RECENT AMENDMENTS TO THE SHIPPING ACT: A COURSE CORRECTION, NOT A SEA CHANGE

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Earlier this month, legislation amending certain Shipping Act prohibitions on anticompetitive conduct was enacted as part of the Coast Guard Authorization Act of 2018.[1] The legislation expands the enforcement powers of the Federal Maritime Commission (FMC), which administers the Act, and its authority to permit certain agreements only if they are consistent with the antitrust laws and the purposes of the Act. However, the Act is not intended to alter the current division of responsibility between the Department of Justice and the FMC for competition enforcement, and it thus maintains the FMC's exclusive authorities under the Shipping Act and the limitation of the Justice Department's authority to matters outside the FMC's exclusive jurisdiction. The Act represents a modest course correction, rather than a sea change, in the current regulatory regime.

THE NEW STATUTORY PROVISIONS

The legislation adds two restrictions on negotiations or agreements by alliances and other joint carrier groups: a complete prohibition as to tug providers and a requirement that joint carrier negotiations and agreements with marine terminal operators (MTOs) for the purchase of certain port services comply with the antitrust laws and the purposes of the Shipping Act. The new legislation also augments the FMC's regulatory powers to address agreements that lessen competition for covered MTO services, and it adds certain related reporting requirements. The legislation expressly provides that nothing in the Shipping Act's prohibitions on concerted action, as amended, "shall be construed to limit the authority of the Department of Justice regarding antitrust matters."[2]

Increased Protections for Tug Operators and Providers of Certain Marine Terminal Operator Services

The legislation expands the current provision of the Shipping Act prohibiting joint negotiations with non-ocean carriers unless they comply with the antitrust laws and the purposes of the Shipping Act,[3] by adding a new paragraph that applies the same prohibition and exception to joint negotiations and agreements for the purchase of certain marine terminal operator services.[4] The covered MTO services are defined to include vessel berthing or bunkering, loading or unloading cargo to or from a vessel to or from a point on a wharf or terminal, and positioning, removal, or replacement of buoys related to the movement of the vessel.[5] A new paragraph prohibits, without exception, any joint negotiations for towing or tug services.[6]

These new provisions are intended to address a problem perceived by some tug operators and marine terminal operators, that increasingly large carrier alliances might exercise undue market power in negotiating agreements with them. Ironically, many tug operators themselves have monopolies in their service areas. The flat prohibition on negotiations with tug operators mirrors the flat prohibition on joint negotiations with non-ocean carriers in the Shipping Act before the 1998 Ocean Shipping Reform Act (OSRA) amendments. That prohibition was loosened in 1998 to allow joint carrier negotiations and agreements with non-ocean carriers if consistent with the antitrust laws and the purposes of the Shipping Act. That looser restriction was the model for the new provision on negotiations for covered MTO services, and only tug providers are now protected by a flat prohibition on joint carrier negotiations.

Increased FMC Enforcement Authority

Some corresponding changes in the FMC's enforcement powers have been added as well. The Commission is expressly given the power to reject an agreement "likely to substantially lessen competition in the purchasing of certain covered [MTO] services," and to consider any relevant competition factors in making that determination, including "the competitive effect of agreements other than the agreement under review.[7] The Commission must also include in its annual report an analysis of any impacts on competition for the purchase of covered MTO services by carrier alliances, and a summary of any corrective actions taken.[8]

Miscellaneous Provisions

The Commission is given the express authority to require reports and records from MTOs and their officers and agents.[9] The Commission is also directed, when publishing notice of any agreement filed with it for review, to ask that interested persons submit information and documents.[10] Various transparency provisions are added for Commission meetings.[11] Ocean transportation intermediaries must be licensed to advertise and hold out to provide services, as well as to actually provide them, but need not be licensed and bonded to act as the disclosed agent of another intermediary.[12] Finally, the Commission is authorized to preclude a carrier from participating simultaneously in a rate discussion agreement and an agreement to share vessels in the same trade if that is likely by a reduction in competition to unreasonably reduce transportation service or increase transportation cost.[13]

