Shipping cartel fines in South Africa

In August this year, two shipping companies were fined by the Competition Commission of South Africa for restrictive horizontal practices including; fixing a purchase or selling price of a product or service, dividing markets and collusive tendering in the transport of vehicles, equipment and/or machinery by sea on the route between Japan and South Africa.¹ Nippon Yusen Kabushiki Kaisha (NYK) admitted to 14 instances of restrictive practices listed in section 4(b) of the Competition Act and was fined an administrative penalty of close to R104 million. Wallenius Wilhelmsen Logistics (WWL) agreed to a settlement of R96 million for taking part in the cartel and engaging in 11 instances.² The settlements follow an investigation into the collusive behaviour of a number of shipping firms including Mitsui O.S.K Lines, Kawasaki Kisen Kaisha Ltd, Compania Sud Americana de Vapores, Hoegh Autoliners Holdings AS, Wallenius Wilhelmsen Logistics, Eukor Car Carriers, and NYK between 1999 and 2012. Given the length of time the shipping cartel operated on South African routes, this article uses international comparisons to demonstrate the likely impact of this arrangement on the region.

The shipping services provided in South Africa can generally be divided into two main categories; liner and non-liner services.³ The main distinction between these is that liner services are regular and scheduled transport services while non-liner services involve the shipping of products based on the needs of a customer involving unscheduled and irregular shipments. Within the ship liner services is a sector for containerised shipping. The shipping of products such as cars requires specialised containers and is thus conducted by select shipping liners.

International agreements

Restrictive horizontal practices in the shipping industry have been a particular concern historically due to the practice of accepting “conference agreements” between shipping companies.⁴ Conference agreements constituted formal agreements between liners on a route in which they fixed prices, managed capacity, allocated routes and offered loyalty discounts.⁵ With the emergence of containerisation in the shipping industry, other forms of collusive arrangements developed such as consortia, strategic alliances, capacity accords and discussion agreements.⁶ While these kind of agreements clearly represented clear restrictive practices, several countries globally provided the liner shipping industry with exemptions that allowed these agreements to continue. They have in fact been in existence since 1875 following the Calcutta Conference. One such agreement, the Far Eastern Freight Conference was established as early as 1879 and was only dissolved in 2008.⁷ The main justifications for these arrangements have been to ensure stability of shipping services through capacity control and price fixing as well as to prevent destructive competition such as that which characterised the 1800s and resulted in an unstable industry.⁸

Proponents of conference agreements and exemptions argued that liner shipping was a unique industry in which cooperative agreements were necessary to prevent excessive volatility in price and ensure regular and frequent services from the shippers.⁹ Another argument is that of ‘destructive competition’. The claim is that high sunk costs form a barrier to exit the market. This accompanied by rigid demand and supply in liner shipping could result in freight rates that are higher than the average cost. Entrants are then attracted into the industry creating over supply which drives freight rates below average costs, thus destabilising the market.

However an OECD report in 2002 showed that collusive arrangements between shipping companies raised prices above the competitive level and aligned them with the least efficient companies in the industry.¹⁰ The report showed that industries such as liner shipping are not unique and in fact share the same characteristics as industries that provide regular scheduled services, like air and rail transport. Empirical evidence does not support the theory of destructive competition. The European Commission subsequently launched a study into exemptions in the liner shipping industry which culminated in a repeal of the block exemption on liner shipping conferences. Authorities in countries such as Israel, Australia, New Zealand and Canada made amendments to their own exemptions also.¹¹ However, Japan which is tied with the firms that have been fined in South Africa, has maintained cooperation agreements in the industry.

