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Sailing Through the Storm: Practical Guidance for Ocean Container Shipping in a New Era of Antitrust Enforcement

By Michael S. Wise, Camille Paulhac & Michael L. Spafford

Pressure for antitrust intervention in the complex and global ocean container shipping industry is ratcheting up once again. In the U.S., President Biden went out of his way in his March 1, 2022 State of the Union to target ocean carriers, noting that there will be a "crackdown on these companies overcharging American businesses and consumers." The day before, the White House announced a "new joint initiative" between the Federal Maritime Commission and the Department of Justice to "promote competition in the ocean freight transportation system." Meanwhile, shippers have been advocating for the European Commission to step in to address container trade rates, and industry participants in China have raised similar concerns to the Chinese Ministry of Commerce and State Administration for Market Regulation.

Antitrust scrutiny is not new to ocean shipping – it has been ongoing for years. What is interesting is how limited actual violations have been. Indeed, several of the world's best enforcement agencies have investigated and come away without imposing major penalties. For example, in 2011 the European Commission conducted "dawn raids" of multiple ocean carriers, subsequently opening an investigation in 2013 relating to pricing practices. That investigation evidently did not turn up evidence of an illegal cartel, and instead settled in 2016 for commitments by various carriers relating to their public pricing announcements. Similarly, the U.S. Department of Justice served subpoenas on multiple carriers in 2017 as part of a potential antitrust cartel investigation. That investigation terminated in 2019 without any charges being filed. China's Ministry of Transportation has also scrutinized the industry without identifying illicit cartel behavior.

Given the level of inquiry the ocean carriers have faced over the last decade, one could anticipate that there is a limited prospect of uncovering broad conspiratorial conduct that has heretofore been undetected—despite suggestions to the contrary from President Biden and others. Instead, the likely emphasis in 2022 and forward will almost certainly be on novel applications of antitrust principles that aim to address perceptions of excessively high rates.

Some of these likely require legislative changes, as President Biden has called for. In particular, the global container shipping industry benefits from limited antitrust immunity in many jurisdictions, which is intended to facilitate stability of supply and enhance efficiency. These protections cannot simply be removed without legislative action in many cases (and even if they could be, there is ongoing debate about whether it would be wise to do so when the protections themselves are intended to promote

economic efficiency in a critical piece of global trade). However, the clear indication from the various calls for action is that regulators will be pushing the boundaries of existing statutes to come up with new actions to bring under existing laws.

All of this puts ocean carriers in a challenging position, since they can expect to be targeted by antitrust enforcers once again, but do not yet have a clear indication of what new categories of conduct (if any) will be targeted. Despite the uncertainty, there are several proactive steps that savvy companies can take to position themselves to navigate these choppy waters.

Prepare For Novel Antitrust Theories

Obviously, carriers must remain diligent in avoiding risks of cartel behavior, but given the regime changes in Washington and the global calls for some sort of antitrust action, it is a good time to put fresh eyes on carriers' overall antitrust risk profile. Several categories of conduct outside of more traditional "price fixing" are near existing boundaries of antitrust permissibility, meaning that if enforcers are inclined to shift the playing field, the conduct may now fall out of bounds. As White House competition advisor Timothy Wu noted, the administration believes that there are many "competition-related issues that have a way of evading straight-forward, old-fashioned antitrust enforcement."

Some examples of such "borderline" conduct may include refusals to deal, discriminatory conduct, use of most-favored nations clauses, and bundling of services. Many of these would fall within "abuse of dominance" or monopolization frameworks. Indeed, DOJ Antitrust Division recently suggested that Sherman Act Section 2 monopolization claims were an area where it was looking to increase criminal enforcement. Moreover, as we have noted elsewhere, DOJ enforcement has highlighted the risks associated not only with a company's own conduct, but with the conduct of its business partners—particularly where those partners are engaged in government contracting.