PRESERVATION OF THE RESPECTIVE ROLES OF THE FMC AND THE JUSTICE DEPARTMENT IN COMPETITION ENFORCEMENT

The new legislation makes only modest changes to the Shipping Act's regulation of competition, and it does not affect the general proposition that conduct is within the FMC's exclusive jurisdiction if it is under a filed and effective Shipping Act agreement, or if there is a reasonable basis to conclude it is under such an agreement or is exempt from filing.[14] The legislation does, however, confirm the FMC's authority to assess whether joint carrier negotiations for covered MTO services are consistent with the antitrust laws. As noted previously, a similar provision has been in place for non-ocean carriers since 1998, although it does not appear to have been construed, and no issue about the FMC construing the antitrust laws appears to have been raised when this

provision was enacted.

The new legislation nonetheless provides that the Shipping Act's prohibitions on concerted conduct shall not be "construed to limit the authority of the Department of Justice regarding antitrust matters."[15] The legislative history does not discuss the origin or purpose of this provision, but it is by its terms a savings clause that preserves the current division of authority between the FMC and Justice. This is confirmed by the Presidential signing statement issued upon enactment, stating that the provision will be interpreted "to indicate that the FMC should defer to the Department of Justice regarding interpretations of the Federal antitrust laws," and not suggesting that the legislation contains any broad revision of the respective enforcement roles of the Department and the FMC.

The FMC already looks to antitrust precedents as appropriate,[16] and there is no indication that it has an interest in advancing constructions of the antitrust laws contrary to those of the Department of Justice. Indeed, it would have no real need to do so because the subject negotiations and agreements must be consistent with the purposes and policy of the Shipping Act as well as the antitrust laws, and there is no question that the FMC has primacy over Justice in construing the Shipping Act. Thus, while the FMC as an independent agency is not bound by the Presidential direction,[17] and while the courts would not be bound by it either in deciding the level of deference to give to the FMC in the administration and enforcement of the Act, the signing statement is likely to reflect the Commission's actual practice. In any event, neither the savings clause nor the signing statement alters the division of responsibility between the FMC and Justice for competition enforcement.

Notes

[1] *See* Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, Title VII, "Federal Maritime Commission Authorization Act of 2017." The Shipping Act is codified at 46 U.S.C. §§ 40101-41309.
[2] *Id.* § 709(b)(1)(adding 46 U.S.C. § 41105A).
[3] This provision is codified at 46 U.S.C. § 41105(c)(4) and was Section 10(c)(4) of the Shipping Act before the current codification.
[4] The new provision is codified at 46 U.S.C. § 41105(c)(6).
[5] Pub. L. No. 115-282 § 704 (adding 46 U.S.C. § 40102(5)).
[6] *Id.* § 709 (adding 46 U.S.C. § 41105(c)(5)).
[7] *Id.* § 710 (amending 46 U.S.C. § 41307(b)).
[8] *Id.* § 703 (adding 46 U.S.C. § 306(b)(6)).
[9] *Id.* § 705 (amending 46 U.S.C. § 40104(a)).
[10] *Id.* § 706 (amending 46 U.S.C. § 40304(a)).
[11] *Id.* §§ 711-13 (amending 46 U.S.C. § 303).
[12] *Id.* § 707 (amending 46 U.S.C. § 40901).
[13] *Id.* § 708 (adding 46 U.S.C. § 41104(13)). The practical effect of this change is limited because there are only a handful of remaining rate discussion agreements, and those that remain deal primarily with the carriage of military cargo.
[14] *See In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71 (3d Cir.), *cert. denied sub nom. Alban v. Nippon Yusen Kabushiki Kaisha*, 138 S. Ct. 114 (2017)(Shipping Act precludes federal antitrust claims and related state law claims).
[15] *Id.* § 709(b)(1)(adding 46 U.S.C. § 41105A).
[16] *See, e.g., River Parishes Co. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 770 (F.M.C. 1999) (looking to antitrust law precedents to address a tying claim, though also noting that a practice can be unreasonable under the Shipping Act even if it is not also an antitrust violation).
[17] *See* 144 Cong. Rec. 6113 (April 21, 1998)(Statement of Sen. Breaux)("The FMC is an independent regulatory agency that is not accountable to the direction of the administration.")

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