



November 21, 2016

BY EMAIL

Rachel E. Dickon, Assistant Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, DC 20573

Re: THE Alliance Agreement
FMC Agreement No. 012439

Dear Ms. Dickon:

The Institute of International Container Lessors ("IICL"), the leading trade association of the container and chassis leasing industry¹, submits the following comments in response to the Federal Maritime Commission ("FMC") Notice of Filing of Agreement No. 012439, THE Alliance Agreement, (the "Agreement"), 81*Fed.Reg.*79028 (November 10, 2016), in order to express the concerns of its members with respect to certain provisions of the Agreement.

The Agreement is described as a "Vessel Sharing Agreement" on its Title Page and in the *Federal Register* Notice. This significantly misrepresents the scope of the authority and the antitrust immunity that the parties would obtain if this Agreement takes effect. Many of the provisions of the agreement have nothing to do with vessel sharing or consortia arrangements but rather extend to matters relating to containers and chassis and to joint purchasing and procurement. The extensive provisions that have no direct relationship to vessel sharing would give the Agreement parties' collective buying power to reduce costs for goods and services at the expense of providers of goods and services who have no antitrust protection to allow them to join together to combat the Agreement parties' collective buying power.

¹ A list of IICL's members can be found at www.iicl.org.

IICL is particularly concerned with the provisions of Article 5.2(i) and 5.2(j), which would authorize the Agreement parties to:

(i) Consult and meet, discuss, and reach agreement amongst themselves or with one more operators of container or chassis pools, container or chassis lessors or providers, or other third parties regarding financial, operational, and liability terms for the shared or individual use, interchange, lease, sublease, purchase, or provision of containers, Alternative Marine Power devices, chassis, or related equipment, or goods or services that may be required in connection with the use, interchange, lease, or sublease of containers or chassis; the Parties may also agree on common standards for containers, chassis, and other intermodal equipment used in the Trade;

(j) Discuss and agree upon joint contracting for the purchase, lease, or operation of equipment, facilities (inland terminals, equipment depots, warehouses, container yards, container freight stations), and any services provided by such facilities, or inland transportation services.²

Point I. The Commission Lacks Subject Matter Jurisdiction

Section 4(a) of the Shipping Act of 1984, as amended, 46 U.S.C. §40301(a), does not give the FMC jurisdiction to permit the parties to the Agreement to make agreements concerning the matters contained in Articles 5.2(i) and 5.2(j).

Section 4(a) lists seven classes of ocean common carrier agreements:

(a) Ocean Common Carrier Agreements.—This part applies to an agreement between or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or regulate the number and character of voyages between ports;

(4) regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in an exclusive, preferential, or cooperative working arrangement between themselves or with a marine terminal operator;

² The inclusion of “inland transportation services” in Article 5.2(j) appears to be directly contrary to the provisions of Sections 4 and 7 (46 U.S.C. 40301 and 40307) and Section 10(c)(4) (46 U.S.C. 41105(4)) of the Act. The inclusion validates our concerns as expressed in Point II of these comments.

(6) control, regulate, or prevent competition in international ocean transportation;
or

(7) discuss and agree on any matter related to a service contract. (Emphasis added.)

These provisions establish the subject matter jurisdiction of the Commission with respect to agreements that are required to be filed between or among ocean common carriers. IICL believes that nothing in Section 4(a) includes agreements such as those described in Article 5.2(i) or 5.2(j) of the Agreement.

A full and fair reading of Article 5.2(i) shows that the parties seek authority to agree “amongst³ themselves or with one more operators of container or chassis pools, container or chassis lessors or providers⁴, or other third parties . . . regarding financial, operational, and liability terms” for the members use, collectively or individually, relating to the “use, interchange, lease, sublease, purchase or provision of containers . . . chassis, or related equipment . . .” In addition the authority would extend to making agreements among themselves on “common standards for containers, chassis or other intermodal equipment.” Section 5.2(j) would authorize the Agreement parties to “[d]iscuss and agree upon joint contracting for the purchase, lease, or operation of equipment, . . .” (Emphasis added.)

