Climate and Covid-19: Will the shipping industry succeed in charting the right course between Scylla and Charybdis?

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Containerised liner shipping services have moved from supply chain models to commodity-driven digital logistics solutions. These solutions enable shipping lines to provide multimodal services by linking ports and terminals, customs authorities, third-party logistics, inland transportation, shippers and other actors simultaneously. All major lines have all but staked their companies on the shift to these services and the required digital logistics solutions with state-of-the-art features. Nearly all of these actors are responsible for the emission of greenhouse gases (GHG). The EU Member States have made agreements aiming at the collective reduction of GHG emissions to zero by 2050. The agreements have been laid down inter alia in the 2016 Paris Agreement, the 2018 climate legislation of the European Parliament and the Council of Ministers, and the 2019 Green Deal of the European Commission. The EU institutions are faced with the task of striking the right balance between the measures Member States take regarding climate control and the aid measures they take regarding the Covid-19 crisis. This is a tall order. Failure to do so may result in serious distortions of competition on the market for containerised liner shipping services. This article discusses the challenges the EU institutions are likely to face during the period 2020–2030.

Measures regarding climate control

General

The EU measures regarding climate control for the period between 2020 and 2030 have been laid down in a regulation of the European Parliament and of the Council of Ministers (the regulation). This regulation determines the percentage by which the Member States must collectively have restricted their GHG emissions by 2030. In 2018, this percentage was set at 40 per cent compared with 1990 emission levels.

The regulation also determines the percentage required for each individual Member State to achieve this target. The Commission thereupon determines in implementing acts on a linear basis the annual limit value to be achieved by each individual Member State. The Member States are granted some degree of flexibility and can adjust their limit values by borrowing, reserving or transferring a limited amount of their annual emission room to other Member States. In addition, a Member State may make use of a security reserve. If the conditions prescribed for this purpose have been complied with, the Member State concerned receives a maximum amount of 20 per cent of its total GHG emission transgression over the period from 2013 up to and including 2020.

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If the Commission, accounting for the envisaged use of these supportive measures, finds that a Member State has made insufficient progress, the Member State in question is required to submit an action plan within three months, containing additional measures and a strict time schedule for implementing these measures. The Commission may issue recommendations concerning this action plan. The Member State concerned must account for these recommendations as much as possible and may revise its action plan accordingly. The regulation does not provide specific penal sanctions.

Regulations are legal acts that apply automatically and uniformly to all EU Member States as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety. This implies that the regulation from 2020 to 2030 has taken 40 per cent of the GHG emission reduction, which the Member States collectively must have realised by 2030, out of the political arena. In the course of 2020 the Commission will issue a proposal on increasing this target, which is likely to be in the region of 50–55 per cent.

In default of specific penal sanctions that might compel a Member State to achieve the limit value imposed by the Commission each year, the Commission may where appropriate revert to the general sanctions prescribed by the Treaty on the Functioning of the European Union (TFEU). As mentioned above, the regulation from 2020 to 2030 – including the implementing acts that pertain to it – is binding in all its components and directly applicable in each Member State. A Member State that fails to achieve its annual limit value over the period from 2020 to 2030 and, following intervention on the part of the Commission, cannot or does not want to take measures to ensure this will happen after all, is acting contrary to its Community obligations. Where this is the case, the Commission will decide whether, and if at all, when to initiate the TFEU infringement proceedings.

A reduction of GHG emissions by at least 40 per cent by 2030 is entirely dependent on whether each Member State lives up to its obligation to achieve its annual limit value of GHG emissions. So, if a Member State fails to comply with this obligation and the Commission does not take action, other Member States will in turn not hesitate to lodge a complaint with the Commission. All facts and records based on which the Commission has itself found that a Member State has not complied with its obligation for achieving its limit value set for a certain year are in the public domain. Therefore, it is hard to imagine that, in these circumstances, the Commission would arrive at a verdict different from the viewpoint of the complainant(s). This means that the Commission must in that case take on the complaint. If after three months the Commission has still not taken action, the complainant(s) will be entitled to take their complaint(s) to the Court of Justice of the European Union (CJEU or the Court). On this basis, it would seem improbable that the Commission would not take action of its own accord.

Achieving their annual limit value demands very drastic decisions from the Member States in the socio-economic domain. These decisions have a major political component. This means that considerations of a national or political nature may be a (sometimes serious) impediment for a Member State to take the required measures in time.

The obligation to submit, where appropriate, an action plan containing additional measures accompanied by a strict time schedule for implementation of these measures within three months following intervention on the part of the Commission does not grant a Member State in default much scope to make the necessary changes. However, additional time may be crucial in the national or political context. So, in order to gain more time, a Member State may decide to submit an inadequate action plan and to ignore the recommendations of the Commission regarding this plan. The consultation trajectory which has been followed so far by the Commission and the Member State concerned will correspond with the trajectory that must be taken in infringement proceedings before appealing to the CJEU. Where appropriate, the Commission may therefore skip infringement proceedings on these grounds and appeal to the Court directly.

The Commission submits the case to the Court by way of an application. This application may also contain a proposal for the periodic penalty and fine to be imposed by the Court, and an insistence on a hearing in so-called accelerated proceedings. These proceedings enable the Court to give

judgment quickly in particularly urgent cases by shortening the terms as much as possible and by assigning absolute priority to the case. At the request of a party, the President of the Court will decide, on the proposal of the judge-rapporteur and having heard the Advocate General and possibly other parties, whether the case is particularly urgent and would justify an appeal for accelerated proceedings. Considering the interests of the Union and of the remaining Member States at stake, it would seem likely that the President of the Court will be (strongly) inclined to grant an appeal for accelerated proceedings.

The periodic penalty to be imposed by the Court in these proceedings must be high enough that the Member State concerned can do nothing but back down. If this happens before the Court has passed judgment, the procedure has thereby ended at the point when the periodic penalty has been imposed.

Especially in cases relating to the failure to transpose directives into national law, the Commission has so far restricted it to periodic penalties and has not imposed fines. This has resulted in Member States increasingly choosing the above escape route in order to gain time. For this reason, the Commission has proceeded to appeal to the Court for fines to be imposed apart from periodic penalties. If the Court consents, the proceedings will nonetheless end at the time the Member State concerned backs down on the point of the periodic penalty imposed, but they will continue on the point of the fine until the Court has passed judgment.

As the annual limit values have been laid down in a regulation it would seem likely that the Commission will appeal to the Court for a fine being imposed as well as a periodic penalty, and that the Court will grant such appeal.

The amount of the periodic penalty and the fine is determined on the basis of the impact on the general interest and the interests of the European citizens and business community caused by the infringement of the Member State concerned on its Community obligations, the period covering this infringement and the gross domestic product, in line with the Member State's ability to pay.

A Member State that considers taking the escape route set out above, and to back down before the Court passes judgment, must decide, before allowing Court proceedings to happen, whether the expected fine will outweigh the time gain deemed necessary on national or political grounds. The average duration of accelerated proceedings is 6 months to 12 months. When ignoring the year in which the Member State should have realised the limit value of its GHG emissions and assuming as a starting point the period of first assessment by the Commission until judgment by the Court, the possible time gain involved in such a situation will soon be one year.

The fine demanded by the Commission and imposed, whether or not in mitigated form, by the Court, must be sufficiently large that Member States will avoid choosing the escape route. Only then will this fine be an effective remedy against the harm of self-interest on the part of a Member State that will, where appropriate, also influence the Union and other Member States to behave likewise.

The EU European Trading System

General

Parallel to the agreements and legislative measures at governmental level, the Commission has put in place the EU European Trading System (EU ETS). At present, CO_2 emissions, the most common GHG emissions, from power and heat generation, energy-intensive sectors and commercial aviation are subjected to the EU ETS. For companies in these sectors, participation is mandatory.

The EU ETS is the EU's key tool for reducing GHG emissions cost-effectively. It is the world's first major carbon market and remains the biggest one. The EU ETS covers around 45 per cent of the EU's GHG emissions.

The EU ETS works on the 'cap and trade' principle. A single EU-wide cap is set on the total amount of GHG emissions covered by the system. Within the cap, companies receive free of charge or can

buy European emission allowances (EEAs), which they can trade with one another as needed. An EEA is like a voucher that allows the holder to emit one tonne of GHG within a calendar year. The price for one EEA is currently around €25. The expectation is that this price will increase over the years, since the total quantity of EEAs will decrease each year. During the period from 2021 to 2030 the decrease will be subject to an annual linear factor of 2.2 per cent.

The Covid-19 crisis has put the economies of the Member States under enormous pressure. However, for the Commission this is not a valid reason for a possible deferral of measures that will lead to a climate-neutral Union by 2050. Vice-president Timmermans even regards the Green Deal as one of the spearheads for financial and economic recovery. Therefore, the annual limit values set by implementing acts of the regulation in the period 2020 to 2030, being limit values to be achieved by each Member State in order to arrive at a 40 per cent reduction compared to 1990 of GHG emissions by 2030, and the intention to increase this percentage to 50 or 55 per cent (as well as the EEAs set within the framework of the EU ETS) will remain untouched.

Maritime transport

Maritime transport causes the emission of approximately 940 million tonnes of $C0_2$ annually and is responsible for about 2.5 per cent of global CO_2 emissions. These emissions are projected to increase significantly if mitigation measures are not put in place swiftly. According to the third GHG study of the International Maritime Organization (IMO), shipping emissions could under a business-as-usual scenario increase by between 50 per cent and 250 per cent by 2050, thus undermining the objectives of the Paris Agreement and the Green Deal.

Although a global approach to address CO_2 emissions from international shipping led by the IMO would be the most effective and thus the preferable approach, the relatively slow progress of the IMO has triggered the EU to take action. The first step was to oblige, as from 1 January 2018, large ships over 5000 gross tonnage loading or unloading cargo or passengers at ports in the EEA to monitor and report their related CO_2 emissions and other relevant information.

Monitoring, reporting and verification (MRV) of information must be done in conformity with Regulation 2015/757 (as amended by Delegated Regulation 2016/2017). This implies, amongst other things, that from 2019, by 30 April of each year, companies shall, through THETIS MRV, submit to the Commission and to the Member States in which those ships are registered ('flag states') a satisfactorily verified emissions report for each ship that has performed maritime transport in the EEA in the previous reporting period (calendar year).

In April 2018, the IMO agreed on an initial CO_2 emissions reduction strategy. This strategy provides for a reduction of the total annual emissions from shipping by at least 50 per cent by 2050 compared to 2018 levels. In October 2018, the IMO agreed on short-term measures to be decided between 2020 and 2023 and to the consideration of proposals for mid- and long-term measures, without mentioning the timelines for agreement. The strategy will be revised in 2023, taking into account the available information. As a result, the EU decided effectively to postpone the inclusion of shipping emissions in the EU ETS until 2023.

The new Commission, which took up its duties in December 2019, is not overly confident that the measures, which the IMO envisages in the period from 2020 to 2023, will have the effects required to meet the goals of the Paris Agreement and the Green Deal. Therefore, supported by the European Parliament, it considers the application of the MRV Regulation to the shipping sector as an avenue for including the CO_2 emissions by ships going to and from EEA ports into the EU's policy to combat climate change. The discussions relate to: (i) a binding target to force shipping companies to reduce the carbon intensity of their transport by at least 40 per cent by 2030 compared to 2018; (ii) the inclusion of ships going to and from EEA ports into the EU ETS; and (iii) the establishment of the 'Maritime Transport Decarbonisation Fund', which will be used for recycling EU ETS revenues generated by the shipping sector into supporting decarbonisation actions and innovations in the sector itself.

