



SHIPPING POOLS: A COMPETITION LAW PERSPECTIVE – SINK OR SWIM?

Introduction

In today's difficult market conditions, it is vital for shipowners to use all available efficiencies. Designing a pool in accordance with competition law is a way for shipowners to achieve those efficiencies and to enable them to "swim" rather than "sink".

The nature of pools

Although there are different models, a standard shipping pool brings together a number of similar vessels under different ownership and operated under a single administration. A pool manager is normally responsible for the commercial management (for example, joint marketing, negotiation of freight rates and centralisation of incomes and voyage costs) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices, ordering bunkers, collecting the vessels' earnings and distributing them under a prearranged weighting system).

The pool manager's activities can be important to achieve a level of integration necessary to obtain the benefits of the cooperation. To achieve this, the pool manager must often have functional independence and be responsible for providing integrated services. The pool manager tends to act under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels (safety, crew, repairs, maintenance) is usually the responsibility of each owner. Although they market their services jointly, the pool members often perform the services individually.

Merger or cooperative arrangement

Pools are assessed under competition law either as mergers or as cooperative arrangements falling short of a merger. The more integrated the pool, the more likely it is to be considered as a merger.

Mergers

A merger whose participants exceed relevant financial thresholds will generally require pre-



The pool manager tends to act under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels (safety, crew, repairs, maintenance) is usually the responsibility of each owner.

ANTHONY WOOLICH, PARTNER

notification and prior clearance from the relevant competition authority(ies). Clearance confers the benefit of legal certainty, but there is the risk of changes being required or even a negative decision, although there is possibly a more lenient test for mergers than for cooperative arrangements. But many pools will not be considered to have the requisite degree of permanence to be considered as mergers, due for example to the rights of shipowners to withdraw ships on notice, or will be regarded as too reliant on their parent companies to be mergers. In some jurisdictions, particulars of pools falling short of mergers need to be filed with maritime transport regulators in any event.

Cooperative arrangements

For cooperative arrangements there will generally be no competition law issue if the participants are not actual or potential competitors. For example, when shipowners set up a pool to tender for, and perform, contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry out on their own, no competition issues will generally arise.

In addition, where the market share of the pool participants in a cooperative arrangement is low, for example in a fragmented market, competition authorities are unlikely to be concerned to intervene. This is because the pool participants will not have a significant economic impact on the market.

But it is usually important that there is a degree of integration between the participants' activities in the pool: otherwise, the pool could be seen as a bare cartel focused on joint selling, with the object of coordinating the pricing policy of the competitors, but with no efficiencies.

Pools which do not involve joint selling, but, for example, joint scheduling or joint purchasing will generally only raise competition issues where the parties have some degree of market power.

Key points to consider include non-compete clauses, lock-in periods and notice periods and exchanges of commercially sensitive information.

Efficiencies

The greater the extent to which the pool gives rise to restrictions of competition (for example the higher the market share of the participants), the greater the efficiencies and pass-on of benefits to customers there must be. The efficiencies must result from the integration. Such efficiencies

could result from obtaining better utilisation rates and economies of scale, improved geographic spread and consequent reduction of ballast voyages. In addition, each restrictive clause contained in a pool agreement must be reasonably necessary to attain the claimed efficiencies.

Conclusion

Shipowners may find pools attractive for a number of reasons. Pools can be an effective way for shipowners to cooperate and gain efficiencies without losing their independence.



For more information, please contact the author of this Briefing:

Anthony Woolich

Partner, London
T: +44 (0)20 7264 8033
E: anthony.woolich@hfw.com

HFW's London office is part of an international network of 13 offices in 11 countries. For further information about EU, Competition and Regulatory related issues in other jurisdictions, please contact:

Daniel Martin

Partner, London
T: +44 (0)20 7264 8136
E: daniel.martin@hfw.com

Guy Hardaker

Partner, Hong Kong
T: +852 3983 7644
E: guy.hardaker@hfw.com

Edouard Tay Pamart

Partner, Paris
T: +33 1 44 94 40 50
E: edouard.taypamart@hfw.com

Julian Davies

Partner, Shanghai
T: +86 21 2080 1188
E: julian.davies@hfw.com

Konstantinos Adamantopoulos

Partner, Brussels
T: +32 2 643 3401
E: konstantinos.adamantopoulos@hfw.com

Aaron Jordan

Partner, Melbourne
T: +61 (0)3 8601 4535
E: aaron.jordan@hfw.com

Jeremy Davies

Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Stephen Thompson

Partner, Sydney
T: +61 (0)2 9320 4646
E: stephen.thompson@hfw.com

Jasel Chauhan

Partner, Piraeus
T: +30 210 429 3978
E: jasel.chauhan@hfw.com

Simon Adams

Partner, Perth
T: +61 (0) 8 9422 4715
E: simon.adams@hfw.com

Ian Chung

Partner, Dubai
T: +971 4 423 0534
E: ian.chung@hfw.com

Fernando Albino

Partner, São Paulo
T: +55 (11) 3179 2900
E: fernando.albino@hfw.com

Brian Gordon

Partner, Singapore
T: +65 6411 5333
E: brian.gordon@hfw.com

Lawyers for international commerce

hfw.com

© 2015 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth