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Industry viewpoint: Reflections on the Chinese rejection of the P3 alliance and its aftermath

Dutch competition lawyer Gus Braakman, whose paper last year on the implications of the P3 Network was thought to have influenced Chinese regulators in their decision to prohibit the alliance, discusses the need for legal certainty and asks whether shipping should have a global set of antitrust rules as Maersk and MSC propose the 2M alliance

CHINA's Ministry of Commerce rejected the P3 alliance on June 17. The main consideration for this decision was that the alliance was not compliant with "social public interest" and did not "promote a healthy development of the socialist market economy" in China.

The task to achieve these two objectives of Chinese competition law, however, is not only entrusted to MofCom; the Ministry of Transport has also played an important role in the decision-making process around P3.

Seen from this perspective, it is clear that the application of Chinese competition law is a tool for conducting the country's industrial policy. When reaching a decision, this highlights the importance of considerations either indirectly or not at all relating to the realisation of a fair and undistorted competition that aims at the creation of a level playing field for all competitors.

The rejection of P3 is the first case in which it was ruled that an alliance between exclusively non-Chinese companies is contrary to Chinese competition law. Apparently, the effects that P3 admittedly would have had on Chinese industrial policy formed sufficient reason for China to intervene.

In my previous article on P3, I have argued that the exchange of commercially sensitive information on for example pricing between participants to conference and discussion agreements that is allowed under Singapore competition law, for instance, may have anti-competitive effects in the European Union, also when directed at foreign markets. This being the case in the context of P3, EU competition law would have to be applied in order to squash these effects. This would require application of EU competition law beyond its present scope.
The guiding principle of EU competition law is the realisation of a fair and undistorted competition that aims at the creation of a level playing field for all competitors. This objective of creating open and competitive markets takes

primacy over national interests.

As Chinese competition law is a tool for conducting industrial policy and is therefore based on completely different guiding principles, an extension of EU competition law jurisdiction to such conference and discussion agreements may well run counter to the said policy in the event of Chinese lines participating therein.

Lines appear confident

On July 10, 2014, Maersk and Mediterranean Shipping Co announced that they had entered into the so-called 2M alliance. This operates on 21 strings, six of which will serve the Asia-north Europe trades and four will cover the Asia-Mediterranean trade lanes.

Both Maersk and MSC appear quite confident that the regulatory authorities will give their approval to the 2M alliance.

With regard to China, this optimism apparently stems from the fact that MofCom was in the first place unhappy with the market share of the P3 alliance.
What has also contributed to this optimism is the circumstance that the pricing and marketing of either partner will remain independent.

The actual differences between P3 and 2M seem smaller than suggested.
P3 was intended to operate 255 vessels with a capacity of 2.6m teu.
2M includes 185 vessels with an estimated capacity of 2.1m teu.

The market share of the P3 participants on the Asia-North Europe trade lanes was 45.6%; for 2M this is 34.9%. Market shares on the Asia-Mediterranean trade lanes will drop from 54.6% in the case of P3 to 41.8% in the case of 2M.
Also regarding P3 it was agreed that each partner's pricing and marketing was to remain independent, i.e. similar to 2M.

The only important organizational difference between P3 and 2M is that 2M will not have any jointly owned independent entity with executional powers.
Rather than setting up a network centre, 2M will only have a joint co-ordination committee to monitor its daily operations.

The 2M partners take the view that the absence of a network centre implies that 2M is a purely operational vessel-sharing agreement and for that reason does not fall under the scope of China's Anti-Monopoly Law. Therefore, the 2M alliance will not be filed with MofCom but only with the Ministry of Transport.
Irrespective of the legal validity of this argument, the question is whether the different organizational structure of 2M will make a difference with regard to the assessment thereof by the Chinese authorities in light of its industrial policy.

EU competition law

Like the P3 alliance, also the 2M alliance, with or without a network centre, will substantially increase the risk of shipping lines being caught by EU competition law on account of exchanging commercially sensitive information that is allowed under foreign jurisdictions such as Singapore competition law, also in cases where this exchange of information is directed at foreign markets.
This means that also the 2M alliance may induce an extension of EU competition law jurisdiction.

In this context, it should be borne in mind that the biggest Chinese shipping company, Cosco, apart from being party to 18 conference and discussion agreements, also participates in the CKYH alliance, to which the 2M alliance will appear a severe competitor.

Cosco, moreover, is facing a very precarious financial position.
EU rulings that would prohibit conference and discussion agreements in which Cosco participates and that would govern competition between the 2M and the CKYH alliances therefore might adversely affect the position of Cosco, and thereby the realisation of the goals of Chinese industrial policy.
I have little doubt that these considerations, and more in particular the position of Cosco, have played a role in the rejection of P3 and will play a role in the assessment of 2M.

In view of the above, I feel that a consistent attitude on the part of MofCom and the Ministry of Transport may induce them to conclude that the 2M alliance is not compliant with “social public interest” either and does not “promote a healthy development of the socialist market economy” in China.
In other words, this attitude may induce them to conclude that also 2M is contrary to Chinese industrial policy.

This viewpoint would likewise virtually kill the 2M alliance. Here, too, the underlying aim would be to steer around possible interventions by the European Commission, in areas that are important for Chinese industrial policy.
It should be noted that a similar reasoning holds with regard to US competition law and possible interventions by the FMC.

Irrespective of the attitude of MofCom and the Ministry of Transport towards the 2M alliance, I feel that their stance in P3, together with the European Commission’s policy of “wait and see”, which was also adopted, to a lesser extent, by the FMC, leaves the shipping industry with far too many uncertainties for it to be able to develop a commercially sound strategy.

In this context, it is important to note that the shipping industry not only consists of shipping lines. Ports also take great benefit from a clear and transparent set of competition rules as basis for the commercial strategies of shipping lines. This will enable ports to adopt and adapt their own commercial strategy.

Transparent set of rules

In view of all this, there can be no doubt that the shipping industry is in need of a clear and transparent set of competition rules that will guide them towards formulating a sound commercial policy on a global level.

Without such rules, extension of the P3 approach adopted by MofCom and/or by the European Commission and the FMC to the 2M alliance and possible future forms of co-operation, may in the end result in a situation in which only the strongest lines survive. Surely this cannot be the goal of any regulatory body.

When formulating this set of rules, the characteristic position of the shipping industry should be borne in mind. At the time, the main argument for repealing the EU block exemption for conference agreements was that, over the years, the shipping industry had developed into an ordinary industry that should be governed by the same set of general rules as any other industry. An argument that still holds, in principle.

However, the various regulatory approaches towards P3 demonstrate that the specific characteristics of the shipping industry are such that it needs special rules that are fine-tuned in order to meet the demands of this industry.

The circumstance that shipping is a global industry, combined with the fact that it is improbable that a set of global competition rules will be agreed on at short notice, will oblige each individual regulatory body to apply this fine-tuning for its own jurisdiction. This, obviously, must be done from the perspective of a fair and undistorted competition which aims at the creation of a level playing field for all competitors, i.e at the creation of open and competitive markets.

Until this (hopefully) temporary lack of a set of global competition rules can be provided for, the legal certainties that the shipping industry requires and is entitled to, must be acquired by way of recognition by the regulatory bodies of the validity and effect of each other's executive, legislative and judicial acts.

To arrive at this comity as soon as possible for the sake of acquiring legal certainty for the shipping industry, formulation and adoption of special rules by the various regulatory bodies that meet the demands of this industry should not be postponed.

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