The authority described in Articles 5.2(i) and 5.2(j) is not included in the terms of Section 4(a)(1) through (7) of the Act. The quoted provisions of Article 5.2(i) and 5.2(j) are not about (1) fixing “rates, cargo space accommodations or other conditions of service;” (2) pooling or apportioning traffic, revenue, earnings or losses; (3) allotting ports or regulating the number and character of sailings; (4) limiting or regulating the “volume or character of cargo or passenger traffic to be carried;” (5) “exclusive, preferential, or cooperative working arrangements between themselves or with marine terminal operators;” (6) controlling, regulating, or preventing competition in international ocean transportation;” or (7) relating to service contracts.

³ The word “amongst” suggests an Agreement of all the parties to the Agreement. However, Article 5.18 provides that “Any two or more Parties may discuss and agree on any matter within the scope of this Agreement.” Allowing the terms of the Agreement to extend to discussions between any two or more Parties makes the Agreement far broader and less capable of being monitored. One might question why it is necessary to extend the Agreement authority to two or more parties without limitation. This is particularly disturbing to IICL’s members with respect to Articles 5.2(i) and 5.2(j).

⁴ The members of IICL are “operators of container or chassis pools [and are] container or chassis lessors or providers . . .”

We suspect that the Agreement parties will claim that the provisions of Articles 5.2(i) and 5.2(j) are a “cooperative working arrangement.” But that type agreement must be solely “between themselves,” or with “marine terminal operators.” The Commission’s regulations (46 C.F.R. §535.104(i)) state that the term

“*Cooperative working agreement* means an agreement that establishes exclusive, preferential, or cooperative working relationships that are subject to the Act, but that do not fall precisely within the parameters of any specifically defined agreement.” (Emphasis added.)

In IICL’s view the provisions of Articles 5.2(i) and 5.2(j) are not “relationships that are subject to the Act.” The authority sought extends to agreements with “one more operators of container or chassis pools, container or chassis lessors or providers, or other third parties.” These entities are not subject to the Act. This authority is not authorized explicitly or implicitly or inferentially by any provision of Section 4(a)(1) through (7) of Shipping Act.⁵

The Commission must interpret its jurisdiction under Section 4 narrowly because Agreements filed under Section 4 are the beneficiaries of extensive antitrust immunity under Section 7 of the Act, 46 U.S.C. §40307. In *United States v. Gosselin World Wide Moving, N.V., et al.*, 411 F.3d 502 (4th Cir. 2005), *cert. denied*, (2006), the court stated:

The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly, even when Congress confers these exemptions in terms. *See, e.g., Union Labor Life Ins. Co. v. Pireno*, **458 U.S. 119**, 126, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a “fundamental national economic policy.” *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *see also Otter*

⁵ IICL believes that the Agreement parties are closer to establishing a joint service agreement rather than a vessel sharing agreement. 46 C.F.R. §535.104(o) defines the term “joint service agreement.” But for the fact that the parties are participating in their respective names, the effect of the Agreement, as filed, is to create what in most respects is a joint service. We suspect that the rationale for this effort to designate the Agreement as a vessel sharing agreement is that as a joint service, the joint venture carrier would be viewed with a single market share while as a proposed vessel sharing agreement, the parties may believe that each party would be viewed as a separate competitor. IICL believes that competition authorities will likely view THE Alliance with a collective market share given all the joint activity that they would have in every aspect of their operation under the Agreement as filed. According to Alphaliner, the combined market share of the parties to the Agreement would be 28% in the Asia to North America trade and 25% in the Asia to Europe trade. See Attachment to these comments.

