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„Cooperation Between Liner Shipping Operators Under EU and Chinese Competition Law "

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Abstract

Due to the specialty of the shipping industry, the cooperation between liner shipping operators has a long history of exempting from competition rules. As the market structure grows more concentrated, cooperation between liner shipping operators and its impact on the market has attached attention to the area of competition law.

This thesis will explore the legal status of liner shipping operator's cooperation under the EU competition law and Chinese antimonopoly law. It will start with a general brief introduction to the global shipping market, including the benefit of the cooperation and the highly concentrated market structure. Then it will provide an analysis of cooperation between liner shipping operators under the current EU competition law and the current Chinese anti-monopoly law, demonstrated by the opposite result of P3 Network under the two legal systems. Finally, as the cooperation between liner shipping operators shifts towards information exchange, it will explore the permitted information exchange between liner shipping operators, provided no more exemption is allowed in the future. This thesis also intends to provide a prediction for the interpretation of future Chinese legislation.

Abstrakt

Aufgrund der Spezialität der Schifffahrtsbranche hat die Zusammenarbeit zwischen Linienreedereien eine lange Geschichte der Freistellung von Wettbewerbsregeln. Mit zunehmender Konzentration der Marktstruktur hat die Zusammenarbeit zwischen Linienreedereien und ihre Auswirkungen auf den Markt den Bereich des Wettbewerbsrechts in den Fokus gerückt.

Diese Arbeit untersucht den rechtlichen Status der Zusammenarbeit von Linienreedereien nach dem EU-Wettbewerbsrecht und dem chinesischen Kartellrecht. Es beginnt mit einer allgemeinen kurzen Einführung in den globalen Schifffahrtsmarkt, einschließlich der Vorteile der Zusammenarbeit und der hochkonzentrierten Marktstruktur. Anschließend wird eine Analyse der Zusammenarbeit zwischen Linienreedereien nach dem aktuellen EU-Wettbewerbsrecht und dem aktuellen chinesischen Antimonopolgesetz vorgelegt, die durch das gegensätzliche Ergebnis von P3 Network nach den beiden Rechtssystemen belegt wird. Da sich die Zusammenarbeit zwischen Linienschifffahrtsunternehmen hin zum Informationsaustausch verlagert, wird schließlich der zulässige Informationsaustausch zwischen Linienschifffahrtsunternehmen untersucht, sofern in Zukunft keine Ausnahmen mehr zulässig sind. Diese Arbeit beabsichtigt auch, eine Vorhersage für die Interpretation der zukünftigen chinesischen Gesetzgebung zu liefern.

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Introduction

The liner shipping market is famous for its high investment requirement and operation cost. Driven by the desire to avoid cut-throat competition, liner shipping operators have been seeking cooperation in every possible form. Historically, the cooperation between liner shipping operators has been exempted from the competition rules from the very beginning of the competition law regime. However, with the close cooperation between liner shipping operators, the liner shipping market lacks sufficient competition and extreme inequality in bargaining power derived from the market structure. The permitted room for cooperation between liner shipping operators is shrinking gradually. Therefore, the purpose of this thesis is to provide a comparative overview of the legal status of the cooperation between liner shipping operators under the EU competition law and the Chinese antimonopoly law.

The thesis is divided into three chapters. Chapter I provides an overview of the liner shipping market, a brief historical development of the cooperation between liner shipping operators, and an overview of the current liner shipping market structure. The advantages of cooperation support the long-existed exemption, which is also accompanied by the undesired consequence that restricts competition. Chapter II analyzes the legal status of the liner shipping operators under the EU competition law and the Chinese antimonopoly law separately. The application of the rules in cooperation between liner shipping operators in different jurisdictions is compared through the different results of the investigation of the P3 Network, intending to draw a clear line between prohibited and permitted cooperation practices. As the focus of cooperation between liner shipping operators is shifting to the exchange of information, Chapter III is dedicated to analyzing the cooperation between liner shipping operators under the general competition law, in absence of the sector-specific exemptions, and to predict future legislative development of Chinese legislation on the exchange of information between liner shipping operators.

Chapter I Liner Shipping Market: Is There a Way for More Competition

The liner shipping market has played an indispensable part in global trade. Due to the high investment requirement and operation cost, liner shipping operators use every method to avoid cut-throat competition, including conferences, VSAs, and alliances. The lack of sufficient competition in the liner shipping market is accompanied by unequal bargaining power between shippers and liner shipping operators. This chapter will explore the specialty of the liner shipping market and how the cooperation between liner shipping operators evolved.

Liner shipping market

As one of the keystones of globalization, seaborn shipping plays a crucial part in global trade.[1] According to the Review of Maritime Transport 2021, shipping and seafarers transport more than 80 percent of world trade by volume.[2] Among all the other subdivisions of seaborn shipping, liner shipping plays a prominent role in facilitating international trade, as it not only enables the physical transportation of goods but also benefits the commercial and marketing aspects of global trade since most containerized cargo cannot be transported in other alternatives.[3]

Seaborn transportation is unique due to the nature of its cost.[4] Liner shipping stands out among the three main segments of seaborn transportation of goods. With the predetermined price, schedule, and ports, the cost of liner shipping service is scheduled before the effective demand could happen. In other words, liner shipping costs are borne by liner service operators irrespective of the volume of cargo shipped. [5] Once the vessel set sail from the port, the unused capacity on the vessel can no longer be utilized, and hence became part of the cost. The fixed costs of liner service, including depreciation, amortization, insurance, vessel maintenance cost, and crew

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[1] OECD, Working Party No. 2 on Competition and Regulation, 'Competition Issues In Liner Shipping -- Note by the Secretariat -- '[2015] DAF/COMP/WP2(2015)3, available at: <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2015)3&docLanguage=En> accessed on 14 August 14, 2022, 3.
[2] United Nations Conference on Trade on Trade and Development, *Review of maritime transport 2021* UNCTAD/RMT/2021, 111.
[3] Photis Panayides and others, 'Strategic alliances in container liner shipping (2011) 32 (2011) Research in Transportation Economics 25 < https://linkinghub.elsevier.com/retrieve/pii/S0739885911000187> 25 accessed on 14 August 14, 2022; OECD (n 1) 3.
[4] Alla Pozdnakova, *Liner Shipping and EU Competition Law* (Kluwer Law International 2008) 4.
[5] OECD (n 1) 6.

expense, are higher than the variable costs, including voyage and cargo-related expenses.[6] Therefore, the nature of liner shipping forces liner shipping operators to seek the maximum use of the capacity to achieve economies of scale, which set the baseline for horizontal cooperation between liner shipping operators.

Apart from the need to maximize capacity use, high market barriers and high capital investment requirements are factors shared by all seaborne transportation sectors.[7] Overcapacity is another important feature of the liner shipping industry.[8] In seeking to utilize the economies of scale, one way is to increase the individual vessel size. On the one hand, the increase in the size of the ship reduced the average ship cost of the higher unit capacity it provides. On the other hand, it made it more challenging for individual liner operators to purchase and maintain the running of the ship.[9] Chased by the demand to lower the shipping cost and utilize the shipping capacity on every vessel, liner shipping operators have even more incentive to share the cost and maintain a stable market through cooperation.

Driven by the need to maintain a reasonable freight and to find sufficient cargo to utilize the spaces,[10] liner shipping operators have cooperated closely since the growth of competition in the liner shipping industry.[11]

Conference

The liner shipping market was once dominated by conference agreements, which are organizations of liner shipping operators on similar routes. The shipping operators agree on the price of the specific routes, as a mechanism to maintain the freight at a stabilized level and to prohibit low-price competition that will drive them out of business.[12] Sometimes, they also agree on other issues, including pooling profits or revenues, capacity management, and loyalty discounts provided to shippers.[13]

[6] Ibid.
[7] Ibid 4.
[8] Ibid 7.
[9] Ibid 4.
[10] Owen Tang and Po-wan Sun, ‘Anti-Competition of Ocean Shipping Alliances: A Legal Perspective’ (2018) 3 Maritime Business Review 4, 5.
[11] OECD (n 1) 4.
[12] William Sjostrom, ‘Ocean Shipping Cartels: A Survey’ (2004) 3 Review of Network Economics 107, 107.
[13] Ibid.

The first liner conference was set up by the operators of the Calcutta conference in 1875.[14] It was a reaction to the initial cut-throat competition between liners.[15] Before the conference was gradually replaced by alliances, the liner shipping conference dominated the liner shipping market for over one hundred years. [16]

Conference agreements are price-fixing cartels by nature. Through the conference, a freight tariff is issued by conferences. Conferences list the freight rate for every kind of cargo to be shipped, and conferences also employ placing agencies to check members' adherence to the listed tariff.[17] Apart from the price-fixing feature, conferences may also restrict their members' output through cargo quotas or sailing quotas. [18]

Conferences are further divided into two categories, open conferences, and closed conferences.[19] The difference between the two is whether any liner can join such a conference. A close conference is more restrictive, and it does not allow outsiders to join the conference, which made its use as a tool for monopolizing the trade route more effective.[20]

In the history of competition law enforcement, the liner conference was long exempted from competition law. The justification for the liner conference exemption includes preventing destructive pricing that underestimates the real cost, preventing consolidation in the industry, the need for information exchange for future strategy development, and how the price fixing practice acts as a benchmark for rate negotiation.[21]

[14] OECD (n 1) 4.
[15] OECD (n 1) 11.
[16] Sjostrom (n 12) 107.
[17] Ibid 109.
[18] Ibid.
[19] Mariner Wang, 'The Formation of Shipping Conference and Rise of Shipping Alliance' (2015) 6 International Journal of Business Administration 22, 23.
[20] Ibid.
[21] OECD (n 1) 12.

However, the uniqueness of the liner shipping industry that was used for the justification of the price-fixing practice was questioned as all undertakings are not expected to be subject to competition in a fair and open market, and the liner shipping industry is not different from any other industries.[22]

At first, liner shipping conferences were exempted from antitrust scrutiny under Article 101 TFEU according to Regulation 4056/86[23]. After years of review, Regulation 1419/2006[24] was adopted on September 25, 2006, which officially terminated the era of liner conferences when it took effect on October 18, 2008.

