

Pandemic pushes maritime competition regulators into uncharted territory

The Federal Maritime Commission has been singled out as one of the few competition regulators in the world to be taking positive steps during the Covid-19 crisis to improve the efficiency of supply chains, in contrast to the more conventional approaches of most authorities with antitrust jurisdiction over the maritime industry.

The Washington agency, which is responsible for regulating liner and passenger shipping in the US, has adopted a proactive initiative to bring together stakeholders from across the transport industry in an effort to seek solutions to problem areas such as port congestion, or onward road and rail connections.

The contrasting response to the health crisis between the FMC and two other bodies with oversight of the US transport sector – the Department of Justice and the Federal Trade Commission – was highlighted by top Washington lawyer Jeff Lawrence during a webinar organised by the European Maritime Law Organisation to review lessons learned in the field of maritime law from the pandemic.

Mr Lawrence, chair of the transportation and trade division at the law firm Cozen O'Connor, noted that the DoJ and FTC had said in a joint statement that they would speed up the effective antitrust authorisation of cooperation agreements between competitors during the crisis that would help facilitate the delivery of goods such as personal protective equipment or medications.

“This is a commendable response of a regulator,” said Mr Lawrence, but a fairly conventional one, and similar to the greater flexibility that competition authorities in other parts of the world are displaying.

The DoJ has also made it clear that any company thought to be exploiting the situation through anti-competitive activities would still face prosecution

The FMC, though, has gone beyond its usual remit and is “exploring the boundaries” of what a regulatory agency can do during this health emergency, setting up two fact-finding initiatives, and engaging with stakeholders who are not technically the responsibility of the agency. One covers the ocean transport supply chain and is led by Commissioner Rebecca Dye. The other, led by Commissioner Louis Sola, is working with industry leaders to identify commercial measures that passenger cruise lines can adopt to mitigate Covid-19 related impacts to this sector

On the marine cargo side, Mr Lawrence noted that US shipping, ports, and surface transport services have suffered major disruptions in recent years caused by numerous factors such as labour disputes, trade embargoes, tariff impositions, and hurricanes. Now the industry is confronting the added challenge of a global health emergency.

This has exposed the US marketplace, which is so reliant on seamless distribution connections, to added vulnerability, made worse by the lack of government focus on the country's vast intermodal transport network and the absence of any effort to make sure it functions efficiently.

What the FMC is now doing is "quite unique", said Mr Lawrence, as it not only seeks to find out the facts, but is also convening meetings with key stakeholders including those that are not regulated by the agency, and getting them to sit and talk with each other to identify problem areas that need to be addressed.

Elsewhere in the world, other governments and authorities have also recognised the need to adapt, albeit mostly in a more conventional way than the FMC.

Speaking during the same webinar, Kirstie Nicholson, competition counsel for BHP Billiton in Singapore, said competition law in the region continued to apply but regulators across Asia were taking a more flexible approach to collaboration between competitors in order to mitigate the impact of the pandemic. Competition authorities have handled requests for official blessings on collaborations more quickly, and also have been prepared to issue interim authorisations sometimes within a day, rather than a week or more.

"It shows that regulators can respond quickly to different situations when necessary," she said.

In Europe, Professor Francesco Munari of the Italian firm Munari Giudici Maniglio Panfili & Associati noted that shipping markets had behaved differently during the Covid-19 pandemic than in the 2009 financial crisis, when container freight rates collapsed. This time, rates have held up as ocean carriers cancelled sailings or withdrew whole services in order to remove excess shipping capacity.

He noted, though, that Mediterranean ports have suffered from the decision by some container lines to route ships round the Cape of Good Hope rather than via the Suez Canal. In Italy, where ro-ro shipping has been hit by the drop in passenger and vehicle traffic, government aid for the maritime sector has been provided through measures such as tax holidays and the suspension social security contributions. The question remains, though as to whether this support for ports and shipping will be scrutinised by the European Commission.

However, Martin Andre Dittmar, managing partner of the Danish law firm Gorrissen Federspiel, said Brussels had provided guidelines on state aid during the pandemic, and recognised that support for shipping lines and port operators may be needed. This could take various forms including grants, loans, state guarantees, or tax rebates.

Also member states may feel it necessary to impose public service obligations on operators to maintain essential transport links during the crisis.

Talking on the same webinar that was moderated by EMLO chairman Vincent Power, Mishcon de Reya partner Rob Murray said the pandemic had shown that existing supply chains, whether national, regional, or global, were not fit for purpose.

Resolving those weaknesses that have been exposed during the health crisis may require more collaboration between rival companies in future, with some relaxation of the rules already seen in certain industry sectors such as supermarkets and pharmaceutical companies.

“So will the new buzzword be cooperation rather than competition?” he asked.

“The genie is out of the bottle, and I don’t think it will go back very easily.”