Parties. The Asia-Europe route container liner shipping market would become highly concentrated” MOFCOM Decision.

¹² MOFCOM Decision.

¹³ See, e.g., n.2 *supra*.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	212 450 4352	arthur.burke@davispolk.com
Joel M. Cohen	212 450 4592	joel.cohen@davispolk.com
Arthur F. Golden	212 450 4388	arthur.golden@davispolk.com
Ronan P. Harty	212 450 4870	ronan.harty@davispolk.com
Christopher B. Hockett	650 752 2009	chris.hockett@davispolk.com
Jon Leibowitz	202 962 7050	jon.leibowitz@davispolk.com
Miranda So	+852 2533 3373	miranda.so@davispolk.com
Michael N. Sohn	202 962 7145	michael.sohn@davispolk.com
Howard Zhang	+86 10 8567 5002	howard.zhang@davispolk.com

© 2014 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

Notice: This publication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. If you have received this email in error, please notify the sender immediately and destroy the original message, any attachments thereto and all copies. Refer to the firm's [privacy policy](#) located at davispolk.com for important information on this policy. Please consider adding Davis Polk to your Safe Senders list or adding dpwmail@davispolk.com to your address book.

Unsubscribe: If you would rather not receive these publications, please respond to this email and indicate that you would like to be removed from our distribution list.