Before the conference exemption was repealed, the rigid price-fixing conference had gradually started to be replaced by more flexible formats of cooperation, including vessel-sharing and space charter agreements, and alliances.[25]

Consortia

Consortia are technical agreements formed between liner shipping operators for cooperation, driven by the motivation of cost control.[26] The agreement is a horizontal integration to maximize capacity utilization that focuses on a single maritime service.[27] Achieved through various internal agreements, the integration encompasses different degrees, including slot charter, slot exchange, and vessel sharing.[28]

The consortia agreement in theory does not involve price-fixing and only concerns the rationalization of capacity through the mechanisms of the vessel, terminal, and equipment sharing, joint scheduling, and slot-chartering.[29] Consortia is a form of

[22] Ibid 13.
[23] Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJL378/4.
[24] Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJL268/1.
[25] Wang (n 19) 29.
[26] OECD (n 1) 26.
[27] Annetta Varbanova, 'Concentration in Liner Shipping and Alliances Formation: Issues and Challenges' (2017) 2 Trans Motauto World 241, 241.
[28] OECD (n 1) 27.
[29] Wang (n 19) 29.

horizontal cooperation with low entry and exit barriers and less adherence commitment for carriers, which allows the carriers to adjust their commitment to market changes and customers' needs.[30]

Strategic alliances are technical cooperative agreements between liner shipping operators for investment risk sharing and vessel utilization.[31] Compared to consortia for single service, strategic alliances aim for long-term cooperation and intend the members to adhere to their commitment to a common objective for many years.[32] Strategic alliances also focus on cost rationalization that covers full interrogation[33] of the service capabilities of the members, but still no price-fixing.[34]

Modern liner sipping companies always aim for sharing the risk and high investment requirements, achieving economies of scale and cost control and utilizing the increase in frequencies and capacity made in response to the dynamic growing containerized trade environment.[35] The rise of the alliance was also a result of globalization. The expansion of trade routes required liner operators to provide broader geographic coverage and higher service frequency, which make it harder for stand-alone operators to compete in the capital-intensive market.[36] The desire for a stable market not only motivates the operation of conferences but also remains the incentive for the operation of consortia and alliances.

Indeed, consortia and alliances no longer include price-fixing features. Knowing other competitors in the market remains critical in business operations. Consortia and alliances are used as tools for gathering confidential information regarding market conditions and competitors, both as their partners and their rivals.[37]

Compared to conferences, consortia and strategic alliance agreements deliberately avoid price-fixing features. After the conference system is no longer exempted

[30] OECD (n 1) 27.
[31] Ibid 28.
[32] OECD (n 1) 28.
[33] Cooperation via global alliances does not cover joint sales, marketing, pricing, joint ownership of assets, pooling of revenues, profit or loss sharing, or joint management.
[34] OECD (n 1) 28.
[35] Panayides (n 3) 27.
[36] OECD (n 1) 26.
[37] Ibid 27.

from competition law in the major jurisdictions, alliances, the more flexible form of cooperation, have been the dominant feature of the container shipping market.

The Current Liner Shipping Market

The current liner shipping market is dominated by major alliances. Liner shipping alliances and members of individual alliances reshuffled multiple times since the five modern shipping alliances were formed in 1995. From 2017 to 2021, the three major alliances[38] control about 75 percent of the global container shipping market. [39] There is a fluctuation in the market share of non-alliance liner operators for certain routes ranging from 10 percent to 30 percent under the impact of COVID-19.[40] However, as of 2022, members of the three major alliances control 83 percent of the global market share.[41]

The liner shipping market has been a highly concentrated market since 2014.[42] Until 2014, the liner shipping market was almost evenly disturbed between members of the alliances, carriers whose market share ranked top 30, and the remaining carriers.[43] Applying the Herfindahl-Hirschman Index (HHI), the market concentration is demonstrated as around 1350 points. Within the following years, the number of alliances was reshuffled into three, and the market share controlled by the members of the alliances increased to 80 percent.[44] Among the major trade routes, the Asia-Europe route is the most concentrated market, with the three alliances dominating the market by taking more than 85 percent of the market share.[45]

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[38] The three major alliances are the 2M Alliance (Maersk and MSC), Ocean Alliance (COSCO, OOCL, CMA CGM, and Evergreen), and THE Alliance (Hapag-Lloyd, ONE, Yang Ming, HMM).
[39]Martin Placek, 'Leading Container Ship Alliances - Market Share 2021' (Statista, April 2022) <https://www.statista.com/statistics/1249648/leading-container-ship-alliances-market-share/> accessed 25 June 2022.
[40]Sam Chambers, 'New Analysis Shows the Fierce Fight between Alliances for Market Share on the Main East-West Trades' (Splash247, 24 August 2021) <https://splash247.com/new-analysis-shows-the-fierce-fight-between-alliances-for-market-share-on-the-main-east-west-trades/> accessed 25 June 2022.
[41] Alphaliner, 'Top 100' (Axsmarine, 25 June 2022) <https://alphaliner.axsmarine.com/PublicTop100/> accessed 25 June 2022.
[42] Ashley Boroski Mendoza, 'What are Shipping Alliances and What are Their Importance?' (Shiplilly, 21 January 2020) https://www.shiplilly.com/blog/what-are-shipping-alliances-and-whats-their-importance/ accessed 22 August 22, 2022.
[43] Varbanova, (n 27) 243.
[44] Ibid.
[45] United Nations Conference on Trade on Trade and Development, *Review of maritime transport 2019* UNCTAD/RMT/2019/Corr.1, 47

The shipping industry enjoys different competition law exemptions in many jurisdictions.[46] Some jurisdictions use national security as the reason for giving special treatment to the shipping industry.[47] Though some jurisdictions gradually limited the exemption that the shipping industry enjoyed since the birth of competition law rules, consortia remain exempted from competition law rules provided the requirements listed are satisfied.[48] The rationale for exempting consortia from general competition law rules can be summarized in two points. First, a corporation in the form of consortia can bring about economies of scale. Second, through consortia, liner operators can better utilize the space on their ships that would become a mere cost once the ship set sail.

The special market structure provides the shippers, the other side of the market, with limited bargaining power. The situation is aggravated under the impact of COVID-19. High market concentration has raised questions about whether it has exacerbated the surge in container rate starting from the second half of 2020.[49] From the side of shippers, there are complaints about the unreasonable increase in freight rate, more blank sailings, and worst service.[50] Shippers argue that because cargo handled by different ocean carriers are eventually loaded on the same vessel, the factors that differentiate the companies, including different cargo and document cut-off times, are all the same for the companies in the same alliance.[51]

Conclusion

The global liner shipping market is a highly concentrated market dominated by only a few players. As an industry requiring high capital investment and operation costs, it has a long history of enjoying competition law exemption. The desire to avoid

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[46] Ralitsa Georgieva, 'COMMENT: Cracking Down Antitrust Prohibitions: Conferences, Mergers and Acquisitions, and Alliances in the Shipping Industry' (2020) 44 Tul. Mar. L. J. 291, 310
[47] Ibid.
[48] Ibid.
[49] United Nations Conference on Trade on Trade and Development, Review of maritime transport 2021 (n 2) 74.
[50] Mike Wackett, 'More Blank Sailings Check Rates Decline, but Eyes Are on the Carriers' (The Loadstar, 20 May 2022) <https://theloadstar.com/more-blank-sailings-check-rates-decline-but-eyes-are-on-the-carriers/> accessed 26 June 2022.
[51]FreightWaves Staff, 'Shippers Raise Concerns over Ocean Liner Alliances' (FreightWaves, 20 May 2016) <https://www.freightwaves.com/news/shippers-raise-concerns-over-ocean-liner-alliances> accessed 26 June 2022.

cut-throat competition, to reduce cost, and to maximize capacity use drives liner shipping operators to seek cooperation in every possible method.

Conferences that control the freight rate of a certain route have the feature of price-fixing. It controlled the liner shipping market for one hundred years. After the repeal of the exemption for conferences and the need for a more flexible format of cooperation, it was gradually replaced by liner alliances, which are considered less restrictive to competition and leave the liner operators more room for individual consideration.

Since the three major alliances that formed around the year 2014, the global liner shipping market has been dominated by the three alliances. The market share controlled by the members of the alliances varies from 80 to 90 percent on different routes, demonstrating the characteristics of a highly concentrated market that lacks sufficient competition.

The market structure raises concerns in multiple aspects. Shippers with limited bargaining power complain about the unreasonable freight rate and the bad service that does not correspond with the price. Currently, the cooperation between liner shipping operators remains exempted from the competition rules to a certain level under EU and Chinese law. The rationale and concerns behind the exemption are examined below in Chapter II.

Chapter II Liner shipping cooperation under EU law and Chinese law

Liner shipping cooperation under EU Competition Law

Agreements between liner shipping operators are subject to the general EU competition rules. Under Article 101 TFEU, cooperation agreements between liner shipping operators are agreements that restrict competition. Though the liner shipping industry has historically been subject to more sector-specific legislation, the only remaining block exemption is for consortia that satisfy certain requirements.

EU competition law in general

The source of EU Competition law embodies in Article 101 TFEU and Article 102 TFEU. Per Article 101 TFEU, agreements between undertakings that restrict competition are void.[52] Article 102 TFEU regulates dominant undertakings and forbids them from abusing their position.[53] Since cooperation between liner shipping operators often takes the form of horizontal agreements, Article 101 TFEU is more relevant to the topic of the thesis. Whether an agreement restricts competition is determined by a two-part assessment. First, whether the agreement is caught by Article 101(1) as having anticompetitive objects or effects. Second, whether the agreement has enough pro-competitive benefits under Article 101(3) as to be exempt from Article 101(1).

The first step is to determine whether the agreement is caught by Article 101(1). Article 101(1) provides that "[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"[54]

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[52] Michael Jürgen Werner, *III. Application of EU Competition Rules to Maritime Sector – Commentary on the Liner Shipping Consortium Block Exemption Regulation No. 697/2014 (Regulation 906/2009)* (In EU Maritime Transport Law (1st ed., pp. 340–359). Nomos Verlagsgesellschaft mbH & Co. KG. 2016), 918; Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ115/88.
[53] Werner (n 52) 919.
[54] TFEU, art. 101.

An agreement restrict competition by an object when the undertakings have the intention to restrict competition.[55] The cooperation between liner shipping operators is driven by the desire to avoid cut-throat competition.[56] From the very beginning of the development of liner service, the liner shipping operators intended to restrict competition through various forms of cooperation.

Common horizontal agreements that restrict competition by an object include price-fixing cartels, quotas of production, and the exchange of information.[57] The price-fixing agreement was the core practice of liner conferences. Regarding liner alliances, the core provisions are vessel-sharing agreements and slot-sharing agreements, which by nature are a share of supply sources. The multiple forms of cooperation between liner shipping operators all restrict competition by object, which renders them prohibited under Article 101(1) per se.[58] Compared to horizontal cooperation between liner shipping operators, vertical integration is less relevant to competition restriction under Article 101 TFEU in the context of the liner shipping operation. Therefore, any cooperation between liner shipping operators that takes the form of horizontal agreements faces the risk of void under Article 101 TFEU, provided no exemption applies.

The second step is to determine whether the agreement is exempted under Article 101(3) TFEU. Not all agreements that fall into the Article 101(1) categories are automatically void. Article 101(3) TFEU provides the possibility of exemption even if the agreement restricts competition under Article 101(1) TFEU.

Article 101(1) TFEU provides that: "Any agreements … which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."[59]

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55 Werner (n 52) 920.
56 Wang, (n 19) 24.
57 Damian Chalmers and others, *European Union Law* (4th edn, Cambridge University Press 2019), 938.
58 Ibid.
59 Consolidated version of the Treaty on the Functioning of the European Union - Article 101 [2008] OJC115/47.

