Hub-and-spoke cartels in the container liner shipping industry

August J Braakman
*Advocat, Rotterdam**

Hub-and-spoke cartels may be used as a link in the chain to legitimise infringements of EU anti-trust law in the container liner shipping industry. This applies in particular in a situation when these cartels fall within the scope of both non-EU and EU jurisdiction and are perfectly legitimate in the first, whereas they constitute a severe infringement in the second. This article argues that the European Commission should provide guidance to the industry to face this phenomenon, and the sooner the better.

Introduction

EU anti-trust law does not contain a definition of a hub-and-spoke cartel. For the purposes of this article, I will define a hub-and-spoke cartel as 'the exchange of strategically sensitive information between competitors through a third party that facilitates the cartelistic behaviour of the competitors involved'.[1]

The EU Commission (Commission) only recently began to push the cartel concept into the area of exchange of strategically sensitive information. This means that 'companies are facing anti-trust risks which go well beyond the traditional concept of concerted practices aimed at fixing prices, allocating markets or rigging bids'.[2] Unlike a number of national competition authorities in the EU,[3] the Commission has not as yet addressed hub-and-spoke cartels under EU anti-trust law. By the looks of the developments on the exchange of strategically sensitive information, this may change in the not too distant future, at least for deep-sea container liner shipping services.

The exchange of strategically sensitive information

The recent focus of the EU anti-trust authorities on the exchange of strategically sensitive information in the container liner shipping industry stems from the repeal of the EU block exemption for one of the earliest cartels in this trade, ie liner conferences. Liner conferences can be defined as:

> [a] group of two or more vessel operating carriers which provide international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.[4]

* August Braakman (www.braakmanadvocaat.nl) specialises in maritime anti-trust law. He serves as Secretary-General of the European Maritime Law Organization (EMLO). The opinions expressed in this article are the author's own and are in no way to be attributed to the EMLO.

[1] B Vereecken *Hub and Spoke Cartels in EU Competition Law* (Universiteit Gent 2014–15) 3.

[2] Johan Ysewyn and Jiwon Choi 'Price signalling: the final frontier?' (7 July 2015) *Competition Law Insight* 10.

[3] There have been cases in the UK, Belgium, Italy, the Netherlands and Romania. For a summary see N Apostolov and others 'Hubs, spokes, middlemen and signalling' (DLA Piper Publications 15 March 2016).

[4] UNCTAD Code of Conduct for Liner Conferences (UNCTAD 1975).

Under EU anti-trust law, liner conferences were allowed until 18 October 2008. As of that date, liner carriers operating services to and/or from one or more ports in the European Union (the Union) had to cease all liner conference activity contrary to Article 101 TFEU.[5] This obligation applies 'regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conference or discussion agreements'.[6]

The repeal of the block exemption for conferences has not deprived lines of their appetite for price fixing. They have continued to do so under jurisdictions that allow for conference and/or discussion agreements. The asymmetries across different jurisdictions could have distortionary effects on global trade.[7] Therefore, within the Union lines will look for arrangements, which will enable them to continue the reduction of strategic uncertainty on the EU market of container liner shipping services that they were used to under the block exemption.[8]

It is not an option to try to construe these arrangements in such a manner that they are in accordance with EU anti-trust law. The Commission has made it clear that the horizontal arrangements that would have to be incorporated in these arrangements are unlawful per se. This is the case with regard to:

- discussing or fixing prices, surcharges, discounts and rebates
- agreeing on levels of capacity and utilisation
- rationalisation of capacity
- allocating customers or regions
- discussing relations with particular customers or suppliers
- planned service launches and service characteristics
- exchanging confidential information that might affect the competition positions of the participants or third parties.[9]

However, there are jurisdictions whose anti-trust laws allow for these arrangements on a particular route or routes. These routes border on routes that fall within the scope of EU anti-trust law. As a result, the anti-competitive effects of the arrangements on the former route or routes may have an impact on the latter.

The most important jurisdiction that explicitly allows for the exchange of strategically sensitive information and rate fixing by lines is the jurisdiction of Singapore. Under Singapore's Competition Law, carriers are allowed to cooperate on: (i) technical, operational or commercial arrangements; (ii) price; and (iii) remuneration terms. Order 2015 of 25 November 2015, No S 718, of the Singapore Ministry of Trade and Industry extends the block exemption, which allows for this conduct until 31 December 2020.

Intra-Asian trade is between four and five times bigger than trade between Asia and Europe. Singapore has the world's second busiest port after Shanghai. It is a very important hub in the trade between ports in Asia and Europe. When heading for Europe, mega-carriers are taking up an ever-larger part of intra-Asian trade. The main reason is that, in the intra-Asia trade, freight rates have declined to about one-sixth of their 2014 average since 2015. For mega-carriers the port of Singapore (PSA) is the best port-of-call by far for unloading intra-Asian cargo. The PSA is located along the Straits of Malacca in the centre of the Asia–Europe shipping route. It is the main hub in the Far East, with 200 of the world's shipping lines calling at PSA Singapore terminals. These offer connections to

[5] Regulation (EC) No 1419/2006 OJ L269 (28 September 2006) 1–3.

[6] Guidelines on the application of art 81 of the EC Treaty to maritime transport services, OJ C245/2 (26 September 2008).

[7] OECD 'Competition Issues in Liner Shipping' DAF/COMP/WP2(2015)3 pt 189; see also H E Haralambides and others *Erasmus Report* (Contract of Services for the Assistance in Processing Public Submissions to be Received in Response of the 'Consultation Paper' on the Review of Council regulation 4056/86), prepared for the European Commission, Competition Directorate general.

[8] Horizontal Guidelines OJ C11/1 of 14 January 2011 para 62, with references to jurisprudence.

[9] See Guidelines on the applicability of art 101 TFEU to horizontal cooperation agreements OJ C11/1 (14 January 2011) paras 86 ff, in conjunction with the block exemptions for liner shipping consortia OJ L256/31 (29 September 2009), and for specialisation agreements, OJ L335/3 (18 December 2010).

600 ports in 123 countries, largely in the Southeast Asia region. The PSA has a container-handling capacity of 40 million twenty-foot equivalent unit (TEU), to be increased to 50 million TEU in 2017. Moreover, Singapore has decided to build one of the first mega-ports in Asia, which aims to add capacity of 65 million TEU annually. Over 80 per cent of the containers handled at the PSA are in the transhipment category.

The economic and legal context within which lines operate is that of global alliances. As of 18 July 2016 there are four major shipping alliances, namely 2M, O3, G6 and CKYHE. In 2017, the landscape will change dramatically: CKYHE and G6 will disappear and the 'Alliance' will be created, while O3 will be transformed into the 'Ocean Alliance'. Together, the alliances move roughly 90 per cent of ocean freight.

In principle, alliances qualify as vessel sharing agreements (VSAs). Members of an alliance are supposed to set prices independently from each other. However, they may still influence prices through the joint setting of capacity. Because they share capacity, commonality of costs may lead to alignment of prices.[10] More importantly, all members of these alliances participate in conference and/or discussion agreements where, in accordance with the Singapore Competition Law, strategically sensitive information is being exchanged and freight rates and surcharges are being discussed and fixed with regard to intra-Asian routes.

In its Commitment Decision, the Commission has indicated that the key parameters of ocean freight rates are:

(i) base rate, bunker charges, security charges, terminal handling charges and peak season charges
(ii) possible other charges
(iii) the services to which they apply
(iv) the period to which they relate (which can be expressed as either a fixed or an open-ended period, in which latter case prices are valid until further notice).[11]

When fixing ocean freight rates for the Asia–Europe routes, the parties to alliances and conference and/or discussion agreements exchange information and agree on these parameters for the intra-Asian leg of the route. The question is whether the exchange of this information has an impact on the rates for the Asia–Europe routes as such and, if so, whether this impact leads to coordination of competitive behaviour that has restrictive effects on competition on the EU market, qualifying a as a 'concerted practice' within the meaning of Article 101(1) of the TFEU.[12]

The Court of Justice (of the EU) has defined a 'concerted practice' as a form of coordination between undertakings, which, without having reached the stage of concluding a formal agreement, have knowingly substituted practical cooperation for the risks of competition.[13] A concerted practice can be constituted by direct or indirect contact between firms that affect, or intend to affect, the conduct of the market or to disclose intended future behaviour to competitors.

Lines will argue that there is no direct or indirect contact with regard to pricing or its key parameters for the Asia–Europe leg of the route. Assuming that this is correct, and given the current state of the jurisprudence of the CJEU, the test is whether exchange of, and agreement on, strategically sensitive information with regard to the intra-Asian leg of the route may be seen as direct evidence of collusion, which actively aims to align the market conduct of the lines with regard to those contingents of cargo that remain on board and are destined for ports in Europe.[14]

[10] Speech by Henrik Moerch, Director DG COMP Transport, Post and other Services at the EU Commission, given at the 22nd EMLO Conference held in London on 30 September 2016.

[11] Decision of 7 July 2016 Case AT.39850 *Container Shipping* C(2016) 4215 final.

