New US Presidential Executive Order targets liner operators and alliances

Our guest authors from US Law Firm, Holland and Knight, explain the background and potential reach of President Biden's executive order that calls for improved detention and demurrage practices for container traffic, along with the Federal Maritime Commission increased scrutiny of liner alliances with respect to enforcement of antitrust laws and shipping regulations.

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Cargo congestion has reached historic proportions during the COVID-19 pandemic as the demand for imports by U.S. consumers and businesses has skyrocketed combined with an increase in operational disruptions. The effect has been felt across global supply chains, including the U.S.

On July 9, 2021, President Joe Biden took aim at the ocean shipping sector of the maritime industry, and in particular international container lines and alliances, with the issuance of his Executive Order (E.O. 14036) on Promoting Competition in the American Economy . The E.O. addresses liner shipping, along with other industries such telecommunications, internet platforms and medical service providers, and is intended to promote fair competition in the American economy. The E.O. references consolidation in the maritime shipping industry during the past couple of decades, suggesting that such consolidation may disadvantage U.S. exporters. To this end, the E.O. encourages the Federal Maritime Commission (FMC) to "vigorously enforce the prohibition of unjust and unreasonable practices" in the context of detention and demurrage pursuant to the Shipping Act as clarified in the FMC interpretive rule published in 2020 (codified at 46 USC Section 545.5). As interpreted, demurrage and detention encompass any charge assessed by regulated entities related to the use of marine terminal space or shipping containers not including freight charges.

The E.O. follows significant and ongoing activity involving the FMC concerning intermodal congestion. The Commission initiated Fact Finding No. 29, International Ocean Transportation Supply Chain Engagement , in order to identify operational solutions to cargo delivery system challenges related to COVID-19. The E.O. also follows a June 15, 2021, hearing of the House Subcommittee on the Coast Guard and Maritime Transportation on Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain , at which FMC Chairman Daniel B. Maffei highlighted how overseas shipping is critical to all Americans and how invaluable the contribution of ocean transportation is to economic competitiveness and our way of life .

Potential impacts

Although it is difficult to predict the full range of the impact of the E.O. on ocean carriers subject to U.S. laws and regulations, it seems reasonable to expect that carriers should prepare for more scrutiny from U.S. regulators in the areas identified in the E.O., such as price surges and export availability concerns, anti-competitive concerns, and demurrage and detention. Such regulatory efforts could, however, prove difficult to effect meaningful impact if frustrated by the scope of the antitrust exemptions already in place, the limited reach of the Shipping Act in these circumstances, and ultimately how long the COVID-19 related congestion — which is the major driver of industry congestion problems — continues.

What does seem clear is that the White House and FMC have signaled with this E.O. that U.S. regulators want to take some action related to issues such as demurrage and detention charges on container traffic, and thus containership operators, ocean carrier alliances, and marine terminals should take notice. In light of the practical limitations noted above, carriers could see the FMC getting more vigorously involved in areas where it has direct authority and has expressed interest, such as:

1. heightened consideration of any new alliance activity (if there is any) and potentially more inquiry into existing alliance activity and reporting/data (notably, the FMC already increased some reporting last year)
2. taking action on demurrage and detention practices, which are already under significant scrutiny, including in Fact Finding 29 and the FMC's consideration of arguments in a pending demurrage and detention decision on review before the Commission
3. looking for opportunities to investigate complaints related to rates and export availability that might rise to an actionable level, for example, that might involve concerted carrier action, boycotting, retaliation against complaining shippers, or suggest any major alliances overstepping the scope of the agreements or alliance actions having major anti-competitive effects

Moreover, since the FMC has authority and multiple avenues to potentially take action with demurrage and detention, stakeholders should be watchful of FMC initiatives in this regard. Any initiatives involving demurrage and detention must be balanced against the potential of overregulation. Despite having recently promulgated its interpretive rule on demurrage and detention, if the FMC is considering more binding guidance in the area, it would be well served to take up the suggestion in the E.O. to consider a formal rulemaking process that takes into account the diversity of positions and concerns in the industry.

Lastly, there is also the possibility that the FMC might rethink the scope or competitive impact of existing alliance agreements. One would expect that the FMC will continue to look for potential abuses arising from private complaints or investigative efforts. In addition, whether alone or in conjunction with the U.S. Department of Justice (DOJ), the government may delve deeper into alliance and carrier reporting data and other industry information to look for potentially anti-competitive effects more broadly (see below).

The emerging role of the DOJ

The E.O. also calls on the DOJ and Federal Trade Commission (FTC) to cooperate with the FMC and other agencies on the investigation and enforcement of existing antitrust laws. To that end, the FMC and DOJ's Antitrust Division on July 12 announced that they had signed an interagency Memorandum of Understanding (MOU) to foster increased cooperation and communication in their respective oversight and enforcement responsibilities of the ocean liner shipping industry. The MOU, the first ever between the two agencies, was signed by FMC Chairman Maffei and Acting Assistant Attorney General Richard Powers.

Although the practical impact of the MOU remains to be seen, its swift development three days after the release of the E.O. is notable given the federal interagency approach being taken. The MOU is short on specifics, other than that the DOJ Antitrust Division and FMC will collaborate in ensuring competition in shipping, although it is not uncommon for interagency MOUs to develop in practice. Importantly for carriers, the development of the MOU suggests some increased antitrust attention by the federal government on the shipping sector.

More specifically, the MOU brings to bear the DOJ Antitrust Division's criminal enforcement capabilities and experience under the Sherman Antitrust Act. Bearing that in mind, efforts toward developing an interagency MOU are not without forethought and collaboration, so the DOJ likely intends to keep a watchful eye on carrier operations and allow for specific enforcement initiatives to develop over time.

In closing

Although these ocean shipping and intermodal transportation system concerns are not new, the E.O. raises the profile and attention to the matters. Stakeholders in the industry should review the E.O. and closely monitor further industry developments with the FMC, Surface Transportation Board (STB) and DOJ. Finally, since the FMC may bring to bear the investigative and enforcement capabilities of the DOJ Antitrust Division, stakeholders should consider an assessment of their current compliance posture and consider seeking legal advice if they intend to make any decisions germane to the scope of the E.O. going forward.

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