The exemption of Article 101 TFEU requires four cumulative conditions. First, the agreement must achieve a general interest goal, including the improvement of production or distribution of goods, or the promotion of technical or economic progress. Second, consumers must receive a fair share of the benefits. Third, the agreement must be essential in attaining the general interest goal. Fourth, the agreement must not fully eliminate the competition in the market.

The exemption can be achieved through individual cases review or block exemption regulations to categories of agreements and concerted practices.[60] When the exemption is achieved through a block exemption regulation, the restrictive agreement that falls within the scope of the regulation is presumed to have satisfied the four cumulative requirements.[61] In addition, the agreements that fall within the scope of the regulation are relieved from the burden to show that the four cumulative requirements are satisfied under Article 2 of Regulation 1/2003.[62]

Where no block exemption exists, the undertakings bear the burden of proof to show that the four cumulative requirements are satisfied.[63] The undertakings must self-assess whether the four cumulative requirements are satisfied, and use it as a defense in the investigation.[64]

Sector-specific laws and regulation

Though the liner shipping industry has historically been subjected to more sector-specific legislations and exemptions, as of today, all of the cooperation between liner shipping operators are subject to the general EU competition law.[65] The only exemption that remains is the block exemption for consortia.

[60] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty [2004] OJC101/97.
[61] Ibid.
[62] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJL1/1, art.2.
[63] Ibid.
[64] Ibid.
[65] European Commission, 'Maritime Transport' (European Commission) https://competition-policy.ec.europa.eu/sectors/transport-tourism/maritime-transport_en accessed 22 August, 2022.

Consortia BER

After the block exemption regulation on liner conference was repealed on October 18, 2008, the only valid block exemption regulation in the liner shipping area remained is Regulation 906/2009, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies.[66] (Hereinafter 'Consortia BER').

In the recitals of the Consortia BER, the Commission explained how the consortia agreements that fall into the scope of the BER satisfied the four cumulative requirements of Article 101(3) TFEU. First, the consortia achieve the general interest goal by contributing to the improvement of productivity and quality of available liner shipping services, as they will bring rationalization to the members' activity in vessel operation and port facility utilization.[67] Through greater utilization of containers and more efficient use of vessel capacity, technical and economic progress is made via the operation of consortia, as it enables the members to adjust capacity in response to fluctuations in supply and demand.[68] Second, consumers receive a fair share of the benefits as consortia bring about improvements in productivity, in the frequency of sailings and port calls, in scheduling, and in better quality and personalized services.[69] Third, Consortia BER limited the scope of exemption by excluding hardcore restrictions that are not necessary for the achievement of the general interest.[70] Fourth, Consortia BER justified its exemption as not eliminating competition in the relevant market since there is a market share threshold.[71]

Article 3 of the Consortia BER provides the scope of agreements that are exempted. The scope of the cooperation agreement covered ranges from simple vessel-sharing agreements to the setting up of joint operation centers. In the course of joint operation, liner shipping providers can coordinate the sailing timetables and the ports

[66] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJL256/31.
[67] Reg. 906/2009 (n 66) recital 5.
[68] Ibid.
[69] Ibid recital 6.
[70] Ibid recital 8.
[71] Ibid.

of call.[72] They can jointly determine the use of the space or slots on vessels, the pooling of the vessels or port installations, the use of joint operation offices, and the management of equipment, including containers.[73]

Liner shipping providers also can jointly make capacity adjustments in response to fluctuations in supply and demand, and jointly operate or use port terminals and related services.[74] All other activity ancillary to the permitted joint operation is also permitted, provided it is necessary for the implementation of such joint operation.[75]

Even though the scope of permitted joint operation is rather broad, infringement to some hardcore restrictions would render an otherwise exempted agreement void. The hardcore restrictions include the practice of price fixing when selling liner services to third parties, the limitation of capacity or sales that are not a response to fluctuation in supply and demand, and the allocation of markets or customers, which are by nature in line within the restrictive list under Article 101(1) TFEU.[76]

Regarding the content of the agreement, the consortium must give members the right to withdraw without financial or other penalties.[77] Penalties like the obligation to cease all transport activity in the relevant market, whether it is coupled with a period limitation or not, are all strictly prohibited.[78] There are limitations on the notice period, as the right to withdraw shall be subject to a maximum period of six months.[79] The consortium is free to limit the right to withdrawal as it may only be utilized after an initial period of a maximum of twenty-four months.[80] For the highly integrated consortium, the period of notice is permitted to extend to twelve months, and the initial period limit may be a maximum of thirty-six months.[81]

In addition to the content of the agreement, the Consortia BER also made limitations to the market share of the operators. To qualify for the exemption, the liner

[72] Ibid art.3
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid art.4
[77] Ibid art.6
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.

shipping operators must satisfy the market share condition. The combined market share of the consortium members in the relevant market shall not exceed 30%.[82] Such a limitation on market share is implemented to ensure that the exemption of the agreements will not eliminate competition in the relevant market, which is also one of the four cumulative requirements of Article 101(3) TFEU.

In calculating the market share of the members in the consortia, the volumes of goods carried by the consortium member do not limit to the consortium. Even when the volumes of goods are carried within another consortium to which the member is a party or when they are outside a consortium but they are on the member's own or on third-party vessels, they are included as the market share of the consortium member.[83]

The Consortia BER is not eternal. It is subject to expiration every four years. Calls for review and repeal of it never disappear. It remains uncertain whether the Consortia will continue to exist in the future.

Liner shipping cooperation under Chinese Antimonopoly law

As a civil law jurisdiction, the competition law in China is code-oriented. However, studies and research in the area of competition law only started in the past twenty years. Only limited legislation is passed. There is no clear division on the authority of enforcers and not all decisions made by the enforcement authorities are publicized or coupled with detailed reasoning.

Chinese Antimonopoly Law in general

Chinese regulations on competition law only started in the past decades. Two laws passed in the past decade provide the main source for the government to regulate competition behaviors, which are the Antimonopoly Law first passed in 2007 and revised in 2022[84], and the Anti-unfair Competition Law first passed in 1993 and revised in 2019. Of the two laws, the Antimonopoly Law is more relevant to the focus of the

[82] Ibid art.5.
[83] Ibid.
[84] Antimonopoly law of the People's Republic of China (中华人民共和国反垄断法) (promulgated by Standing Comm. Nat'l People's Cong. Gaz, June 24, 2022, effective August 1, 2022).

cooperation between liner shipping operators, as it regulates the agreements made between competitors in the same market.

The government's power to capture monopoly behavior is authorized under Article 2 and Article 3 of the Antimonopoly law. Undertakings are prohibited from conducting monopoly behaviors, which would result in fines or other publishments.[85] Article three of the law, listed three behaviors of operators as monopoly behaviors: forming monopoly agreements between operators, abusing market dominant status, and concentrating of operators that may have the effect of excluding or restricting the competition.[86]

Monopoly agreement between operators

Monopoly agreements are defined in Article 16 of the Antimonopoly Law as agreements, decisions, or other coordinated behaviors that exclude or restrict competition.[87] It also provided a list of possible monopoly agreements, including price fixing, production or sale restriction, and market dividing.[88] As the cooperation between liner shipping operators gradually changed from conference to alliance, reducing competition through price fixing is no longer an aim pursued by the liner operators.[89] The content of the liner alliance agreement does not fall into the listed categories of the monopoly agreement.

However, there is a bottom-line clause that left space for the enforcement authority to identify other agreements, decisions, or behaviors as monopoly agreements. The Interim Provisions on Prohibition of Monopoly Agreements (hereinafter "Interim Provisions") implemented by the enforcement administration provide further guidance on what to consider when it comes to other agreements that could be identified as monopoly agreements.[90] Article 113 of the Interim Provisions requires the administration to consider the fact that the operators have reached and implemented the

[85] Ibid art.2.
[86] Ibid art.3.
[87] Ibid art.16.
[88] Article 16 read as follows: *The term "monopoly agreement" as mentioned in this Law refers to an agreement, decision, or other concerted action that excludes or restricts competition.*
[89] n 10, 5.
[90] Interim Provisions on Prohibition of Monopoly Agreements (禁止垄断协议暂行规定) (promulgated by State Administration for Market Regulation, March 24, 2022, effective May 1, 2022).

agreement, the competition in the market, the market share of the operators, the impact of the agreement on market entry, technological progress, and consumers and other business operators.[91]

The liner shipping market is highly concentrated, and the consumers, and shippers, often have limited bargaining power due to the market structure.[92] As the cooperation agreements made between liner shipping operators maintain multiple factors listed by the Provisions, they may be identified as monopoly agreements even when no price-fixing provisions are included.

Concentration of Undertakings

Apart from being considered a monopoly agreement and caught by the Antimonopoly law, cooperation agreements between liner shipping operators may also be caught under another concept in the Antimonopoly agreement, as a concentration of undertaking.

Under the Antimonopoly law, the concept of concentration of undertakings does not limit to the merger of undertakings or gaining control over another undertaking through acquiring shares or assets like in other jurisdictions. The concentration of undertakings under the Antimonopoly law also includes gaining control over other undertakings or the ability capable of exert a decisive influence through contract or other means.[93] Undertakings are required to declare the concentration of undertakings

[91] Article 13 of the Interim Provision reads as follows: *Other agreements, decisions or concerted acts that do not fall under the circumstances listed in Articles 7 to 12 of these Provisions, if there is evidence to prove that they exclude or restrict competition, shall be identified as monopoly agreements and prohibited.*
The monopoly agreement stipulated in the preceding paragraph shall be determined by the State Administration for Market Regulation, and the following factors shall be considered when determining: (1) The fact that the operator has reached and implemented the agreement; (2) Market competition; (3) The market share of the operator in the relevant market and its control over the market; (4) The impact of the agreement on commodity price, quantity, quality, etc.; (5) The impact of the agreement on market entry, technological progress, etc.; (6) The impact of the agreement on consumers and other business operators; (7) Other factors related to the determination of the monopoly agreement.
[92] n 2, 112.
[93] Article 25 of the Antimonopoly Law reads the following: *Concentration of business operators refers to the following circumstances: (1) Merger of business operators; (2) An operator obtains control over other operators by acquiring equity or assets;(3) An operator obtains control over other operators through contracts or other means or is able to exert decisive influence over other operators.*

in advance and are prohibited from implementing the concentration in the absence of the declaration.[94]

As the text of the Antimonopoly law indicated, gaining the ability to exert a decisive influence on the undertaking through contract is a way of undertaking concentration. Even when there is no exchange of shares or creation of joint ventures, cooperation between liner shipping operators may trigger the declaration obligation on the concentration of undertakings when the content of the agreement is considered to provide the operators the ability to exert a decisive influence on other operators, which can be illustrated by MOFCOM's analysis of the P3 Network in the following analysis.

