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MARITIME LOGISTICS CHAINS AND ' THE PERFECT STORM'

The Perfect Storm and its consequences for assessment of container marine terminal services under EU anti-trust law

by

August J. Braakman*

Introduction

In the maritime shipping industry, the Perfect Storm is characterised by a powerful concurrence of two factors: (i) encroachment of regional and global e-commerce players on traditional maritime logistics business; and (ii) digitalization of this industry, which is provoking a move from supply chain models to commodity-driven logistics solutions.[1]
These two factors are the result of the ever-increasing impact of the high-technology industry (HTI) and the use of business intelligence and analytics (BI&A) systems.

HTI *"is characterised by rapid innovation with the creation of new products, platforms, or services, and by the reduction of production costs as a result of competitive pressure. ... [It heavily relies] on intellectual property."*[2] *"HTI markets feature high-sunk costs, regulatory barriers to entry, and they often involve strategic bottlenecks."*[3]
HTI permeates every aspect of BI&A systems.
BI&A *"is often referred to as the techniques, technologies, systems, practices, methodologies, and applications to analyse critical business data to help an enterprise better understand its business and market and make timely business decisions."*[4]

* August J. Braakman (www.braakmanadvocaat.nl) is an advocate practising in C.N.A. Looslaan 32, 3054BR Rotterdam, the Netherlands. He specialises in maritime anti-trust law.

1 FEPORT Brochure, 3rd Annual Conference, 2017.
2 Alexander Italianer, Director General DG COMP, "Level playing field and innovation in technology markets", speech at the Conference on Antitrust in Technology, 28 January 2013, Palo Alto (US), p. 2.
3 https://www.slideshare.net/dr_martyn_taylor/competition-law-in-high-technology-industries-lessons-for-australia.
4 Hsinchun Chen and others ' Business intelligence and analytics: from Big Data to Big Impact" (2012) 36(4) MIS Quaterly 1165

Undertakings that are active in the maritime shipping industry increasingly rely on BI&A in making business decisions. The constant and extremely rapid pace of change in HTI requires them to constantly update these systems in order to keep up with, or - better still - get a step ahead of competition. Failure to do so may "tip" the market. [5] The investments that have to be made in this regard are very substantial.

Undertakings that develop BI&A wish to acquire exclusive rights to use the innovative product without the concerns generated by competition, at least for a specific period of time. Exclusivity can be achieved by protecting this product by vesting IP rights, such as copyrights, patents, trademarks or trade secrets. A court via lawsuit may enforce these rights.

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The market of container marine terminal services

Market structure

A line, including the alliance it belongs to, determines the port-of-call; not policymakers or regulators.[6] To a large extent, the decision, which port-of-call will be chosen, depends on the quality and charges of the available container marine terminal operator(s). Shippers, consignees and drayage providers are second-tier players in the decision-making process. They cannot independently select a terminal operator, or negotiate the charges for its services. Consequently, in concluding contracts with lines, they depend on the charges agreed between the line and the terminal operator on the demurrage[7], detention[8] and *per diem*[9] charges for the use of terminal space and equipment.

The choice of a port-of-call and a container marine terminal operator is increasingly influenced by the facilities offered for the handling of Ultra Large Container Ships (ULCSs). The increase in the deployment of ULCSs right now is spectacular, with 10-15 new ULCSs joining the fleet every three months. This development has put ports and terminal operators under ever-increasing pressure to adjust their infrastructure and technical superstructure in

[5] Jonathan B. Baker, Can Antitrust Keep Up? Competition Policy in High-Tech Markets, Brookings, December 1, 2001.
[6] V. Flitsch, Port cooperation between European Seaports - Fundamentals, Challenges and Good Practices, Frauenhofer Center for Maritime Logistics and Services CML, para 2, 23 September 2016, www.guengl.eu.
[7] Demurrage is the charge assessed for cargo occupying terminal space.
[8] Detention is the charge to shippers and consignees for use of ocean containers and other equipment (e.g. chassis).
[9] Per diem is the daily charge to drayage providers for use of ocean containers and equipment.

order to be able to successfully receive and handle ULCSs. The investments that must be made in this respect are considerable. They vary from special facilities for transhipment to rail, road and barge to tailor-made cranes, berths, terminals, quays and staff well-versed in handling ULCSs.

At present, there are three mega-alliances: 2M, The Alliance and The Ocean Alliance. These alliances represent 77.2% of global container capacity and 96% of the full container capacity of all East-West trades. [10] Lines that are party to one of these three alliances are the ones that deploy most ULCSs, if not all of them.

