

A.P. Møller-Mærsk A/S's proposed acquisition of Royal P&O Nedlloyd N.V.

On 4 August 2005, the Australian Competition and Consumer Commission (ACCC) announced that it would not intervene in the proposed acquisition of Royal P&O Nedlloyd N.V. (P&O Nedlloyd) by A.P. Møller-Mærsk A/S (Møller-Mærsk).

Timing

On 25 May 2005, Møller-Mærsk submitted its proposal to the ACCC to acquire P&O Nedlloyd.

On 30 May 2005, the ACCC commenced market inquiries in relation to the proposed acquisition.

On 18 July 2005, it was proposed that the ACCC would announce its decision; however, the proposed date for announcement was extended until 29 July 2005 to consider additional information.

On 4 August 2005, the ACCC announced that it did not propose to intervene in the proposed acquisition pursuant to section 50 of the *Trade Practices Act 1974* (the Act) having regard to the section 87B Undertaking provided by Møller-Mærsk to the ACCC (the Undertaking).

On 2 September 2005, the ACCC accepted a Variation to Undertaking given by Møller-Mærsk to vary the Undertaking.

The Parties

Møller-Mærsk

Møller-Mærsk is a public company listed on the Copenhagen Stock Exchange. Its principal activities worldwide include the operation of containerised liner shipping services, bulk carriers, tankers, supply vessels, drilling rigs as well as oil and gas exploration.

In Australia, Møller-Mærsk's main business relates to international containerised liner shipping services. It operates via its local subsidiaries APM Holdings Australia Pty Ltd, Mærsk Australia Pty Ltd, Mærsk Logistics Australia Pty Ltd, Mærsk Line Eastern Australia Pty Ltd, Mærsk Supply Service Australia Pty Ltd and Safmarine Australia Pty Ltd.

P&O Nedlloyd

P&O Nedlloyd is a public company listed on the Amsterdam Stock Exchange. It is a container shipping line operating a fleet of vessels serving ports throughout the world. In addition, it provides warehousing and distribution services, freight forwarding, logistics services and truck transportation to its customers.

In Australia, P&O Nedlloyd's principal activities are containerised shipping from Australia to ports around the globe.

Area of Overlap

The main area of overlap between the two parties is with respect to container shipping.

The Proposal

Møller-Mærsk intends to acquire the assets of P&O Nedlloyd.

Industry Background

The international liner shipping industry is characterised by a number of features including:

- low level of concentration due to a number of participating shipping lines;
- alternative trade routes, for example direct trade routes or transshipment;
- shipping agreements being exempt from anticompetitive conduct prohibitions.

In relation to the latter point, Part X of the Act provides an exemption regime for international liner shipping whereby certain agreements and arrangements are exempt from some of the anticompetitive conduct prohibitions contained in Part IV.

There are typically three types of agreements:

- conference agreements;
- consortia agreements; and
- discussion agreements.

Generally, the agreements differ by the degree of cooperation between the members.

Market Inquiries

The ACCC conducted wide ranging market inquiries on the matter, contacting competitors, customers and other interested parties.

The ACCC also consulted with the European Commission during the course of its market inquiries, which was also considering the proposed acquisition.

Market Definition

The ACCC considered the relevant market definition to be the supply of containerised liner shipping on Australian trade routes.

Market inquiries revealed that container shipping vessels were the most suitable type of vessels for the majority of customers.

For the geographic scope of the market, inquiries suggested that individual trade routes were separate markets.

Market inquiries indicated that while there may be a degree of supply-side substitutability between trade routes, evidenced by some movements by shipping lines between trade routes, there did not appear to be strong demand-side substitutability.

Competition Analysis

During the course of the ACCC's investigation, the following competition issues were considered:

(i) The level of market concentration

On a trade route basis, the ACCC found that the merged entity is unlikely to have a significant level of concentration. Due to the international liner shipping industry being characterised by low levels of concentration, the ACCC's inquiries found that for most trade routes there were a number of competing shipping lines.

It was found that the merged entity would have a higher concentration level in the Australia-United States East Coast trade route; however, there are a number of shipping lines which may be able to constrain the merged entity.

(ii) The extent of barriers to entry

The ACCC's inquiries found that while barriers to entry may be high, barriers to switching between trade routes appeared to be low.

For barriers to entry, it was found that regulatory and institutional barriers were low, but capital costs associated with operating a containership suggested that there are high barriers to entry.

Market inquiries suggested that a new entrant would incur high set up costs to acquire vessels and containers as well as the supporting systems. It appeared that this could be countered, to some extent, through chartering vessels.

Barriers to switching between trade routes did not appear as high. Market inquiries revealed that vessels are often redeployed between trade routes; that is, vessels can enter and exit trade routes with minimal sunk costs.

(iii) Likelihood of coordinated behaviour

A characteristic of the shipping industry is the exemption from anticompetitive conduct prohibitions of the shipping agreements entered into by a number of shipping lines.

Møller-Mærsk is typically an independent shipping line, although it is a member of some consortia and discussion agreements relevant to Australian trade routes. P&O Nedlloyd is a member of a number of conferences, consortia and discussion agreements relevant to Australian trade routes.

Møller-Mærsk indicated to the ACCC at the outset that it would procure the withdrawal of P&O Nedlloyd from a number of agreements and that it was intended to operate the merged entity independently of these agreements.

The Undertaking

When Møller-Mærsk approached the ACCC with its submission, Møller-Mærsk indicated it intended to withdraw P&O Nedlloyd from conferences, consortia and discussion agreements relevant to Australian trade routes to which P&O Nedlloyd currently participates but Møller-Mærsk does not. Møller-Mærsk subsequently formalised this intention by providing a court-enforceable undertaking.

In short, the details of the Undertaking are:

- to withdraw from Australian Conferences, Australian Consortia and Australian Discussion Agreements to which P&O Nedlloyd is a member but Møller-Mærsk is not;
- to withdraw from the above agreements at the earliest date permitted by each relevant agreement;
- for Australian Conferences and Australian Discussion Agreements, to preclude P&O Nedlloyd attending meetings pursuant to these agreements and being an active member in the agreements during the withdrawal period;
- for Australian Consortia, to provide ring-fencing provisions precluding the sharing of information between Møller-Mærsk and P&O Nedlloyd where the withdrawal period exceeds six months; and
- to preclude Møller-Mærsk from re-entering into Australian Conferences, Australian Consortia and Australian Discussion Agreements for a period of five years. This does not preclude Møller-Mærsk from entering into any other agreement, any *ad hoc* bilateral space or slot-charter agreement in order to meet customer demand for capacity or frequency at any point in time.

For further details, please refer to the Undertaking provided by the parties.

The Variation to Undertaking

Møller-Mærsk provided the ACCC with a Variation to Undertaking to vary the Undertaking and release Møller-Mærsk from the ring-fencing provisions for Australian Consortia.

Møller-Mærsk procured agreement from the partners to the relevant Australian Consortia to provide its notice to withdraw such that the withdrawal period will not exceed six months.

Conclusion

Having regard to the Undertaking provided by the parties, the ACCC concluded that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in any of the relevant markets in breach of section 50 of the Act.