Exemption from Antimonopoly Law

Exemption from the Antimonopoly law is possible. Article 20 of the antimonopoly law provides that if the agreement serves a greater economic or political purpose, it is not prohibited and sanctioned.[95] The greater economic or political purposes include the improvement of technology, and efficiency, protection small and medium-sized business operators, the realization of social and public interests like environmental protection, and the protection of legitimate national interests in foreign trade and economic cooperation.[96]

[94] Article 16 of the Antimonopoly Law reads the following: *Where the concentration of business operators meets the reporting standards stipulated by the State Council, the business operators shall declare to the anti-monopoly law enforcement agency of the State Council in advance, and the concentration shall not be implemented if the declaration is not made.*

[95] Article 20 of the Antimonopoly law reads the following: *If the operator can prove that the agreement reached is one of the following circumstances, the provisions of Article 17, paragraph 1 of Article 18 and Article 19 of this Law shall not apply: (1) For the purpose of improving technology, researching and developing new products; (2) In order to improve product quality, reduce costs and increase efficiency, unify product specifications and standards or implement specialized division of labor; (3) In order to improve the operating efficiency of small and medium-sized business operators and enhance the competitiveness of small and medium-sized business operators; (4) For the realization of social and public interests such as energy conservation, environmental protection, disaster relief and assistance; (5) Due to the economic downturn, in order to alleviate the serious decline in sales or obvious excess production; (6) To protect legitimate interests in foreign trade and foreign economic cooperation; (7) Other circumstances prescribed by laws and the State Council. If it falls under the circumstances of items 1 to 5 of the preceding paragraph, and the provisions of Article 17, paragraph 1 of Article 18, and Article 19 of this Law do not apply, the operator shall also prove that the agreement reached will not seriously restrict the relevant business. market competition and enable consumers to share the resulting benefits.*

[96] Ibid.

Considering the ownership of the leading Chinese liner shipping operators, and the national security purpose of preserving fleet power, proving the existence of such a greater interest is rather feasible for Chinese liner shipping operators, provided the cooperation is indeed caught by the enforcement administration.

In addition, apart from the immunity excuse explicitly listed in Article 20 of Antimonopoly Law, other laws and regulations can exemplify monopoly agreements.[97] In the context of cooperation between liner shipping operators, such exemption is likely to be found in other sector-specific laws and regulations, including the yet-to-be-promulgated shipping law and other lower-level regulations regarding the shipping industry.

Sector-specific laws and regulations in the shipping market

Though the calls for a sector-specific law on the shipping industry have existed for years, the shipping law is yet to be promulgated. Currently, there is no sector-specific law in the shipping industry on the legislation level. The only relevant administrative regulation on the shipping industry is the Regulations on International Ocean Shipping, which is a lower-ranking regulation executed by the Chinese State Council in 2019.[98]

No explicit immunity for antimonopoly law was provided in the Regulation on international shipping. The main content of the International Shipping Regulation is the obligation and requirements for a liner shipping operator to operate within Chinese territory. It made no direct reference to the Antimonopoly law, which is understandable as the antimonopoly law regime is still in the phase of development.

However, the legitimacy of some forms of cooperation between liner shipping operators can be read between the lines of the International Ocean Shipping Regulation. Per Article 17 of the Regulation, international liner shipping operators are required to file a copy of the agreement to the designated department of the State Coun-

[97] Ibid.
[98] Regulations of the People's Republic of China on International Ocean Shipping (中华人民共和国国际海运条例) (promulgated by State Council, March 2, 2019, effective March 2, 2019).

cil, the Transportation Ministry, when they make agreements on liner conference, operation, and freight.[99] The competent transportation authority is entitled to conduct an investigation when the agreements could harm fair competition and when the liner alliance whose market share covers more than 30 percent of the route.[100] If the agreement is considered to harm fair competition, the competent authority is entitled to oblige the operators to modify the agreement, limit the volume of the liner shipping service, or other prohibitive measures.[101]

From the existence of the filing requirement, the various format of cooperation between liner shipping operators is acknowledged by the administration. By mandating the liner shipping operators to fulfill the filing requirement, the existence of such agreements is legitimated. Therefore, even though the sector-specific regulation did not list the cooperation agreements between liner shipping operators as exempted under Article 20 of the Antimonopoly law, the cooperative agreements between liner shipping operators are exempted from the antimonopoly law by effect. In practice, the filling mechanism mainly functions in the area of freight,[102] leaving other agreements untouched.

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[99] Article 17 of the International Ocean Shipping Regulations reads the following: *Where the international liner services operators conclude any liner conference agreement, operation agreement, freight agreement, or other agreement between themselves, they shall submit a copy of the agreement to the competent transportation authority under the State Council for filing within 15 days from the day on which the agreement is made.*

[100] Article 28 of the International Ocean Shipping Regulations reads the following: *The transportation department of the State Council may, at the request of interested parties or at its own discretion, conduct investigations into the following circumstances: (1) The liner conference agreement, operation agreement, freight rate agreement, etc. involving Chinese ports entered into between international shipping operators engaged in international liner shipping business may cause damage to fair competition; (2) Various types of joint ventures formed by international shipping operators operating international liner shipping business through agreements, whose services involve the shipping share of a certain route of Chinese ports, exceeding 30% of the total transportation volume of the route for one year, and may damage to fair competition; (3) Having one of the acts specified in Article 21 of these Regulations; (4) Other acts that may impair fair competition in the international shipping market.*

[101] Article 33 of the International Ocean Shipping Regulations reads the following: *After the investigation is over, the investigation organ shall make an investigation conclusion and notify the person under investigation and interested parties in writing.*

If damage is caused to fair competition, the investigation authority may take prohibitive and restrictive measures such as ordering to amend relevant agreements, restricting the number of liner flights, suspending the tariff book, or suspending the acceptance of tariff filings, and ordering to regularly submit relevant materials.

[102] Ministry of Transportation (交通运输部), ‘The Ministry of Transport will investigate and deal with irregularities such as incomplete freight rate filing according to the law (交通运输部将依法查处运价备案不完整等违规行为)’ (Website of Ministry of Transportation, September 30, 2009) <http://www.gov.cn/gzdt/2009-09/30/content_1430467.htm> accessed August 22, 2022.

Chinese antimonopoly law enforcement authorities need more experience in dealing with monopoly issues in the liner shipping industry. There is no clear framework, no explicit exemption, and no guideline on the application of the law in this area.

The enforcement authority division of the Antimonopoly Law in the shipping sector remains unclear. The enforcement power division between the Water Transport Bureau is in charge of the enforcement of the Regulation and the Antimonopoly Bureau under the State Administration for Market Regulation is in charge of the general enforcement of the Antimonopoly law.[103]

Since there is no clear application guideline on the cooperation between the liner shipping operators under the current legislative framework, the legal status of the cooperation agreements can only be inferred from the language of the regulation and the limited investigation of the cooperation between liner shipping operators, especially the investigation to the P3 framework.[104]

Competition Rules Application in liner shipping: the P3 Network and more

After the liner alliance gradually became the dominant format of cooperation in the liner shipping industry, the market structure has gone through various changes. The leading liner shipping operators join or leave, splitting the global market with three or four alliances.[105]

Under EU law, since the alliances are designed to fulfill the exemption threshold, no direct action was taken against the liner alliances. Though there are concerns about the consequences of provided exemption, it has been determined that they are outweighed by the benefit of efficiency.[106]

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[103] Zhu-Zuoxian, 'The Shipping Competition Practice in China: Policy, Regulation and Cases' (2019) 24 Asian Bus Law 75, 77-78.

[104] Peng Yang, 'The Reform of EU and US Antitrust Exemption Regimes and China's Shipping Legislation Tendency' (2015) China Oceans L Rev 413, 441.

[105] 'Alliances in Container Shipping | Port Economics, Management and Policy' (10 February 2020) <https://porteconomicsmanagement.org/pemp/contents/part1/ports-and-container-shipping/alliances-container-shipping/> accessed 3 September 2022.

[106] European Commission, 'Antitrust: Commission prolongs the validity of block exemption for liner shipping consortia' (24 March 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_518 accessed 3 September 2022.

In Chinese legal practice, the enforcement of antimonopoly law just started in the past decade and is limited only to certain areas.[107] Given the specialty of the shipping sector, the involved anti-monopoly law is limited to two cases, the investigation of the P3 Network, and the approval for the merger of the Chinese top two shipping operators.

A pattern can be observed that there has been no investigation originating from the failure to fulfill the filing requirement in the International Shipping Regulation.[108] In other words, the has been no anti-monopoly law enforcement to the liner shipping cooperation led by the Transportation Ministry.

Both the investigation of the P3 Network and the merger of COSCO and China Shipping are categorized as a concentration of undertakings, which fell into the jurisdiction of the Ministry of Commerce, which is now within the scope of authority of the newly established Antimonopoly Bureau. Since the merger of COSCO and China Shipping is a straightforward merger, the investigation on the P3 Network provides more perspective on considering where the bottom line for liner shipping cooperation is.

The Investigation of the P3 Network Alliance

P3 Network Alliance ("P3 Network") was a long-term vessel-sharing alliance proposal on trans-oceanic, east-west trade routes.[109] The intention of creating it was announced on June 18, 2013, by Maersk Liner, MSC, and CMA CGM.[110] Through the establishment of the P3 network, the parties intended to create a combined fleet of

[107] State Anti-Monopoly Bureau (国家反垄断局), China Antitrust Enforcement Annual Report 2021 (中国反垄断执法年度报告（2021）) (2022), 29-47, available at <https://www.samr.gov.cn/xw/zj/202206/P020220608430645470953.pdf>, accessed 3 September 2022.
[108] Regulations of the People's Republic of China on International Shipping (中华人民共和国国际海运条例) (promulgated by State Council, March 2, 2019, effective March 2, 2019).
[109] 'P3 Network Vessel Sharing Agreement, FMC Agreement No. 012230, A Cooperative Working Agreement' (Federal Maritime Commission, July 24, 2013), available at < https://www2.fmc.gov/agreement_lib/012230-000-P.pdf>, accessed 3 September 2022.
[110] Ibid 1.

255 ships, running nearly 30 shipping routes, while continuing "to have fully independent sales, marketing, and customer service functions".[111] The P3 network was expected to maximize operation and cost efficiency through the joint assignment of vessels and cost-sharing between the parties.[112]

Former liner shipping alliances are typically very flexible, with low barriers to entry and exit, and only require a minimum degree of commitment for carriers to adhere.[113] The flexibility also represents that the traditional alliance enables carriers to customize the number of committed resources.[114]

The P3 Network distinguishes itself from the former liner shipping alliance or vessel sharing agreement by the creation of a separate legal entity, the Network Center, for the joint coordination and management of the network.[115] Though per the provisions of it, each party of the P3 Network shall retain its separate identity and have fully separate and independent sales, pricing, and marketing functions, the Network Center plays a significant role in the operation and management of the liner shipping service provided by the parties.[116] Information exchange and operation decisions are jointly made in the Network Center, which could improve operational efficiency.

The P3 Network authorizes its parties to share any information related to the operation of the trade, from statistics and studies to costs, cargo volumes, and market share information, regardless of the source of the information.[117] However, the exchange of commercially sensitive information including customer pricing is strictly prohibited by the arrangement.

Due to its broad geological coverage of it, the creation of the P3 network required approval from multiple jurisdictions, including U.S. Federal Maritime Commission (FMC), the EU Commission, MOFCOM, and South Korea's Fair Trade Commission (KFTC).

[111] Ibid 2-3.
[112] Ibid 3.
[113] OECD (n 1) 27.
[114] Ibid.
[115] P3 Network (n 109) 13.
[116] Ibid 11.
[117] Ibid 11-12.

On March 24, 2014, the FMC approved the alliance agreement, despite Richard Lidinsky, one of the five FMC Commissioners, voting to disapprove.[118] He acknowledged that the alliance carrier structures' advantage in rationalizing services and calling new ports.[119] However, the P3 Network is not just an alliance or vessel-sharing arrangement.[120] It is a merger of the top three global liner companies by effect.[121] In seeking approval for the P3 Network in South Korea, the Korean Shipowner's Association lodged strong objections with the KFTC.[122] Before the KFTC reached any decision, the attempt to form P3 Network failed due to the prohibition decision by MOFCOM.[123]

EU's reaction to the P3 Network

As the combined market share of the parties exceeds the thirty percent threshold for the Consortia BER, the parties must conduct a self-assessment on the legality of the P3 Network.[124] The parties communicated to the EU commission about the legality. On June 3, 2014, the EU commission informed the parties that it decided not to open an investigation into the proposed P3 Network until there are any risks for competition that make intervening necessary.[125]

China's reaction to the P3 Network

On June 20, 2014, the Chinese Ministry of Commerce published *MOFCOM Announcement No.46 of 2014 on Decisions of Antimonopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC, and CMA CGM from Estab-*

[118] Richard A. Lidinsky, 'Comments of Commissioner Richard A. Lidinsky, Jr. on Proposed P3 Vessel Sharing Agreement' (Federal Maritime Commission, March 24, 2014) available at <https://www.fmc.gov/comments-of-commissioner-richard-a-lidinsky-jr-on-proposed-p3-vessel-sharing-agreement/>.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Greg Knowler, 'No Sign of Korean Decision on P3 Network' (JOC, June 09, 2014) available at <https://www.joc.com/maritime-news/container-lines/p3-network/no-sign-korean-decision-p3-network_20140609.html>.
[123] Ibid.
[124] TFEU art.101(3).
[125] Mark Szakonyi, 'EU Regulators Clear P3' (JOC, June 03, 2014) available at <https://www.joc.com/maritime-news/container-lines/p3-network/eu-regulators-clear-p3_20140603.html>, accessed September 3, 2022.

lishing a Network Center ("Announcement"), prohibiting the concentration of undertaking by the parties.[126] Though the P3 Network took the form of a liner shipping alliance agreement, under Chinese Antimonopoly law, it did not subject to the Antimonopoly law scrutiny as a monopoly agreement. As the operation and management of the P3 Network rely on the creation of the establishment of a Network Center, it triggered the mandatory declaration requirement of the concentration of undertakings in the Antimonopoly law.[127]

The MOFCOM's decision on prohibiting the concentration of undertakings is based on the compact nature of the P3 Network and the possible impact it may have on the market power of the powers, the relevant market, and the entry barriers for the relevant market.[128]

The MOFCOM characterized the P3 Network as a compact association in nature and differentiated it from the loose traditional shipping alliance that existed in the past. In the competition analysis, the MOFCOM emphasized the establishment of the network center.[129] The Network center is independently responsible for the management and operation of the vessels within the network, and for the functioning of the integration of the full shipping capacity of the parties, including daily management for all vessels, with the parties retaining only technical management of the vessels.[130] The compact nature of the P3 Network is further indicated by the uniform cost allocation mechanism, the sale of unused container space, and the determination of a shipment suspension.[131]

Considerations behind MOFCOM's decision.

National economic development concerns have been taken into consideration in the Antimonopoly law review process conducted by MOFCOM.[132] Considering the

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[126] MOFCOM Announcement No.46 of 2014 on Decisions of Antimonopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC, and CMA CGM from Establishing a Network Center (商务部公告 2014 年第 46 号 商务部关于禁止马士基、地中海航运、达飞设立网络中心经营者集中反垄断审查决定的公告) available at < http://english.www.gov.cn/policies/latest_releases/2014/08/23/content_281474982986692.htm> accessed September 3, 2022.
[127] n 93.
[128] n 126.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] In the five years since MOFCOM prohibited the proposed US$ 2.5 billion acquisition of Chinese Huiyuan Juice Group Limited by U.S. Coca-Cola Co., MOFCOM consistently has demonstrated its

specialty of the shipping sector, such concerns are even more significant. The argument that the antimonopoly law review takes into consideration of national economic development concerns can also be reinforced by the later merger of the two Chinses major state-owned shipping companies, COSCO and China Shipping, which was an effort to strengthen China's competitiveness in the global shipping market.[133]

In conducting the analysis, MOFCOM sought an opinion from Chinese competitors in the relevant market and other groups. Though the two major Chinese competitors denied that they have influenced the decision, the relevant trade association, the China Shipowner's Association worked actively for the prohibition.[134] Because MOFCOM must consult with the Ministry of Transportation in dealing with cases in the shipping area, and the Ministry of Transportation bears the duty to strengthen Chinese power in the global shipping market, other factors are likely taken into consideration.

After the failure of the P3 Network, which was considered a compact alliance, the liner operators returned to the traditional format of alliances. The three major alliances that dominated the market now were formed.[135] Though there are differences in the use of language, the purpose of the alliance was to restrict to improve efficiency and reduce cost through vessel sharing and charting and enter into related cooperative working arrangements.[136] Instead of creating a Network Center like in the P3 Network, later alliances operate the alliances through a standing or ad hoc committee.[137] Though the committees have the authority to monitor the market and make a recom-

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willingness (and even its obligation) to consider national economic development concerns alongside pure competition concerns during its merger review process.

[133] Joanne Chiu and Costas Paris, 'China Approves Merger of Cosco, China Shipping'(WSJ, December 11, 2015) available at <https://www.wsj.com/articles/china-approves-merger-of-cosco-china-shipping-1449834748>.

[134] 'Navigating Chinese Merger Control: MOFCOM Prohibits P3 Shipping Alliance' (*JD Supra*) <https://www.jdsupra.com/legalnews/navigating-chinese-merger-control-mofc-63495/> accessed 4 June 2022.

[135] 'Maersk/MSC Vessel Sharing Agreement FMC Agreement No. 012293 a Cooperative Working Agreement' (Federal Maritime Commission, August 27, 2014), available at < https://www2.fmc.gov/agreement_lib/012293-001-P.pdf>; 'The OCEAN Alliance Agreement FMC Agreement No. 012426'(Federal Maritime Commission, July 15, 2016), available at <https://www2.fmc.gov/FMC.Agreements.Web/Public/Document/30159>; 'THE Alliance Agreement FMC Agreement No. 012439 A Vessel Sharing Agreement'(Federal Maritime Commission, January 28, 2018) available at <https://www2.fmc.gov/agreement_lib/012439-000.pdf> accessed 3 September 2022.

[136] 2M alliance (n 135) 1.

[137] Ibid 5.

mendation to the members, the members intentionally retain the operational responsibility and the authorization to make or implement decisions for themselves.[138] In addition, to separate the committee from the Network Center, the later alliances intentionally avoided locating the committees in a distinct physical location.[139]

There has been no investigation into these later alliances from the EU or China. It can be inferred that the effort to avoid the features pointed out in the P3 decision was effective. However, it remains uncertain how long the situation could remain. From the global perspective, concerns about the anti-competitive effect of the global shipping alliance have resulted in more frequent filing requirements in the United States.[140] It remains possible that the exemption of consortia would be repealed in the future, forcing the operators to seek other formats of cooperation.

Conclusion

Though the competition law in both jurisdictions is statute-oriented, the frameworks are different. In comparison to EU competition law, the Chinese legislative framework is less-clear. There exist no clear provisions that exempt cooperation agreements between liner shipping operators. The existence of exemption can only be inferred between the lines of the existing legislation. There is no clear guideline on the Chinese Antimonopoly law application in the shipping sector. The enforcement authority in the shipping sector is shared between two different bureaus. The unclearness is followed by chaos and confusion in antimonopoly law enforcement regarding the liner shipping sector.

Despite the chaos and unclearness, different attitudes toward cooperation between liner shipping operators can be observed through the different results of the reaction to the P3 Network. Compact alliances that involve the creation of a joint separate legal entity are not considered a problem for the EU competition law enforcement. However, compact alliances are considered a concentration of undertakings under the Chinese Antimonopoly law, which triggered high-level scrutiny that is the same as a merger. Though the standard created in the P3 Network investigation may

[138] Ibid 10.
[139] Ibid.
[140] Ibid.

be partly driven by the incentive of state preservatives, it can be observed that the permitted level of cooperation between liner shipping operators under the EU competition law is higher than the level of cooperation permitted by the Chinese Antimonopoly law.

The cooperation between liner shipping operators is shifting to information exchange. Concerns about the restrictive effect of the liner alliances have been raised. A review of the block exemption is underway. Market participants must prepare for the possibility of repeal. An analysis of the competition law status of the information exchange cooperation between liner shipping operators is conducted in the following chapter.

Chapter III Shifting from alliance to the exchange of information

Shifting to information exchange

It can be observed that the exempted formats of cooperation between liner shipping operators have gradually reduced from the earlier conference to the more flexible consortia that intentionally avoided the price-fixing-related elements. Though the benefits of liner shipping operators' cooperation are still widely acknowledged, concerns about the high market concentration problem accompanied by the dominance of the main liner alliances have been raised.

Since the initial adoption of the Consortia BER on 28 September 2009, it is subject to expire on the designated date.[141] The initial date of expiration was 25 April 2015, and then the date was prolonged twice. Both prolongation decisions were made after public consultation and evaluation. In evaluating whether the four cumulative requirements of Article 101(3) TFEU are still satisfied, the Commission found that "the efficiencies for carriers that can be better use vessels' capacity an offer more connections, and the efficiencies result in lower prices and better quality of service for consumers."[142]

The decision to extend the Consortia BER was not fully welcomed by the shippers. As a result of the Consortia BER, the shippers claim to get worse service for more money, calling for long digestion and discussion process to find a common ground.[143]

Under the impact of COVID-19, concerns have been raised about the impact of the market concentration in the container shipping market. Companies are frustrated about the soaring freight rates and delivery delays, calling for a look at how the

[141] Regulation 906/2009 (n 66).
[142] N 106.
[143] Greg Knowler, 'Time to review carrier block exemption: shipper groups' (JOC July 22, 2020) available at <https://www.joc.com/regulation-policy/time-review-carrier-block-exemption-shipper-groups_20200722.html> assessed on 3 September 2022.

alliances are operating.[144] The high transportation cost is further transferred to the end customers and is reflected by the high inflation rate worldwide.

After the last decision to prolong, the EU Consortia BER is expected to expire on 25 April 2024.[145] There has been a public initiative aimed to evaluate it after it was last extended.[146] It remains uncertain whether the Consortia will be further extended after its expiration in 2024.