In view of the above, I take the view that the competitive structure of the market of container marine terminal services is being determined to a large extent by the strategic decisions and the conduct of the three mega-alliances.
The structure of this market is determined furthermore by several concurring developments: consolidation by horizontal integration, consolidation by vertical integration and globalisation. [11] Each of these developments gives proof of spectacular expansion.

Consolidation by horizontal integration

The major marine container terminal operators in the world are: Hong Kong's Hutchison Port Holdings, APM - Maersk Terminals, Singapore's PSA and DP World. They have a combined share of just under 30 per cent of global container throughput. [12] This ranking is not expected to change as there are no major companies left to acquire, in part because of the capital needed to buy or build new port facilities and the EU's concern about the extent of the market share controlled by these operators in the northern European ports.[13]

Consolidation by vertical integration

Financial participation by governments in ports is decreasing rapidly. Therefore, lines that deploy ULCSs - or the group of companies these lines belong to - have become the most prominent private investors where the infrastructure and technical superstructure of ports is

[10] Flexport/ blog ' Guide to Ocean Alliances', https://www.flexport.com/blog/what-are-ocean-alliances/
[11] Theo Notteboom ' The changing face of the terminal operating business: lessons for the regulator' ACCC Regulatory Conference, Gold Coast, Australia, 26-27 July 2007, www.itmma.ua.ac.be
[12] Drewry, ' Top global terminal operators will control a third of world capacity' , www.tdctrade.com/shippers/vol26
[13] Darryl Anderson and Joseph Monteiro ' Marine Container Terminal Operators: The Extent of Competition, 45th proceedings of the Canadian Transportation Research Forum.

concerned. This is due to the fact that instant handling of ULCSs is of critical importance to the scale economies that lines try to realise by deploying such vessels.

Lines that deploy ULCSs, but also the mega-alliance they form part of, take a vested interest in priority access to a port's essential facilities. This may result in a situation where lines that participate in a mega-alliance collectively decide on the actions that one of them will take individually in order to achieve this goal of priority access; not only for itself but also for the alliance it belongs to. As a consequence, in the port concerned, this line and thereby the alliance it belongs to, may well acquire a dominant position on the market of container marine terminal services provided to ULCSs.

In case a line, either directly or through a sister-company, has a dominant position in the provision of container marine terminal services to ULCSs in a port and should refuse a (potential) competitor access to its facilities, this conduct must be addressed within the scope of Article 102 TFEU. Such refusal of access would only constitute an abuse in cases where the line or its sister company has a genuine stranglehold on the market of these services. It does not suffice that its control over a facility should give it a competitive advantage.[14] Under section 2 of the 1890 Sherman Act the US authorities take the same view. They add, however, that a company in a dominant position and in control of an essential facility may justify a refusal to contract on legitimate technical or commercial grounds, or - possibly - on grounds of efficiency.[15]

In cases where this dominant line is required to allow access to essential facilities installed for its own use, it must be fully compensated for by being allowed to allocate an appropriate portion of its investment costs to the supply and to make an appropriate return on this investment, having regard to the risk level involved.[16] These fees will be significantly higher than those charged for the handling of non-ULCSs and, as a consequence, may well be prohibitive. Therefore, the lines and alliances that - either directly or indirectly through a sister-company - provide container terminal handling services to ULCSs may well acquire a dominant position on the market of container marine terminal services for ULCSs and non-ULCSs alike.

[14] CJEU in Oscar Bronner, case C-7/97, 1998 ECR I-7791.

[15] On the essential facilities doctrine under U.S. law, see Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989); Abbott Lipsky & J. Gregory Sidak, Essential Facilities, 51 Stan. L. Rev. 1187 (1999); Robert Pitofski, Dona Patterson & Jonathan Hooks, The Essential Facilities Doctrine under U.S. Antitrust Law, 70 Antitrust L.J. 443 (2002); William Blumenthal, Compulsory Access under the Antitrust Laws, available at http://www.kslaw.com/library/pdf/blumcompulsory.pdf.

[16] See the excellent Opinion of A-G Jacobs in the Bronner case, pt. 39 case C-7/97, 1998 ECR I-7791.
Also see Case 53/87 *CICRA and Another* v *Renault* [1988] ECR 6039.