Tail Power Co. v. United States, [410 U.S. 366](#), 374, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). This canon of construction has been employed by the Supreme Court to defeat antitrust exemptions claimed under provisions of the McCarran-Ferguson Act, see *Group Life & Health Ins. Co. v. Royal Drug Co.*, [440 U.S. 205](#), 231-32, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), the Miller-Tydings and McGuire Acts, see *McKesson*, 351 U.S. at 316, 76 S.Ct. 937, and the Agricultural Marketing Agreement Act, see *United States v. Borden Co.*, [308 U.S. 188](#), 198-200, 60 S.Ct. 182, 84 L.Ed. 181 (1939). 411 F.3d at 508

The court went on to state that the Supreme Court extended this narrow construction to immunity granted under the Shipping Act, 1916 and then concluded:

The 1916 Act was supplemented by the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 (2000). Although the 1984 Act contained several new grants of antitrust immunity, see *id.* § 1706(a), nowhere in the 1984 Act did Congress indicate an intention to override the principle of narrow construction for antitrust exemptions that the Supreme Court had long applied to the 1916 Act. Moreover, this interpretive maxim has informed the construction of every other grant of antitrust immunity in federal legislation. We therefore see no reason to depart from ordinary practice in construing the 1984 Act. (Emphasis added.) 411 F3d at 509.

IICL understands that in the past the Commission has allowed agreements to be filed and to become effective that have allowed members of vessel sharing agreements and alliances to pool their independently owned and leased containers and chassis.⁶ Those agreements, however, did not extend, like the Agreement here at issue, to authorize joint negotiations with container and chassis owners and providers or their equipment pools in a manner that is designed to concertedly control the costs for the equipment and services provided by the container and chassis owners and providers and their pools.

IICL is also aware that the Commission has allowed the Ocean Carrier Equipment Management Association (“OCEMA”), an agreement limited solely to ocean common carriers, to operate chassis pools. IICL has in the past challenged the Commission’s jurisdiction to treat carrier –owned chassis pools operated as separate companies as if they were themselves ocean common carriers. IICL does not believe that the chassis pools under OCEMA with respect to members owned or leased chassis have any legal or precedential effect on the Agreement here at issue.

The issue of whether the Commission has jurisdiction to allow carriers to join together to jointly purchase goods and services from IICL members or other

⁶ The Commission’s jurisdiction was never challenged in relation to the vessel sharing agreements and alliances dealing with members’ owned or leased containers and chassis. Certainly, there are no Commission or judicial decisions on even that narrow question.

providers of goods and services, or as proposed here, to set common standards for containers and chassis⁷, has never been approved by the Commission in a docketed proceeding, a judicial proceeding or in any other precedential manner.

IICL believes that the plain meaning of the language of Section 4(a) requires the provisions of Articles 5(b)(i) and 5(b)(j) of the Agreement to be rejected.⁸

POINT II. The Agreement is Contrary to Public Policy

At the time the Shipping Act of 1984 was amended by the Ocean Shipping Reform Act of 1998 (“OSRA”), the ocean common carriers including the parties to the Agreement individually owned or leased the containers and chassis that they utilized in connection with their ocean common carrier services.

Historically, in the United States, the ocean common carriers individually, not collectively, acquired containers and chassis, by ownership or lease. They agreed, in consortia or vessel sharing agreements, or through equipment interchange agreements, to efficiently utilize their individually owned or leased containers and chassis. But at no time did they have any agreements to create common standards for chassis or containers and they certainly did not have agreements to collectively and concertedly negotiate to buy or to lease containers or chassis for their use.

In Section 7 of the Act, 46 U.S.C. §40307(b)(2), antitrust immunity is specifically not given to:

(2) a discussion or agreement among common carriers subject to this part relating to the inland divisions (as opposed to the inland portions) of through rates within the United States; (Emphasis added.)

The term “inland division” is defined in the Act (46 U.S.C. 40102(11)) as follows:

(11) Inland division.— The term “inland division” means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier. (Emphasis added.)