[12] See Horizontal Guidelines (n 8), with references to jurisprudence.

[13] See Joined Cases 40–48, 50, 54–56, 111, 113 and 114/85; *Suiker Unie & Others v Commission* [1975] ECR 1663, 173; Joined Cases C–89/85, C–104/85, C–114/85, C–116/85, C–117/85 and C–125/85 to C–129/85 *Ahlström Osakeyhtio and Others v Commission (Woodpulp)* [1993] ECR I–1307, 63.

[14] See *Suiker Unie & Others v Commission* (n 13); Case 172/80 *Zuechner v Bayerische Vereinsbank* [1981] ECR 2021, 12–14; Case C–8/08 *T-Mobile Netherlands and Others* EU:C:2009:343, 30–35.

Lines will argue that this is not the case and that, in their view, alignment is passive alignment, if alignment exists at all. The CJEU has held that passive alignment cannot be treated as an illegal form of coordination.[15]

I am not overly convinced by these arguments. The object of the information exchanged with a view to fixing freight rates on the intra-Asian leg of the route is a reduction of the strategic uncertainty on the intra-Asian market of container liner shipping services. Exchange of information on the base rate for the intra-Asian leg of the route is an important element for fixing the rates for the Asia–Europe route as such, while bunker and security surcharges, being very important key parameters, are universal.

Lines that argue that there is no direct or indirect contact on pricing or its key parameters with regard to those contingents that remain on board and are destined for ports in Europe must prove that they have not taken account of the above information on the key parameters for fixing rates for the intra-Asian leg of the route[16] or that these key parameters are immaterial to the fixing of the rates for those contingents. This seems to me to be like squaring the circle.

The supplementary question is whether, by its very nature, the exchange of information on the key parameters of the rates for the intra-Asian leg of the route

> [r]eveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object within the meaning of Article 81(1) EC (now Article 101(1) TFEU). [This question] must be assessed having regard to the subject matter of the information exchanged, the objective of the exchange, and the economic and legal context in which that exchange takes place. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. The parties' intentions may likewise be taken into account, even though they are not a factor, which must necessarily be considered.[17]

I hold the view that this supplementary question must be answered in the affirmative. It is impossible to accept that the exchange of information on the most important key parameters of the rates for the intra-Asian leg of the route has not played an active role in aligning the market conduct of the lines with regard to those contingents that remain on board and are destined for ports in Europe. In fact, it is much more likely that the information that has been exchanged is used to facilitate tacit collusion on the freight rates and surcharges for the Asia–Europe routes as such. This implies that the exchange of information on pricing and its key parameters with regard to those contingents that are unloaded in the port of Singapore constitutes a 'concerted practice' within the meaning of Article 101(1) of the TFEU.

Should this conclusion appear a bridge too far for legal or political reasons, then the question remains whether the effect on the EU market of container liner shipping services of exchanging strategically sensitive information as is allowed under the Singapore Competition Law constitutes an infringement of Article 101(1) of the TFEU at all.

There can be little doubt that the information exchanged on the key parameters of the rates for the intra-Asian leg of the route provides an important indicator, if not the basis indeed, for the pricing policy adopted for those cargo contingents that remain on board, destined for ports in Europe. The CJEU has held that EU anti-trust law applies in cases where practical cooperation between competitors makes it possible for them to foresee, with a sufficient degree of probability, future developments that may have an influence, either direct or indirect, actual or potential, on the pattern of trade between Member States.[18]

---

[15] See *T-Mobile Netherlands and Others* (n 14) paras 29, 30.

[16] Case C–49/92 *Commission v Anic Partecipazione* EU:C:1999:356 paras 121, 126.

[17] Opinion of A-G Kokott delivered on 11 December 2014 in Joined Cases C–293/13 P *Fresh Del Monte Produce v Commission* and C–294/13 P *Commission v Fresh del Monte Produce* ECLI:EU:C:2014:2439 pt 209, with references to jurisprudence of the CJEU.

[18] Case 42/84 *Remia and Others v Commission* [1985] ECR 2545 para 22.

Also in the unlikely event that the exchange of this information within the framework of conferences and/or discussion agreements does not have the level required for a 'concerted practice' within the meaning of Article 101 of the TFEU, it still qualifies as an agreement to exchange price information. Therefore, Article 101 of the TFEU applies in any case.