Vertical integration of lines with container marine terminal operators improves the quality of door-to-door services, thereby matching shippers' expectations.[17] It is therefore considered the most efficient way for lines to manage the entire logistics chain of door-to-door services and, in doing so, remain a step ahead of competition and achieve profitability.[18] This goal is significantly drawn nearer by the use of BI&A systems that permeate the whole implementation process of the mainstreaming strategy of lines and the alliance they belong to, from the origin straight through to the destination of the containers, in particular when (parts of) these systems are protected by IP rights.

When assessed from the perspective of container marine terminal services, this development may well create a divergence in the competitive position of container marine terminal operators that on the one hand are integrated vertically with a line - either directly or through a sister-company thereof - and not-vertically-integrated terminal operators on the other. BI&A that is solely under the control of a vertically-integrated terminal operator enables a far quicker and more efficient response to sudden unexpected changes in the logistics chain than do data, which - after all - are publicly available and for not-vertically-integrated terminal operators to make do with. Although not-vertically-integrated terminal operators may consider setting up BI&A systems of their own, it would seem unlikely that these systems will close the competitive gap, if only because BI&A systems - which after all relate to their vertically-integrated competitors - account for data that concern the transport phase of the route and are not publicly available. Therefore, it would seem safe to say that vertical integration of lines with container marine terminal operators, together with the use of BI&A solely under the control of the integrated entity may well have a considerable effect on competition on the market of containerised liner shipping services - and more specifically on the markets of container marine terminal services and ports - in particular if (part of) the BI&A is protected by IP rights.

Globalisation

The EU Commission is well aware that the market of containerised liner shipping services is a globally concentrated, oligopolistic market, in which each line and the alliance it belongs to takes its strategic decisions by considering the perspective conduct of its competitors from a global perspective.[19] Therefore, the Commission is aware of the fact that the strategic

[17] Haralambides et al., Costs, Benefits and Pricing of Dedicated Container Terminals, International Journal of Maritime Economics. vol 4(1), pp.21-34
[18] McKinsey, The hidden opportunity in container shipping, November 2014, www.mckinsey.com > our-insights >.
[19] Speech of EU Commissioner for competition Margarethe Vestager at the 21st Annual Conference of the European Maritime Law Organisation held in Copenhagen on 5 October 2015.

decisions of alliances - which decisions determine to a large extent the competitive structure of the market of container marine terminal services - are being made under non-EU jurisdictions more favourable to these decisions than the EU would be from an antitrust point of view. Hence, the question whether anti-competitive conduct - even when directed at foreign markets and permitted by foreign jurisdictions - falls within the scope of EU antitrust law must be answered from a global perspective.[20]

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EU antitrust law

The fundamental objective of EU antitrust rules is to prevent distortions of competition. This, however, is not an end in itself. It is rather a condition for achieving a free and dynamic internal market and one of several instruments promoting general economic welfare. The main responsibility for realising this objective lies with the European Commission. In assuming responsibility, the Commission must take effective, predictable and consistent decisions that in turn promote transparency and instil confidence.

I take the view that the tools the Commission presently has at its disposal for fulfilling its task are obsolete, as a result of which an unparalleled burst of legal uncertainty is imminent. My arguments are threefold.

I The market of containerised liner shipping services where alliances are active is a global market. As the conduct of alliances determines to a large extent the competitive structure of the market of container marine terminal services, restrictions of competition between lines that are concluded outside the EU may well lead to a considerable distortion of competition on this latter market.[21] As a result, the objectives of EU anti-trust law must first and foremost be realised by way of extra-territorial application of this law.

In order for Articles 101 and 102 TFEU to apply to anti-competitive agreements or practices involving third countries or undertakings located in third countries, it must be

[20] Francesco Munari, ' Competition in liner shipping' in Basedow and others *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Springer-Verlag Berlin Heidelberg 2012) 7.

[21] General Court in Compagnie maritime belge a.o. v Commission, joined cases T-24-26, 28/93, ECLI: EU: T: 1996,139,paras 202 and 203 and in Atlantic Container Line v Commission, T-395/94, ECLI: EU: T: 2002:49, paras 72,73 and 74; Case COMP/37.396/D2 Revised TACA, paras 73,74 and 75. The decision is available on the Commission website at: http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_74.html#37_396

demonstrated that such conduct has the object or effect of substantially affecting intra-Union trade. It is important to note that the *situs* of the anti-competitive conduct is irrelevant. It is the effect that must be accounted for.[22] This, so-called extra-territorial application of EU anti-trust law cannot be based on a link or effect that is too remote or purely hypothetical. It can only be justified when the anti-competitive conduct has immediate, substantial and foreseeable effects in the EU market.[23] In other words, the effects require being "qualified".