Shipping and transportation in South Africa

In South Africa, such exemptions were never part of the shipping industry which is likely to be because the maritime transport sector’s contribution to the country’s GDP is negligible.¹² The country has no shipping companies which makes South Africa’s international trade dependent on foreign companies. Particular trade routes are thus dominated by shipping companies from trade partners. For instance, the route between South Africa and Europe is dominated by European liners while the route between South Africa and Japan is dominated by Japanese liners. Concentration on the different routes is thus a reflection of the concentration levels in the country where the import and vessel is sourced.¹³

Shipping is not the only mode of transport where the Competition Commission has found evidence of collusion and cartels. The airline industry and freight forwarding segments of South Africa’s intermodal transport network show a history of collusive conduct. In 2012, South African Airways admitted to and was fined for collusive conduct with Cathay Pacific and
other Far East participants to raise the prices on the Johannes-
burg Hong Kong route. This is not the first time South African Airways has been found guilty of collusive conduct. The Commission has on two other occasions fined SAA for collusive conduct and/or price fixing. The first fine was as a result of an identical fuel surcharge levied almost simultaneously by the members of the Airlines Association of Southern Africa (AASA). The fuel surcharge was placed on the price of tickets for carriage on all legs of the routes, both domestic and international. The other parties involved were Comair and SA Express. The other case concerned a price fixing charge against SAA and Lufthansa. The airlines were found to be using a code-sharing agreement to fix prices of tickets on the Cape Town/Johannesburg and Frankfurt route. Similarly, in freight forwarding Schenker South Africa (Pty) Ltd, Kuehne+ Nagel (Pty) Ltd along with a number of other freight forwarders admitted to colluding on several occasions to raise prices and/or introduce surcharges on their services. Approximately 90% of South Africa imports and exports are transported by sea. 60% of the imports into South Africa come through the port of Durban. The Durban port in fact handles the highest volume of sea cargo in southern Africa. By the end of 2014, the port had handled about 36% of the ships calling at South African ports by gross tonnage. Durban is strategically positioned in one of the world busiest trade corridors and this combined with its large capacity, makes it the busiest port in the SADC region as well as an important sea trade gateway for South-South trade, Far East trade, Europe and the USA, East and West Africa regional trade. 80% of the cars on South African roads are imported from outside South Africa. Ro/Ro car terminals at the port of Durban serve most of South Africa's motor manufacturers and vehicle importers, handling 66% of the nation's vehicle imports and exports. Given that South Africa is the main trading partner by percentage share of imports for a number of countries in southern Africa including Botswana, Namibia, Malawi, Zambia, Mozambique and Zimbabwe, and vehicles make up one of the top 5 imports of each of these countries, restrictive practices on the part of the shippers would have a substantial impact on the car industry not just in South Africa but in the great southern African region. This is especially relevant for the importation of second-hand vehicles from east Asian markets to various countries in the SADC region.

Shipping costs account for about 7% of the cost of goods. Given that the cost of freight and insurance for landlocked developing countries is on average 50% higher than that of coastal countries, anti-competitive practices could result in the substantial additional cost of imports for countries such as Zimbabwe, Zambia, Botswana and Malawi. This is important especially when considering that there is a strong negative relationship between shipping costs and economic growth. Artificially raised prices by way of collusive agree-
ments and division of markets has the ability to significantly reduce welfare. High transport prices have also been linked to reduced competitiveness on the international market and slower economic growth. Firms have to pay more for manufacturing and intermediate goods whilst receiving less for their exports. This in turn affects the price of key consumer goods and services.

Notes

1. See, Competition Commission v NYK Logistics and BLL (NLB) of South Africa (Pty) Ltd, Case No. CO055Jun15.
2. See, Competition Commission v Wallenius Wilhelmsen Logistics AS, Case No. CO084Jul15.
7. See note 4.
8. See note 3.
11. See note 4.
13. See note 3.
15. See note 14.
16. See, Competition Commission v Schenker South Africa (Pty), Case No. 2007OCT3236; Competition Commission v Kuehne+ Nagel (Pty) Ltd, Case No. 110/CR/Dec11.
17. Odendaal, N. ‘SA remains key sector in shipping indus-
19. Ports and Ships website.
20. See note 3.
21. World Port Source website.
22. Trade Map website.
23. See note 22.
26. See note 25.