The regulating authorities of the United States, the EU and China have started to meet on a regular basis to try to agree on a global approach of distortions of competition in the global liner shipping industry. This initiative, however laudable, does not mitigate the burden of making a proper self-assessment under EU competition law. Whilst preparing their self-assessment, lines and other undertakings active in this industry must take account of the anti-competitive effects exchanges of strategically sensitive information within the framework of conference and/or discussion agreements, which are allowed under the Singapore Competition Law, may have inside the Union. The jurisprudence of the CJEU is clear:

> The competition rules of the Union apply irrespective of where the undertakings are located or where the agreement/concerted practice has been concluded, provided that it is implemented, or it is foreseeable that it produces immediate and substantial effects, inside the Union.[19]

Hub-and-spoke cartels

Once a week, the Shanghai Shipping Exchange (SSE) publishes the freight rates on 15 individual shipping routes on the Shanghai (Export) Containerised Freight Index (SCFI). The rates are established on the basis of the average spot freight rate of a specific route, divided by the average price of its base period. They reflect the ocean freight and the associated seaborne surcharges on each of these routes on the spot market. The shipping routes include major container trade routes from Shanghai to Europe. The base ports in Europe are Hamburg, Rotterdam, Antwerp, Felixstowe and Le Havre. Seaborne surcharges include bunker rates, peak season surcharges, security surcharges and port congestion surcharges. Representatives of 20 of the major lines and of 17 shippers/freight forwarders report the freight information to the SSE.[20]

All lines that report to the SSE are members of an alliance and/or a conference or discussion agreement that is active under the jurisdiction of Singapore. Therefore, the components of the freight rates and surcharges they report for shipping routes from Shanghai to Europe, relating to contingents that are unloaded in the port of Singapore, have not been set independently by each line, but are the result of concertation that aims at an active alignment of the market conduct of the lines with regard to these contingents. Once published, the lines cannot deviate from the freight rates and surcharges for the Asia–Europe routes by adapting the agreed rates and surcharges for intra-Asian trade. Therefore, publication by the SSE of the freight rates and surcharges in which the concerted rates and surcharges for the intra-Asian trade are incorporated has the effect of policing these agreed rates and surcharges.

The discussion above demonstrates that the SSE meets all the criteria of a hub-and-spoke cartel as defined in the introduction of this article. It organises collusion among undertakings that offer container liner shipping services by enabling them to use strategically sensitive information agreed on in conference and/or discussion agreements with regard to the intra-Asian leg of the route, whilst setting and publishing freight rates with regard to the Asia–Europe routes.

At the repeal of the block exemption for conferences, the Commission explicitly took the position that as of 18 October 2008 all liner conference activity that is contrary to Article 101 of the TFEU is prohibited, 'regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conference or discussion agreements'. Therefore, in making their self-assessment under EU anti-trust

[19] Commission Decision of 7 July 2016 in the *GRI* case, Case AT.39850 *Container Shipping* C(2016) 4215 final 60, with reference to CJEU judgments in Case T–102/96 *Gencor Ltd v Commission* EU:T:1999:65 para 90 and in Case T–289/08 *Intel Corp v Commission* ECLI:EU:T:2014:547 paras 243, 244.

[20] http://en.sse.net.cn/indices/introduction_scfi_new.jsp.

law, all undertakings that are active in the global container liner shipping industry must consider the possible impact of the freight rates and surcharges published by the SSE on the rates that apply on the Asia–Europe route. In this context it is important to note that the 2011 Horizontal Guidelines provide that: 'each case must be assessed on its own facts according to the principles set out in these Guidelines'.[21]

This clearly demonstrates that the importance recently attached by the Commission and the CJEU to price signalling creates new and significant challenges regarding self-assessment and compliance of these phenomena with EU anti-trust law. This is particularly true in cases where price signalling takes place within the framework of a hub-and-spoke cartel. One of the reasons is that, in itself, the behaviour of the spokes is often uncontroversial, being part of a company's day-to-day commercial conduct. However, 'there are factors – sometimes outside the control of business – that could potentially make this behaviour illegal under a certain interpretation of the Law'.[22]

The guidelines the Commission has adopted thus far do not provide guidance on how to deal with these global aspects of the market of container liner shipping services. This is at odds with the view of the Commission that 'liner shipping is a global industry by its very nature'[23] and with the view of the CJEU that intra-Union trade may be affected considerably by a restriction of competition between international liner shipping companies.[24]

Self-assessment is a must, even more so since it is required in the case of an allegation of infringement of Article 101(1) of the TFEU.[25] No undertaking that is active on the market of container liner shipping services can take the risk of not making a self-assessment and, if such self-assessment should prove necessary, of not restructuring its arrangements so as to make them compatible with EU anti-trust law. This follows not only from the huge fines and possibly even higher costs of private damages in the event of an infringement of this law. It also follows from the legal consequences the applicability of Article 101(1) of the TFEU has. Before going into these consequences, it should be noted that national courts are obliged to apply EU anti-trust law out of their own accord.

