



Federal Maritime Commission 57th Annual Report Fiscal Year 2018

Competitive Impact of Ocean Carrier Alliance Joint Purchases of Certain Covered Services

On December 4, 2018, the “Frank LoBiondo Coast Guard Authorization Act of 2018” was enacted as Public Law No. 115-282 (LoBiondo Act). Among other changes, the LoBiondo Act placed restrictions on cooperation between or among carriers and MTOs, including removing antitrust immunity for certain activities; prohibiting certain joint procurement activities; restricting overlapping agreement participation; and modifying the legal standard for enjoining agreements to jointly procure certain covered services, including:

- the berthing or bunkering of a vessel;
- the loading or unloading of cargo to/ from a vessel, or to/ from a point on a wharf or terminal;
- the positioning, removal, or replacement of buoys related to the movement of the vessel;
- or
- towing vessel services provided to a vessel.

Section 703 of the LoBiondo Act requires that the Commission annually provide Congress (1) an analysis of the competitive impact of ocean carrier alliance joint purchases of the covered services mentioned above; and (2) a summary of actions, including corrective actions, taken by the Commission to promote competition.

The Commission’s approach to competitive analysis of ocean common carrier agreements in general utilizes such market information as pricing or revenue data, vessel capacity availability, market shares, and market concentration to define and evaluate the market in which the agreement proposes to operate, or is operating once it becomes effective under the Shipping Act.

As of the close of FY 2018, three global ocean carrier alliances are operating in the trades. As initially filed, two of the global carrier alliances, the OCEAN Alliance and THE Alliance, both contained unclear and indefinite language regarding the Parties’ intent to use the joint contracting and procurement provisions dealing with an array of services such as those provided by terminals,

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tugs, barges, transshipment, bunker suppliers, etc. The 2M Alliance does not contain joint procurement authority.

Given the market share of both the OCEAN and THE alliances in the U.S. trades, the Commission determined that joint purchasing and negotiating authority could have potentially significant anticompetitive effects in the relevant markets. During the Commission's review period, the proposed agreement authority was amended to clarify and ensure that any activity or arrangement executed under the authority that permits joint procurement was expressly prohibited in the U.S., or only permitted with the mutual agreement of marine terminal operators – the seller of covered services.

Further, the Commission notified OCEAN Alliance and THE Alliance that all future joint procurement agreements with third party service providers must be filed with the Commission before going into effect, unless they are among the exempted agreements listed in the Shipping Act or the Commission's regulations. To date, OCEAN and THE alliances have not filed any joint procurement agreements for covered services that required Commission review. To the extent that either OCEAN or THE has established a marine terminal services agreement with suppliers of covered services that fall within the FMC's current regulatory filing exemption, the Commission has provided written notification to the respective agreement parties that these and any future agreements reached through joint purchasing authority must be provided to the Commission. Any marine terminal services agreements provided to the Commission by OCEAN and THE will be analyzed for the competitive impact of the alliances' purchases of covered services. Combined, the three global alliances today account for nearly 80 percent of cargo moving in the inbound and outbound U.S. liner trades.

In addition to the global carrier alliance agreements, there are other vessel-operating common carrier agreements on file with the Commission that contain authority to jointly negotiate or contract for covered services. These agreements have low market share regarding covered services and are limited in geographic scope. Examples include: two-party space charter agreements; vessel sharing agreements limited to certain trades; and equipment discussion agreements authorizing the movement of empty containers. The Commission has initiated a process to obtain more information on each of these agreements to determine the effect of the LoBiondo Act amendments.