⁷ The idea that the parties to the Agreement could attempt to establish “common standards for containers, chassis, and other intermodal equipment used in the Trade,” when the global standards for such equipment are well established by the International Organization for Standardization (“ISO”) appears to be totally unnecessary. One must ask what the Agreement parties intend by this provision and what brings it within the Commission’s jurisdiction?

⁸ IICL believes the all of the other joint procurement provisions in the Agreement are equally outside the Commission’s jurisdiction.

Thus, by this provision in Section 7, the Act makes it clear that ocean common carriers are prohibited from jointly discussing or agreeing on the amount that they would pay to an inland carrier for providing inland transportation services.

Section 10(c)(4) of the Act, 46 U.S.C. 41105(4), makes it a violation of the Act for two or more ocean common carriers to:

negotiate with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers, unless the negotiations and any resulting agreements are not in violation of the antitrust laws and are consistent with the purposes of this part, except that this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or association of ocean common carriers; (Emphasis added.)

We believe these provisions are instructive because they preclude carriers from collectively and concertedly discussing, agreeing and negotiating for the costs of services provided by non-FMC regulated vendors.

This demonstrates two points: (a) that Congress prevented the carriers under the Act from engaging in collective procurement of inland transportation services, which is reflected in the fact that they could not obtain antitrust immunity to collectively negotiate such services and (b) there is concern that the carriers could bring to bear extensive market control for the cost of goods and services with respect to inland transportation through collective action.⁹

IICL believes that these provisions are indicative of a broader public policy concern to preclude carriers from obtaining antitrust immunity to use collective concerted bargaining power to acquire goods and services. IICL believes that the provisions in Articles 5.2(i) and 5.2(j) are not authorized under the Act and are inconsistent with the purposes of the Act and should be rejected.

POINT III. The Agreement Is Not Complete and Definite

The Agreement fails to meet the Commission's regulation (46 C.F.R. §535.402 that requires all filed agreements to be complete and definite and state all specific authorities and conditions:

§535.402 Complete and definite agreements.

⁹ The Act protects airlines, railroads and motor carriers from the ocean common carriers' concerted use of their buying power. The container and chassis lessors and providers are much smaller economic units than airlines and railroads.

An agreement filed under the Act must be clear and definite in its terms, must embody the complete, present understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their operations and regulate the relationships among the agreement members, unless those details are matters specifically enumerated as exempt from the filing requirements of this part.

It seems self-evident that the Agreement does not fully satisfy this requirement. For example, who are the unspecified "other third parties" referenced in Article 5.2(i)? What are the "goods or services" that may be required in connection with the use, interchange, lease, or sublease of containers or chassis?

The Agreement, if carefully read, has many such generalities that are not clear and specific. When there is a lack of clarity, allowing the Agreement to take effect, is effectively granting the parties a blank check to interpret their authority as broadly as possible, an approach clearly at odds with the requirement that antitrust immunity must be narrowly construed. The failure to comply with this regulation is grounds for rejection of the Agreement in its entirety.

Conclusion

For the reasons set forth, IICL respectfully requests that the Commission reject Articles 5.2(i) and 5.2(j) as outside the subject matter jurisdiction of the Commission under Section 4(a) of the Act and would be subject to the U.S. competition laws administered by the U.S. Department of Justice, Antitrust Division or reject the Agreement in its entirety because it is not complete and definite.

We would be pleased to respond to any questions the Commission may have in connection with these comments.

Thank you for your consideration.