On the other hand, there are reactions in other jurisdictions concerning the lack of effective competition in the liner shipping area. Following the historic high proportion of cargo congestion during the COVID-19 pandemic, U.S. President Joe Biden aimed the liner shipping alliances.[147] On July 9, 2021, he issued the Executive Order (E.O. 14036) on Promoting Competition in the American Economy, which referred to consolidation in the maritime shipping industry during the past couple of decades, suggesting that the consolidation may disadvantage U.S. exports.[148] The E.O. encourages the Federal Maritime Commission to "vigorously enforce the prohibition of unjust and unreasonable practice" in the context of detention and demurrage under the Shipping Act, which was interpreted as encompassing any charge assessed by regulated entities related to the use of marine terminal space or shipping containers not including freight charges.[149]

The current method of market share calculation is likely to lead to an underestimation of the market concentration level.[150] Studies show that the liner shipping market is much more concentrated when alternative industry indicators are used than

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[144] Brendan Murray, Ann Koh, and Richard Weiss, 'Freight-Cost Pain Intensifies as Pandemic Rocks Ocean Shipping' (Bloomberg February 4, 2021) available at < https://www.bloomberg.com/news/articles/2021-02-04/freight-cost-pain-intensifies-as-pandemic-rocks-ocean-shipping> assessed on July 27, 2022.
[145] n 106.
[146] European Commission, 'EU competition law – evaluation of the Consortia Block Exemption Regulation' available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation_en> assessed September 3, 2022.
[147] Holland & Knight, 'New US Presidential Executive Order targets liner operators and alliance' (Gard July 22, 2021) available at <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.
[148] Ibid.
[149] Ibid.
[150] Olaf Merk and Antonella Teodoro, 'Alternative Approaches to Measuring Concentration in Liner Shipping' [2022] Maritime Economics & Logistics <https://link.springer.com/10.1057/s41278-022-00225-x> accessed 6 August 2022.

expressed by traditional indicators.[151] With the further development of alternative industry indicators, the underestimated market power of liner alliances is likely to raise more attention from the competition authorities.[152]

It can be observed that the space for cooperation between liner shipping operators has been gradually shrinking over time. Though the bargaining power gap between shippers and operators remains significant, the negotiation position of the shippers and end customers is expected to rise over time. As the exemption for liner shipping cooperation is based on the evaluation that the efficiency benefits outweigh the anticompetitive consequence, a different conclusion will likely be reached in further evaluation and consultation.

However, given the specialty of the liner shipping industry, the complete elimination of cooperation between liner shipping operators is unlikely. Provided no block exemption is extended for the consortia, liner shipping operators must evaluate their action under the general competition law. To achieve an increase in efficiency and cost reduction, liner shipping operators must seek other formats of cooperation, especially information exchange that can increase operational efficiency. As the key feature of the cooperation is information exchange, exploring the legality of information exchange between competitors like liner shipping operators is necessary for future competition law compliance.

Exchange of information

Information exchange may take place in different contexts, including agreement, decisions by associations of undertakings, and concerted practice with exchanged information.[153] Through information exchange, the market may be more efficient as problems of information asymmetries may be solved.[154] It may also help companies reduce costs by dealing with unstable demand.[155]

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[151] Ibid.
[152] Ibid.
[153] COMMUNICATION FROM THE COMMISSION Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJC11/01, para. 56.
[154] Ibid para. 57
[155] Ibid.

However, the exchange of market information may have a restrictive impact on competition when the market strategy of competitors is exchanged.[156] Depending on the characteristics of the market and the type of information exchanged, the competitive outcome of information exchange varies.[157] Depending on the format of information exchange, information-sharing behaviors can be divided into private information exchange and public information exchange, which would be subject to a different level of scrutiny under the competition law.

For liner shipping operators, obtaining information related to the market positions and commercial operations of their competitors is helpful.[158] By exchanging such information, liner shipping operators may plan their market strategies and assess the market performance on their own.[159] Under the background that the existing block exemption may be repealed after more evaluations and consultations are made, analyzing the liner shipping operators' information exchange behavior under the general competition rules can help liner shipping operators anticipate the likely situation in future changes.

Exchange of information under the current EU competition law

Under the EU competition law, the practice of information exchange is defined to include both direct data sharing between competitors and indirect data sharing through a common agency or third parties.[160] According to Article 101 of TFEU, the existence of an agreement, concerted practice or a decision by an association of undertakings is the prerequisite for addressing information exchange behaviors.[161]

Information exchange agreement

The existence of an agreement that features information exchange is rather straightforward. The concept of concerted practice is developed through the caselaw of the Court of Justice of the European Union, which refers to "a form of coordination

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[156] Ibid para. 58.
[157] Ibid.
[158] Antonis Antapassis, Lia Athanassiou and Erik Rosaeg (eds), 'Information Exchange Agreements Between Liner Shipping Companies Under EC Competition Law', *Competition and Regulation in Shipping and Shipping Related Industries* (Brill | Nijhoff 2009) <https://brill.com/view/book/edcoll/9789047427414/Bej.9789004173958.i-404_004.xml> accessed 30 May 2022.
[159] Ibid.
[160] Guideline on Horizontal Agreement, (n 153) para.55.
[161] TFEU (n 59) art.101(3).

between undertakings by which, without it having reached the state where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition".[162] The coordination does not require an actual plan.[163] Instead, as each company must determine its business behavior independently, the criteria of coordination and cooperation are to be understood in the light of the concept inherent in the provision of the Treaty on the competition.[164]

Concerted practice precludes undertakings from conducting any direct or indirect contact that has the object or effect of influencing other competitors' conduct.[165] A concerted practice may be considered as existing even when only one undertaking discloses strategic information to other competitors that accept the information.[166]

Information exchange between competitors may facilitate collusion and lead to anti-competitive foreclosure.[167] Through information exchange, companies may create a common understanding of the uncertainties in the market, monitor deviations that would influence the internal stability of the collusive outcome, and a more transparent market that would allow colluding companies to monitor the activities of the new entrant.[168]

The information exchange may also lead to anti-competitive foreclosure. The exchange of commercially sensitive information may place competitors who do not participate in the information exchange practice.[169] For upstream and downstream markets, information exchange that enables the companies to gain more market power may raise the cost of their competitors, impacting the whole chain of the market.[170]

Depending on the nature of the information exchanged, information exchange behaviors may be considered to restrict competition by an object or by effect.[171]

[162] Guideline on Horizontal Agreement, (n 153) para.60.
[163] Ibid
[164] Ibid.
[165] Ibid para.61.
[166] Ibid para.62.
[167] Ibid para.69.
[168] Ibid para.66.
[169] Ibid.
[170] Ibid para.71.
[171] Ibid para.72.

Though information exchange is not expressly listed in Article 101(1) TFEU, exchanging information of a certain type would be a restriction to competition by object.

In an idealized market, companies' future conduct regarding prices and quantities is made based on their individualized intentions.[172] When information regarding price is shared between competitors, competitors may reach a higher price level together without risking market share loss or a price war.[173] When the shared information concerns future intentions on prices and quantities, the information exchange behaviors are likely to be considered as restricting competition by object.[174] In Dole v. Commission, the Court of Justice ruled that exchanges between competitors of parameters relevant to pricing, conducted by individuals involved in internal pricing meetings, are likely to restrict competition by object, even though there is no direct connection between that practice and consumer prices.[175]

In the alternative, even when the information exchange does not constitute restriction by object, the information exchange behavior may collusively restrict competition by effect. Various factors are considered in determining whether the information exchange behaviors restrict competition by effect, including the market characteristics and the nature of the information exchanged.[176] Given the special market structure of the liner shipping industry, information exchange between liner shipping operators is more likely to be considered to restrict competition by effect.

As an alternative method provided to the repeal of the conference

Information exchange is not a new concept for the liner shipping industry. When the block exemption at the conference was under review, the focus of cooperation in liner shipping shifted to information exchange agreements between carriers.[177] For liner shipping operators, an information exchange agreement can provide efficiency gains without infringing the general competition rules.

[172] Ibid para.73.
[173] Ibid.
[174] Ibid para.74.
[175] *Dole Food Company, Inc and Dole Fresh Fruit Europe v European Commission* [2015] ECJ Case C-286/13 P.
[176] Ibid para.77.
[177] Antapassis, (n 158) 27.

However, depending on the type of information shared between liner shipping operators, information-sharing behaviors may be considered as having the object of restricting competition. As the transparency of information does not threaten competition by itself, information exchange between liner shipping companies that are not anti-competitive should not be considered as restricting competition by object.[178]

Information exchange between liner shipping operators may have anti-competitive effects including market transparency increase, coordinated conduct facilitation, entry barrier increase, capacity decrease, and supra-competitive tariffs.[179] In absence of block exemption, whether the information exchange agreement can be exempted from Article 101 TFEU must be analyzed case by case under Article 101(3) TFEU.

The information exchanged between liner shipping operators will determine whether the information exchange agreement is exempted. For liner shipping operators, the information exchanged includes capacity forecast and price indices.[180] It is especially pointed out by the Commission that when the exchange of capacity forecast takes place in a concentrated market, it has a high potential for infringing Article 101(1) TFEU.[181] As for the price index, as long as it cannot trace the price information back to the individual operator, it is not considered an infringement of Article 101(1) TFEU.

Public information exchange

Information exchange behaviors are not limited to private exchange with or without an agreement. Operators' behavior of publishing commercially sensitive information on their websites could raise the risk of competition law infringement. In July 2016, the European Commission accepted the commitments proposed by a group of liner shipping operators in the Container Shipping case.[182] The accepted commitments stopped the liner shipping operators from publicly announcing information that can be used to predict the future price of other competitors.[183]

[178] Ibid 32.
[179] Ibid 33.
[180] Ibid 36.
[181] Ibid.
[182] Itai Rabinovici, 'Public Exchange of Information After Container Shipping' (2017) 8 Journal of European Competition Law & Practice 149.
[183] Container Shipping (Case AT.39850) Commission Decision of C(2016) 4215 [2016].