Without assuming that any of these practices will necessarily be condemned going forward (all of these historically have required a case-by-case assessment of their reasonableness), it is a good time to consider whether adjusting certain activities may reduce a company's overall antitrust risk profile. Steps may include ceasing "borderline" practices, increasing counsel oversight on certain aspects of sales and marketing, scrutinizing business ventures for potential exposure, or establishing tighter parameters for permissible conduct under existing compliance frameworks.

Establish Dawn Raid and Subpoena Protocols

Several of the past antitrust investigations of ocean shipping have involved surprise visits by enforcers seeking evidence of problematic conduct. Prudence would suggest that the industry should be prepared for another wave of these on the horizon. There are several things that companies can do to ensure that their employees can handle these events appropriately. We have addressed many of these principles in other recent alerts, including responding to FBI search warrants and European Commission "dawn raids." A good starting point is simply having a plan in place that employees have been trained to put into action in these high-stress situations.

Bring Compliance Practices Up To Date

Those charged with antitrust compliance are responsible both for the existence of a comprehensive compliance policy and the implementation of that policy. As noted above, there is reason to believe that existing compliance efforts have been effective in avoiding criminal cartel behavior, but it is always important to ensure that compliance principles do not become stale.

Threats to compliance can arise around new practices or technologies that are employed by a company. One example has been the rise in the use of ephemeral messaging and chat applications, which have been an area of focus for the Department of Justice, among other regulators. Communications over these platforms raise different risks and challenges than more traditional email and voicemail, and compliances practices should take these into account specifically. Another area of recent expansion of antitrust focus is human resources, where the DOJ has been aggressively seeking out horizontal conduct relating to wage fixing and noncompete agreements. Because the HR department has historically not been a hotbed for antitrust concerns, new or added compliance training may be appropriate in this area.

In addition to having accurate and thoughtful policies in place, companies are responsible for ensuring that those policies are implemented effectively. Given the ongoing nature of this task, there is a risk that implementation becomes part of a rote process that begins to lose its force over time. Companies should address this in two ways. First, regular assessment of effectiveness is advisable. Interviewing employees, spot-checking in problem areas (including methods of communication), and testing for familiarity with applicable requirements are all potential sources of insight into effectiveness. Second, training materials should be reviewed and updated with a regular cadence so that they continue to address new issues that come up in the course of the business and do so in engaging ways.

Watch What You Say

As antitrust enforcers scrutinize ocean shipping, they will be doing so with an eye toward potential new theories. In this context, words matter. Many practices that are historically seen as "neutral" from an antitrust perspective on their face can become problematic if practiced with an anticompetitive intent. For instance, a contractual provision may not appear suspect on its face, but it could immediately become a focus if someone describes it as a way to disadvantage a rival – especially if it is being reviewed by a skeptical regulator. Employees should be focused on enhancing their company's competitiveness, but at the same time need to be aware of what sorts of words may inadvertently imply an anticompetitive or illegal intent that does not exist. This goes for both public statements and internal documents. While internal documentation can be addressed through compliance training, it also likely makes sense for any public commentary to be reviewed for potential antitrust concerns in advance.

Conclusion

By any account, future antitrust enforcement in the ocean shipping industry is uncertain. But that uncertainty should not justify a passive "wait and see" approach. Carriers can and should take appropriate steps now to minimize exposure, and this means more than simply looking back at the areas of past antitrust focus or relying on past findings of compliance to carry the day. Today's challenges require a proactive approach to be best positioned to ride out the storm.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Brussels

Camille Paulhac
33.2.641.7460
camillepaulhac@paulhastings.com

Washington, D.C.

Michael Murray
1.202.551.1730
michaelmurray@paulhastings.com

Michael Wise
1.202.551.1777
michaelwise@paulhastings.com

Michael Spafford
1.202.551.1988
michaelspafford@paulhastings.com

Gary Zanfagna
1.202.551.1940
garyzanfagna@paulhastings.com