Sincerely,



Steven R. Blust
President

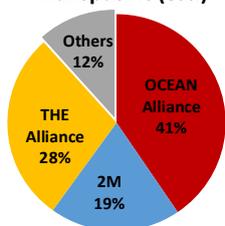
cc: Neal M. Mayer, Esq.
Hoppel, Mayer & Coleman
Attorneys for IICL



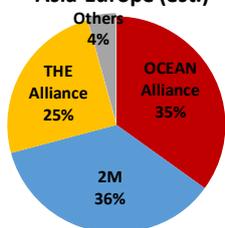
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Chart of the week

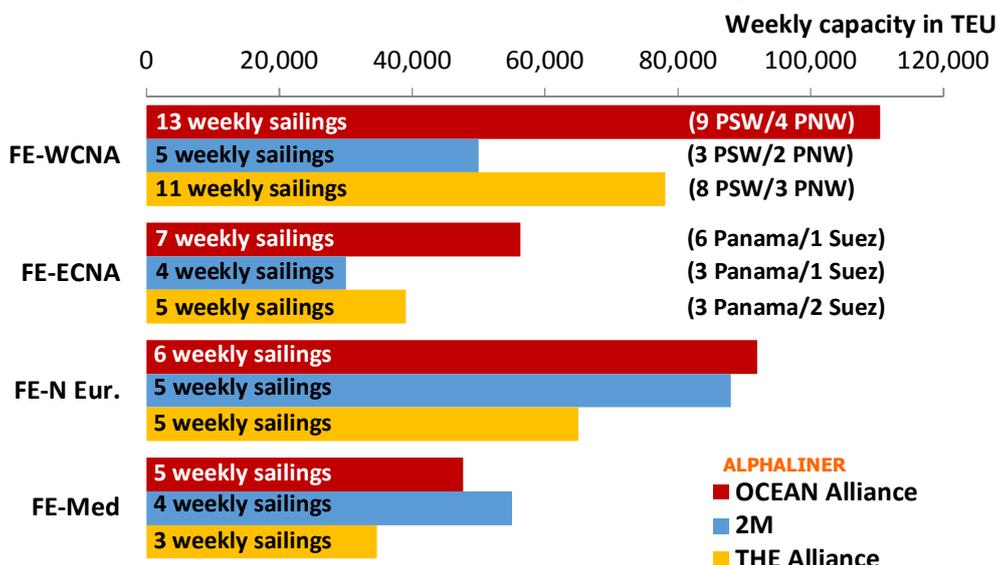
Capacity Share by Alliance - Transpacific (est.)



Capacity Share by Alliance - Asia-Europe (est.)



Asia-Europe and Transpacific : Planned capacity by Alliance (Apr 2017)



ALPHALINER
 ■ OCEAN Alliance
 ■ 2M
 ■ THE Alliance
 2M based on current network. HMM participation in 2M is not finalised and has not been included.

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New alliance battle lines drawn

Although the new carrier alliances will only start operating from April 2017, battle lines on the main east-west routes are already being drawn, after the OCEAN Alliance and THE Alliance unveiled the respective service networks which they plan to start operating as of next year.

The OCEAN Alliance will start with an initial deployment of 331 ships with an aggregate capacity of 3.3 Mteu. This figure is based on Alphaliner's analysis of the 41 weekly services unveiled on 3 November by the four alliance members, comprising CMA CGM (including APL), COSCON, Evergreen and OOCL. The carrier group is set to become the largest alliance in container shipping history, with an initial plan to offer 20 weekly sailings from Asia to North America and 11 weekly sailings from Asia to Europe. OCEAN will also jointly operate three transatlantic strings and seven Far East - Middle East/Red Sea loops.

The second new carrier group, THE Alliance, also unveiled its new network plan on 8 November and it intends to offer 31 weekly services. An estimated total of 244 ships with an aggregate capacity of 2.25 Mteu will be deployed by the six 'THE' Alliance members, made up of Hapag-Lloyd (with UASC), K Line, MOL, NYK and Yang Ming. They will jointly provide a total of 16 transpacific loops and eight Asia-Europe services, together with six transatlantic loops and one Far East-Middle East string. The services were scaled down from an original plan that included the participation of Hanjin Shipping, which could have pushed overall capacity deployed by THE Alliance up by some 500,000 teu.

The unexpected ejection of Hanjin Shipping following, the carrier's filing for re-