In spite of the advice issued by several Advocates General, until recently the CJEU has been reluctant to endorse the qualified-effects doctrine.[24] The approach of the CJEU has presupposed anti-competitive conduct adequately linking up with EU territory.[25] As such it ensures that "*the basic principle of territoriality under public international law is observed."*[26] This approach may well have been induced by the insistence on the part of the UK on the territoriality principle.[27]

On 20 October 2016, A-G Wahl advised the CJEU once more to adopt the qualified-effects doctrine.[28] One of the arguments underlying this advice is that the US has preceded the EU by fully adopting this doctrine.[29] In the US, antitrust law applies if the anti-competitive conduct has a "direct, substantial, and reasonably foreseeable" effect on US commerce, either domestic or non-direct import or export relating, and gives rise to an antitrust claim.[30] This approach implies that international cartels, even when they exclusively operate abroad, fall within the scope of US antitrust law as soon as the anti-competitive effects of their operations harm US

[22] Cases Ahlström Osakeyhtiö and Others v Commission, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, ECLI: EU: C: 1988:447 ('*Woodpulp*'); CFI case T-102/96 and Gencor v Commission, 1999, ECR II-753.

[23] General Court, judgment of 25 March 1999, *Gencor* v *Commission*, T- 102/96, EU:T:1999:65, paragraph 243.

[24] Case C- 413/14 Intel Corporation Inc. v European Commission; Opinion of A-G Wahl delivered on 20 October 2016; ECLI: EU: C: 2016:788, pt. 293. Also see note 182: *"For endorsements of an effects based approach to jurisdiction, see in particular Opinion of Advocate General Mayras in Imperial Chemical Industries v Commission, 48/69, EU:C:1972:32, points 693 et seq., and Opinion of Advocate General Darmon in Joined Cases Ahlström Osakeyhtiö and Others v Commission, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU: C: 1988:258 ('Opinion in Woodpulp'), point 19 et seq. In a similar vein, Opinion of Advocate General Wathelet in InnoLux v Commission,C-231/14 P, EU: C: 2015:292, point 49 et seq.".*

[25] Case C-413/14 Intel Corporation Inc. v European Commission; Opinion of A-G Wahl delivered on 20 October2016; ECLI: EU: C: 2016:788, pt. 284, with references to the case law of the ECJ in note 172.

[26] Case C- 413/14 Intel Corporation Inc. v European Commission; Opinion of A-G Wahl delivered on 20 October 2016; ECLI: EU: C: 2016:788, pt. 284.

[27] Section 2(3) of the UK Competition Act is based on the implementation doctrine and therefore favours the territoriality doctrine.

[28] Case C-413/14 Intel Corporation Inc. v European Commission; Opinion of A-G Wahl delivered on 20 October 2016; ECLI: EU: C: 2016:788, pt. 296.

[29] See US Supreme Court in Hartford Fire Insurance v. California, 544 U.S. 155 (1993).

[30] FTAIA 15 U.S.C para 6a.

consumers.[31] In its judgement of 6 September 2017, the CJEU has followed the advice of A-G Wahl and his colleagues and has adopted the qualified-effects doctrine.[32]

In itself, the endorsement of the qualified effects doctrine does not provide sufficient guarantee for the Commission taking globally effective, predictable and consistent decisions that in turn promote transparency and instil confidence. This can only be achieved by the adoption of Guidelines whereby the concept of extra-territorial application of EU antitrust law is defined from the perspective of the qualified-effects doctrine. It would imply that conduct that is directed at foreign markets and moreover has an immediate, substantial and foreseeable effect on the EU market must be assessed, also when this conduct would not have this for its object. Assessment of this conduct must take account of the conditions of competition on these foreign markets from the perspective of EU antitrust law.

II The legal uncertainty ensuing from the absence of Guidelines on the application of the qualified-effects doctrine is exacerbated by the fact that lines and alliances increasingly rely on BI&A in making business decisions on arrangements that fall within the block exemption for consortia agreements [33], like co-ordination of sailing timetables, cross-chartering of space or slots on vessels, pooling of services of port installations, the use of joint operating offices, provision of containers and so on. However, the block exemption specifically prohibits "hard-core" restrictions like fixing prices with third parties, limitations of capacity or sales (other than temporary adjustments for coping with fluctuations in supply and demand) and allocation of customers.