The applicability of Article 101(1) of the TFEU implies that the arrangement concerned is not binding; nor can it be asserted in relation to third parties.[26] By the same token, it cannot be asserted before the courts either. Nullity for the purpose of Article 101(1) of the TFEU means complete invalidity. It is absolute in nature, especially as anyone can invoke it,[27] and unlimited in time, thereby catching all the past and future effects of the arrangement concerned.[28]

As an exception to this rule, Article 101(3) of the TFEU provides that the prohibition contained in Article 101(1) may be declared inapplicable in case of arrangements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which arrangements do not impose restrictions that are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned. These four conditions of Article 101(3) of the TFEU are cumulative. It is unnecessary to examine any remaining conditions once it is found that one of them is not fulfilled.

---

[21] See Horizontal Guidelines (n 8) para 22.

[22] See Ysewyn and Choi (n 2).

[23] Speech of EU Commissioner for Competition Vestager at the 21st Annual Conference of the European Maritime Law Organization held in Copenhagen on 5 October 2015.

[24] Joined Cases T–24 to 26 and 28/93 *Compagnie maritime belge a.o. v Commission* ECLI:EU:T:1996,139 paras 202, 203; Case T–395/94 *Atlantic Container Line v Commission* ECLI:EU:T:2002:49 paras 72,73 and 74; Case COMP/37.396/D2 *Revised TACA* paras 73, 74 and 75. The decision is available on the Commission website at: http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_74.html#i37_396.

[25] EC Commission, Communication of the Commission, Notice, Guidelines on the application of art 101(3) of the Treaty OJ C101/97 (27 April 2004).

[26] Case 22/71 *Beguelin Imports v GL Import Export SA* [1971] ECR 949 at 962 para 29.

[27] Case 319/82 *Société de Vente de Ciments et Bétons de L'Est v Kerpen & Kerpen GmbH* [1983] ECR 4173, 4183f para 11.

[28] Case 48/72 *Brasserie de Haecht v Wilkin-Janssen (Haecht II)* [1973] ECR 77 at 89.

When an arrangement is found to be restrictive of competition, its pro-competitive benefits must be determined and it must be assessed whether these pro-competitive effects outweigh the anti-competitive effects. The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) of the TFEU.

Arrangements caught by Article 101(1) of the TFEU that do not satisfy the conditions of Article 101(3) are prohibited. However, arrangements caught by Article 101(1) of the TFEU that do indeed satisfy the conditions of Article 101(3) are not prohibited, no prior decision to that effect being required. Such arrangements are valid and enforceable from the moment that the conditions of Article 101(3) of the TFEU are satisfied and for as long as this remains the case.[29]

As a matter of principle, all restrictive arrangements that fulfil the four conditions of Article 101(3) of the TFEU are covered by the exception rule. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 101(3) of the TFEU. Such restrictions are usually blacklisted in block exemption regulations or identified as hard-core restrictions in Commission guidelines and notices. Arrangements of this nature generally fail (at least) the first two conditions of Article 101(3) of the TFEU. They neither create objective economic benefits nor benefit consumers. The discussions on freight rates and surcharges and fixing of these, allowed under the Singapore Competition Law, constitute severe restrictions of competition and are blacklisted under EU anti-trust law.[30]

Conclusion

Based on information provided by the SSE, the SCFI index of 13 January 2017 demonstrates a figure of 1086 for base ports in Europe. For Singapore this is 104. This implies that the freight rates and ancillary surcharges for Europe (base ports) are contaminated with the EU anti-trust virus by up to approximately 10 per cent. The publication by the SSE of the freight rates for Europe (base ports) cannot serve as a means to legitimise components of these rates that are evidently severe infringements of EU anti-trust law. It is the responsibility of each and every undertaking active on the market of container liner shipping services to address this phenomenon by making its self-assessment under EU anti-trust law. However, without clear and transparent guidance from the Commission, this is a near-impossible task. Therefore, the Commission must be prepared to take up its responsibilities and provide this guidance; the sooner the better.

[29] See art 1(2) of Regulation (EC) No 1/2003 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty OJ L1 of 4 January 2003.

[30] See Horizontal Guidelines (n 8) paras 86 ff, in conjunction with the block exemptions for liner shipping consortia OJ L256/31 (29 September 2009), and for specialisation agreements OJ L 335/3 (18 December 2010).