The liner services concerned in the Container Shipping case are the General Rate Increase (GRI).[184] The operators regularly announced the intended future price increases of their service on their website or through the press.[185] The increase announcement covered the amount of the intended increase, the affected trade route, and the intended date of implementation of the increased price.[186] The GRI announcements are made around 3 to 5 weeks before the intended price is implemented.[187] The process is often started with one operator announcing the intended price increase on a given route in a certain amount and then followed by other operators announcing a similar price increase.[188] The announcements were sometimes even postponed or modified by some operators, possibly for the alignment to other operators' GRIs announcements.[189]

The Commission raised concerns about the information exchange mechanism as it might constitute a concerted practice under Article 101 TFEU.[190] Information about other competitors' future price increase intention is considered the most sensitive commercial information, exchanging of which removes uncertainties about other competitors' future conduct.[191]

After the preliminary assessment, the Commission reached the provisional conclusion that in determining their conduct, every liner shipping operator was in a position to take account of the information announced by other competitors in the GRIs.[192] By taking the announcements into account, the liner shipping operators took part in the concerted practice.[193]

The liner shipping operators proposed the Commitments to end the Commission's proceedings. In the Commitments, the liner shipping operators reserved the right to decide on making price announcements.[194] However, there are restrictions to the announcement intended to provide customers with a sufficient level of detail for

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184 Guideline on Horizontal Agreement, (n 153) para. 25
185 Ibid para.26
186 Ibid.
187 Ibid.
188 Ibid para.27
189 Ibid.
190 Ibid para.31
191 Ibid para.35
192 Ibid para.47
193 Ibid.
194 Ibid para.78

informed decisions, including the price element in the announcements and the time of the announcement.[195]

Therefore, the information concerning future prices, both through direct exchange of the price or through an indirect method that would allow the companies to predict the price, is a possible infringement of Article 101(1) TFEU. It remains uncertain whether the existing Consortia BER will be repealed after review and consultation. Provided it is repealed, whether there will be a new BER concerning the information exchange agreement between liner shipping operators is also uncertain. Based on the current information, information exchange between liner shipping operators, whether conducted through private agreements or public exchange, could be a competition law infringement.

Exchange of information under Chinese law

By far, there has been no explicit definition of information exchange behavior under Chinese law. The recent revision of the Antimonopoly law made no in-depth review of the provisions regarding the information exchange behavior between competitors.[196] However, in the recent interpretation of the Antimonopoly Law, the State Administration for Market Regulation, whether there has been any intentional contact or information exchange between the operators is taken into consideration in determining if there is concerted practice.[197]

Other than the information exchange behaviors, whether the market behavior of the operators is consistent, whether the operators can make a reasonable explanation for the consistency, and the market situation is also considered.[198] As the concerted practice is defined as a monopoly agreement under the Antimonopoly Law,[199]

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[195] Ibid. para.78-80.
[196] Antimonopoly Law, (n 错误!未定义书签。)
[197] n 90 art.6 reads the following: *Article 6 The following factors shall be considered when determining other concerted acts:*
(1) Whether the market behavior of the business operators is consistent;
(2) Whether there has been any intentional contact or information exchange between operators;
(3) Whether the operator can make a reasonable explanation for the consistency of the behavior;
(4) The market structure, competition status, market changes, etc. of the relevant market.
[198] Ibid.
[199] n 84.

information exchange behaviors may infringe the Antimonopoly law when it is considered a concerted practice.

According to Article 7 of the Interim Provisions on Prohibition of Monopoly Agreements, competitors are prohibited from entering into monopoly agreements that fix or change price levels, price changes, profit levels or discounts, handling fees, and other expenses, as well as standard formulas for calculating prices.[200] It can be inferred that exchanging price-related information is prohibited from sharing.

There has been no clear definition of sensitive information in the statutory law, which is confusing in exploring prohibited information exchange behavior. However, other documents issued by the former enforcement administration and local enforcement administration can provide insight into the scope of sensitive information.

The Industry Association Price Action Guidelines issued by the former enforcement administration in 2017 was the first document related to Antimonopoly law enforcement that concerns information exchange behaviors between competitors. Though it only covers information exchange made via industry association, it was the first document that mentioned the antimonopoly law risk of the information exchange behaviors.[201] It warned the undertakings of the risk of exchanging current and future price information, recent production cost, sales quotation, and transaction price.[202] In addition, Antitrust Compliance Guidelines for Business Operators in Shanghai, local guidance on antimonopoly law compliance, also provides some clues.

[200] Interim Provisions on Prohibition of Monopoly Agreements (n 90) art. 7 reads the following: *Competitive business operators are prohibited from reaching the following monopoly agreements on the prices of commodities or services (hereinafter collectively referred to as commodities):*
(1) Fixing or changing the price level, price change range, profit level or discount, handling fee and other expenses;
(2) Agree to adopt the standard formula by which the price is calculated;
(3) Restricting the independent pricing power of the operators participating in the agreement;
(4) Fix or change the price by other means.
[201] Industry Association Price Action Guidelines (行业协会价格行为指南) (2017), available at <https://www.ndrc.gov.cn/xxgk/zcfb/gg/201707/t20170725_961180.html?code=&state=123>.
[202] Ibid art.7-9.

It can be inferred from the existing documents that the sensitive information could be categorized as price-related information, production and sales-related information, suppliers and customers-related information, and bidding information and future market behavior.[203]

The price-related information includes price level, price change, revenue and discount, and price calculation formula. The production and sales-related information include production quantity, sales area, market share, sales target, sales revenue, sales profit, and the type, quantity, and time of the sales of the goods.[204] The sales area is further specified as products that are sold or planned to sell, and the area where the service is provided or planned to provide.[205] Even information related to production capacity, output, inventory or costs, terms or conditions of sale, strategies or costs of sales, marketing, advertising, or promotion is also considered sensitive information.[206] The suppliers' and customers' related information includes information about actual or potential suppliers, supplier classifications, customers, policies, or strategies for negotiating with customers.[207]

For liner shipping operators, information on the freight rate, capacity, and other individual market observations are all within the scope of sensitive information. However, as a clear legislative framework on the monopoly question of liner shipping is yet to be created under Chinese law, the Chinese legislative is likely to be a follower of other jurisdictions. Considering the special situation of the shipping industry, it is not likely that the shipping industry will be the next focus of antimonopoly enforcement.[208]

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[203] Ibid.

[204] Ning Xuanfeng (宁宣凤), Pen Heyue (彭荷月), Jin Xiaotian (金晓甜) & Du Nan (杜楠), 'The NDRC guideline must be read by enterprises, and the compliance of information exchange is another alarm (发改委指南企业必读，信息交换合规再敲警钟)' (China Law Insight, August 8, 2017) available at <https://www.chinalawinsight.com/2017/08/articles/compliance/%E5%8F%91%E6%94%B9%E5%A7%94%E6%8C%87%E5%8D%97%E4%BC%81%E4%B8%9A%E5%BF%85%E8%AF%BB%EF%BC%8C%E4%BF%A1%E6%81%AF%E4%BA%A4%E6%8D%A2%E5%90%88%E8%A7%84%E5%86%8D%E6%95%B2%E8%AD%A6%E9%92%9F/>.

[205] Ding Heng(丁恒), Liao Qijia (廖琪珈), 'Analysis of Anti-monopoly Law Risks of Information Exchange between Competitors (竞争者间信息交换的反垄断法风险浅析)' (Zhonglun, July 2, 2020) available at < https://www.zhonglun.com/Content/2020/07-02/1612554710.html>.

[206] Ibid.

[207] Ibid.

[208] n 107.

Conclusion

As the room for cooperative arrangement between liner shipping operators is shrinking over time, the focus of the cooperation is shifting to information exchange. Information exchange may be conducted through agreement or a public exchange in the form of individual announcing.

Under the EU competition law, there is no exemption for information exchange between liner shipping operators. In the Container Shipping Case, the liner shipping operators are considered a concerted practice when they make public announcements about the intended price increase in the future. It can be inferred from the assessment and following Commitments that price-related information is strictly prohibited from sharing in any form. In considering whether the information exchange behaviors restrict competition, its impact on consumers is the baseline for assessment. Regarding the private information exchange between liner shipping operators, there has been no case in the specific area. Caselaw in other areas indicates that the exchange of parameters relevant to pricing is a restriction to competition by object.

Compared to the EU competition law, the Chinese Antimonopoly Law remains void in the area of information exchange. The concept of information exchange only appeared in the context of association practice. The analysis of scholars and practitioners on the concept could only refer to enforcement guidelines that are issued by some local enforcers. It is expected that there will be further development in the area. As Chinese legislative development has a preference for legal transplanting, further development is likely to refer to the EU competition law, which would likely preclude the exchange of price-related information.

In both jurisdictions, the competition law application in the liner shipping area requires more case applications. As the focus of cooperation between liner shipping operators switches to information exchange, more cases are expected to generate in the future.

Conclusive Remarks

Throughout the comparative study, it has become clear that there are more common grounds between the two legislative systems than differences. However, in applying the legislation to specific cases, the same case reached different results under the two systems.

The permitted cooperation between liner shipping operators is now limited to consortia under the EU competition law. Though the expiration date of the block exemption has been extended twice, it remains unclear whether the block exemption will be further extended after another round of review and consultation.

The situation is slightly different in the context of Chinese antimonopoly law, which has no clear legislative framework for its application to the liner shipping industry. The legitimacy of the cooperation between liner shipping operators is only inferred from the filling requirement for the agreements. It is expected that the Chinese legislative authority will promulgate sector-specific legislation for the shipping industry. However, it remains unclear whether future legislation will clarify the ambiguity in the area of antimonopoly law applied to the industry.

Given the different results of the P3 network in the two jurisdictions, it can be observed that the line between permitted and prohibited cooperation between liner shipping is the closeness of the alliances. The level of influence that the liner shipping operators post on each other is taken into consideration. If the alliance is considered a compact alliance that is in effect a merger under the Chinese antimonopoly law, it is prohibited under the Chinese antimonopoly law.

The focus of cooperation between liner shipping has been shifting to information exchange since the exemption for liner conferences is repealed. Under the general EU competition rules, the information exchange between liner shipping operators may be an infringement of Article 101 TFEU if the information exchanged is related to price, regardless of the format of exchange. Information concerning future prices or other price indicators is commercially sensitive information that is prohibited from sharing under the general EU competition law. The same applies to the cooperation between liner shipping operators. Similar prohibitions on sharing sensitive information under the relevant interpretation of the Chinese antimonopoly law.

At this stage, it is still too early to make any conclusive statements on the legal status of the information exchange between liner shipping operators in both jurisdictions. The significance of liner shipping in the global economy remains. The benefits provided by the close cooperation between liner shipping operators may eventually be outweighed by the restrictive effect accompanied. In case the Consortia BER is repealed in the future, a new block exemption likely permits a certain level of information exchange between liner shipping operators.

BIBLIOGRAPHY

I. Primary Sources

Antimonopoly law of the People's Republic of China (中华人民共和国反垄断法) (promulgated by Standing Comm. Nat'l People's Cong. Gaz, June 24, 2022, effective August 1, 2022).

Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJL256/31.

Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty [2004] OJC101/97.

Communication From The Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJC11/01.

Consolidated version of the Treaty on the Functioning of the European Union - Article 101 [2008] OJC115/47.

Container Shipping (Case AT.39850) Commission Decision of C(2016) 4215 [2016].

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJL1/1.

Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJL268/1.

Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJL378/4.

Dole Food Company, Inc and Dole Fresh Fruit Europe v European Commission [2015] ECJ Case C-286/13 P.

Industry Association Price Action Guidelines (行业协会价格行为指南) (2017), available at <https://www.ndrc.gov.cn/xxgk/zcfb/gg/201707/t20170725_961180.html?code=&state=123>.