BI&A may push arrangements permitted under the consortia block exemption into the area of "hard-core" restrictions prohibited under EU antitrust law. This may be illustrated by the following, hypothetical example. An alliance, either directly or indirectly through one of its participating lines, acquires exclusive rights on a new BI&A product protected by IP rights. This new product substantially improves the co-ordination of sailing timetables within the alliance. Other lines or alliances cannot respond at short notice by bringing up a product that "leapfrogs" the product above. This causes shippers to disproportionally opt for this new product. As a result, other lines and alliances lose their competitiveness for the duration of the validity of this new product's IP rights and may even be phased out of the market. In the end, this will give the line that disposes of this new product - and thereby the alliance it belongs to - entrenched market power.

[31] H.R. Rep. No.97-686, at 10 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2495.
[32] ECLI: EU: C: 2017:632, para 46.
[33] (2009) OJ L 79 of 25 March 2009.

In this hypothetical situation, the BI&A product transforms the co-ordination of sailing timetables within the alliance that disposes of this product into conduct that has immediate, substantial and foreseeable anti-competitive effects on the EU market. Such conduct falls within the prohibition of Article 101(1) and/or 102 TFEU, at least for the duration of the validity of the IP rights.

The introduction of HTI and HTI-based BI&A systems demonstrates that alliances can no longer be regarded as full-blooded vessel-sharing agreements. This is furthermore underpinned by the fact that all lines that participate in one of the three mega-alliances also participate in one of the roughly 65 conference and discussion agreements that exist worldwide. These agreements serve as vehicles for exchanging strategically sensitive information including price data relating to routes that fall within jurisdictions that allow for such conduct, like for instance Singapore. In this context it should be noted that the Commission recognises the fact that lines may also influence prices through the joint setting of capacity. Because they share capacity, commonality of costs may lead to alignment of prices.[34]

In view of the above, the Guidelines on the extra-territorial application of EU antitrust law must also take account of BI&A and the temporal dimension of the anti-competitive effects thereof.

III The EU Commission applies EU antitrust law on the basis of the concept of the relevant product and geographical market as explained in the 1997 Commission Notice on the definition of the relevant market.[35]

The tool of the relevant *product* market has become obsolete as a result of the fact that it does not account for the ever-increasing use of HTI and BI&A systems, which, in fact, are entirely based on HTI.

The constant and extremely rapid pace of change in HTI results in markets being characterised by a high degree of imperfect competition. As the present concept of the relevant product market does not take account of the temporal dimension of structural changes, which are caused by new BI&A systems and from which this imperfect competition emerges, this tool for guaranteeing a fair and undistorted competition has become obsolete.

[34] Speech by DG COMP Director Henrik Mörck given at the 22nd EMLO Conference that was held in London on 30n September 2016

[35] OJ C 372 (9December 1997) 5-13, point 2

The tool of the relevant *geographic* market has become obsolete, as it does not account for the globalisation of the maritime shipping industry and the ensuing need for the Commission to take globally effective, predictable and consistent decisions that in turn promote transparency and instil confidence.

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Conclusion

The burst of legal uncertainty, which I anticipate, implies that undertakings will be abandoned to their fate, in particular in making the obligatory self-assessment of their commercial strategies under EU antitrust law. This is unacceptable. Undertakings cannot afford to make mistakes. The resulting penalties, in the form of fines imposed by the EU Commission and damages imposed by national judiciaries or arbitral tribunals, are too severe by far.

It is the task and obligation of the Commission to strangle distortions of competition on the markets of the maritime shipping industry at birth. Time is of the essence, while delays may cause irreparable damage. In the absence of proper Guidelines, the Commission has no option but to apply the qualified-effects doctrine - embryonic as it may be - in a robust way and on a case-by-case basis. The anti-competitive effects of the above developments on the EU market are too serious and too imminent for a half-hearted approach. Such application must take precedence over political considerations.

With regard to these considerations I take the view that the above developments, and in particular the constant and extremely rapid pace of change in HTI and thereby in BI&A systems, pose a huge challenge on the EU Commission to guarantee fair and undistorted competition in the markets of the maritime shipping industry. The Commission has an obligation to act. In case the Commission were to remain silent I take the view that it should be forced to act. The Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty[36] (now: Articles 101 and 102 TFEU) provides the means for such action.

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[36] OJ C 101/64 of 27.4.2004