MOFCOM Announcement No.46 of 2014 on Decisions of Antimonopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC, and CMA CGM from Establishing a Network Center (商务部公告 2014 年第 46 号 商务部关于禁止马士基、地中海航运、达飞设立

网络中心经营者集中反垄断审查决定的公告) available at <
http://english.www.gov.cn/policies/latest_releases/2014/08/23/content_281474982986692.htm>
accessed September 3, 2022.

Regulations of the People's Republic of China on International Ocean Shipping (中华人民共和国国际海运条例) (promulgated by State Council, March 2, 2019, effective March 2, 2019).

Regulations of the People's Republic of China on International Shipping (中华人民共和国国际海运条例) (promulgated by State Council, March 2, 2019, effective March 2, 2019).

II. Secondary Sources

'Alliances in Container Shipping | Port Economics, Management and Policy' (10 February 2020) <https://porteconomicsmanagement.org/pemp/contents/part1/ports-and-container-shipping/alliances-container-shipping/> accessed 3 September 2022.

'Maersk/MSC Vessel Sharing Agreement FMC Agreement No. 012293 a Cooperative Working Agreement' (Federal Maritime Commission, August 27, 2014), available at < https://www2.fmc.gov/agreement_lib/012293-001-P.pdf>

'P3 Network Vessel Sharing Agreement, FMC Agreement No. 012230, A Cooperative Working Agreement' (Federal Maritime Commission, July 24, 2013), available at < https://www2.fmc.gov/agreement_lib/012230-000-P.pdf>, accessed 3 September 2022.

'THE Alliance Agreement FMC Agreement No. 012439 A Vessel Sharing Agreement'(Federal Maritime Commission, January 28, 2018) available at <https://www2.fmc.gov/agreement_lib/012439-000.pdf> accessed 3 September 2022.

'The OCEAN Alliance Agreement FMC Agreement No. 012426'(Federal Maritime Commission, July 15, 2016), available at <https://www2.fmc.gov/FMC.Agreements.Web/Public/Document/30159>

Alphaliner, 'Top 100' (Axsmarine, 25 June 2022) <https://alphaliner.axsmarine.com/PublicTop100/> accessed 25 June 2022

Annetta Varbanova, 'Concentration in Liner Shipping and Alliances Formation: Issues and Challenges' (2017) 2 Trans Motauto World 241.

Antonis Antapassis, Lia Athanassiou and Erik Rosaeg (eds), 'Information Exchange Agreements Between Liner Shipping Companies Under EC Competition Law', Competition and Regulation in Shipping and Shipping Related Industries (Brill | Nijhoff 2009) <https://brill.com/view/book/edcoll/9789047427414/Bej.9789004173958.i-404_004.xml> accessed 30 May 2022.

Ashley Boroski Mendoza, ‘What are Shipping Alliances and What are Their Importance?’ (Shiplilly, 21 January 2020) https://www.shiplilly.com/blog/what-are-shipping-alliances-and-whats-their-importance/ accessed 22 August 22, 2022.

Brendan Murray, Ann Koh, and Richard Weiss, ‘Freight-Cost Pain Intensifies as Pandemic Rocks Ocean Shipping’ (Bloomberg February 4, 2021) available at < https://www.bloomberg.com/news/articles/2021-02-04/freight-cost-pain-intensifies-as-pandemic-rocks-ocean-shipping> assessed on July 27, 2022.

Damian Chalmers and others, European Union Law (4th edn, Cambridge University Press 2019), 938.

Ding Heng(丁恒), Liao Qijia (廖琪珈), ‘Analysis of Anti-monopoly Law Risks of Information Exchange between Competitors (竞争者间信息交换的反垄断法风险浅析)’ (Zhonglun, July 2, 2020) available at < https://www.zhonglun.com/Content/2020/07-02/1612554710.html>.

European Commission, ‘Antitrust: Commission prolongs the validity of block exemption for liner shipping consortia’ (24 March 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_518 accessed 3 September 2022.

European Commission, ‘EU competition law – evaluation of the Consortia Block Exemption Regulation’ available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13519-EU-competition-law-evaluation-of-the-Consortia-Block-Exemption-Regulation_en> assessed September 3, 2022.

European Commission, ‘Maritime Transport’ (European Commission) https://competition-policy.ec.europa.eu/sectors/transport-tourism/maritime-transport_en accessed 22 August, 2022.

FreightWaves Staff, ‘Shippers Raise Concerns over Ocean Liner Alliances’ (FreightWaves, 20 May 2016) <https://www.freightwaves.com/news/shippers-raise-concerns-over-ocean-liner-alliances> accessed 26 June 2022.

Greg Knowler, ‘No Sign of Korean Decision on P3 Network’ (JOC, June 09, 2014) available at <https://www.joc.com/maritime-news/container-lines/p3-network/no-sign-korean-decision-p3-network_20140609.html>.

Greg Knowler, ‘Time to review carrier block exemption: shipper groups’ (JOC July 22, 2020) available at <https://www.joc.com/regulation-policy/time-review-carrier-block-exemption-shipper-groups_20200722.html> assessed on 3 September 2022.

Holland & Knight, ‘New US Presidential Executive Order targets liner operators and alliance’ (Gard July 22, 2021) available at <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

Itai Rabinovici, ‘Public Exchange of Information After Container Shipping’ (2017) 8 Journal of European Competition Law & Practice 149.

Joanne Chiu and Costas Paris, ‘China Approves Merger of Cosco, China Shipping’(WSJ, December 11, 2015) available at <https://www.wsj.com/articles/china-approves-merger-of-cosco-china-shipping-1449834748>.

Mariner Wang, ‘The Formation of Shipping Conference and Rise of Shipping Alliance’ (2015) 6 International Journal of Business Administration 22.

Mark Szakonyi, ‘EU Regulators Clear P3’ (JOC, June 03, 2014) available at <https://www.joc.com/maritime-news/container-lines/p3-network/eu-regulators-clear-p3_20140603.html>, accessed September 3, 2022.

Martin Placek, ‘Leading Container Ship Alliances - Market Share 2021’ (Statista, April 2022) <https://www.statista.com/statistics/1249648/leading-container-ship-alliances-market-share/> accessed 25 June 2022.

Michael Jürgen Werner, III. Application of EU Competition Rules to Maritime Sector – Commentary on the Liner Shipping Consortium Block Exemption Regulation No. 697/2014 (Regulation 906/2009) (In EU Maritime Transport Law (1st ed., pp. 340–359). Nomos Verlagsgesellschaft mbH & Co. KG. 2016), 918; Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ115/88.

Mike Wackett, ‘More Blank Sailings Check Rates Decline, but Eyes Are on the Carriers’ (The Loadstar, 20 May 2022) <https://theloadstar.com/more-blank-sailings-check-rates-decline-but-eyes-are-on-the-carriers/> accessed 26 June 2022.

Ministry of Transportation (交通运输部), ‘The Ministry of Transport will investigate and deal with irregularities such as incomplete freight rate filing according to the law (交通运输部将依法查处运价备案不完整等违规行为)’ (Website of Ministry of Transportation, September 30, 2009) <http://www.gov.cn/gzdt/2009-09/30/content_1430467.htm> accessed August 22, 2022.

Ning Xuanfeng (宁宣凤), Pen Heyue (彭荷月), Jin Xiaotian (金晓甜) & Du Nan (杜楠), ‘The NDRC guideline must be read by enterprises, and the compliance of information exchange is another alarm (发改委指南企业必读，信息交换合规再敲警钟)’ (China Law Insight, August 8, 2017) available at <https://www.chinalawinsight.com/2017/08/articles/compliance/%E5%8F%91%E6%94%B9%E5%A7%94%E6%8C%87%E5%8D%97%E4%BC%81%E4%B8%9A%E5%BF%85%E8%AF%BB%EF%BC%8C%E4%BF%A1%E6%81%AF%E4%BA%A4%E6%8D%A2%E5%90%88%E8%A7%84%E5%86%8D%E6%95%B2%E8%AD%A6%E9%92%9F/>.

OECD, Working Party No. 2 on Competition and Regulation, ‘COMPETITION ISSUES IN LINER SHIPPING -- Note by the Secretariat -- ‘[2015] DAF/COMP/WP2(2015)3, available at: <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2015)3&docLanguage=En> accessed on 14 August 14.

MOFCOM Announcement No.46 of 2014 on Decisions of Antimonopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC, and CMA CGM from Establishing a Network Center (商务部公告 2014 年第 46 号 商务部关于禁止马士基、地中海航运、达飞设立网络中心经营者集中反垄断审查决定的公告) available at < http://english.www.gov.cn/policies/latest_releases/2014/08/23/content_281474982986692.htm> accessed September 3, 2022.

Olaf Merk and Antonella Teodoro, ‘Alternative Approaches to Measuring Concentration in Liner Shipping’ [2022] Maritime Economics & Logistics <https://link.springer.com/10.1057/s41278-022-00225-x> accessed 6 August 2022.

Owen Tang and Po-wan Sun, ‘Anti-Competition of Ocean Shipping Alliances: A Legal Perspective’ (2018) 3 Maritime Business Review 4.

Peng Yang, ‘The Reform of EU and US Antitrust Exemption Regimes and China’s Shipping Legislation Tendency’ (2015) China Oceans L Rev 413.

Photis Panayides and others, ‘Strategic alliances in container liner shipping (2011) 32 (2011) Research in Transportation Economics 25 < https://linkinghub.elsevier.com/retrieve/pii/S0739885911000187> 25 accessed on 14 August 14, 2022.

Ralitsa Georgieva, ‘COMMENT: Cracking Down Antitrust Prohibitions: Conferences, Mergers and Acquisitions, and Alliances in the Shipping Industry’ (2020) 44 Tul. Mar. L. J. 291.

Richard A. Lidinsky, ‘Comments of Commissioner Richard A. Lidinsky, Jr. on Proposed P3 Vessel Sharing Agreement’ (Federal Maritime Commission, March 24, 2014) available at <https://www.fmc.gov/comments-of-commissioner-richard-a-lidinsky-jr-on-proposed-p3-vessel-sharing-agreement/>.

Sam Chambers, ‘New Analysis Shows the Fierce Fight between Alliances for Market Share on the Main East-West Trades’ (Splash247, 24 August 2021) <https://splash247.com/new-analysis-shows-the-fierce-fight-between-alliances-for-market-share-on-the-main-east-west-trades/> accessed 25 June 2022.

State Anti-Monopoly Bureau (国家反垄断局), China Antitrust Enforcement Annual Report 2021 (中国反垄断执法年度报告（2021）) (2022), 29-47, available at

<https://www.samr.gov.cn/xw/zj/202206/P020220608430645470953.pdf>, accessed 3 September 2022.

United Nations Conference on Trade on Trade and Development, Review of maritime transport 2019 UNCTAD/RMT/2019/Corr.1, 47.

United Nations Conference on Trade on Trade and Development, Review of maritime transport 2021 UNCTAD/RMT/2021.

William Sjostrom, ‘Ocean Shipping Cartels: A Survey’ (2004) 3 Review of Network Economics 107.

Zhu-Zuoxian, 'The Shipping Competition Practice in China: Policy, Regulation and Cases' (2019) 24 Asian Bus Law 75.