The EU cannot afford to continue to exempt shipping from the EU ETS much longer: the quantity of its CO_2 emissions is simply too great. Carriers should prepare themselves. Maersk has already taken important steps by investing about US$1 billion and engaging more than 50 engineers in innovation and fleet technology over the past four years in order to improve the technical and financial viability of decarbonised solutions. Also, CMA CGM has announced that it will put in place measures in order to be climate-neutral by 2050.

Aid measures regarding the Covid-19 crisis

On 19 March 2020, the EU Commission adopted a new state aid temporary framework (the Framework) to support the economies of the Member States in the context of the Covid-19 outbreak. The Framework enables Member States to use the full flexibility foreseen under state aid rules to support their economies, while limiting negative consequences to the level playing field in the Single Market. The Framework was amended on 3 April 2020. The amendment complements the many other possibilities available to Member States to mitigate the socio-economic impact of the outbreak, in line with EU state aid rules.

The Framework is based on Article 107(3)(b) of the TFEU. Pursuant to this Article, the Commission may declare aid measures to be compatible with the internal market that will 'remedy a serious disturbance in the economy of a Member State'. The disturbance must affect the whole or an important part of the economy of the Member State concerned. Member States must show that the state aid measures notified to the Commission are necessary, appropriate and proportionate to remedy a serious disturbance in their economy as a result of the Covid-19 outbreak. The litmus test is whether these measures are of a kind as to be useful in the making good of damage caused by the Covid-19 crisis or instead are general measures unconnected with the damage allegedly caused by the crisis. Therefore, the aid measures should be assessed from the perspective of the overall financial position of the beneficiary enterprise, which existed before the Covid-19 outbreak.

EU antitrust law aims at ensuring a level playing field between enterprises. This objective also remains relevant in a period when enterprises and the economy as a whole are suffering from the Covid-19 crisis. Enterprises who take the view that aid which has been granted by a Member State to a competitor amounts to a restriction of competition under Article 101 of the TFEU or Article 53 of the EEA, or which generates efficiencies that would most likely outweigh any such restriction, can reach out to the Commission, the EFTA Surveillance Authority or the national competition authority concerned any time for informal guidance. If this guidance comes to nothing, a complaint may be lodged with the Commission. If the Commission rejects the complaint and by way of a formal decision approves the aid measures in question, the case may be submitted to the Court.

Ryanair has announced it will take this route and go all the way in opposing aid schemes that have been approved by the Commission or are pending approval in the airline sector. It claims that the beneficiary airlines are hoovering up state aid to give them unlimited firepower in order to distort competition once all the airlines are back flying again. Ryanair has already filed two complaints with the Commission: one against Sweden's €455 million scheme to assist the airline sector and another against France's tax-deferral scheme for its airlines, which would push back aviation taxes for 2020 to next year. Ryanair was excluded from both schemes because it carries neither a Swedish nor a French operating licence. At the end of May 2020, Lufthansa came to an agreement with the Commission on the terms and conditions of an aid scheme of approximately €9 billion. Other Member States have filed similar aid schemes, including for example France with regard to Air France (€7 billion) and several Nordic countries with regard to SAS (several hundreds of million euros). Ryanair has announced that it will take each and every case to the Court, if necessary.

Considering the above, stakeholders on the market of containerised liner shipping services would be well advised to monitor the EU aid measures closely, particularly as to which measures have been and will be accorded to its competitors and to analyse these measures on their compatibility with EU state aid rules and EU antitrust law.

In the event of a possible infringement of either or both sets of rules, the aid measures would place an enterprise awarded such aid in a better financial position than it was in prior to the Covid-19 outbreak. As a result, its competitive position on the market for containerised liner shipping services would be improved. In that event, serious consideration should be given to the need to take legal action.

Challenges

The International Monetary Fund (IMF) sketches a black picture for the future of the European economies as a result of the Covid-19 crisis. Economic decline in the Eurozone is estimated at 7.5 per cent. Member States including Italy and Spain suffered the worst effects with a decline of 9.1 and 8 per cent respectively. At 7.5 per cent, the Netherlands finds itself exactly on the average European level, with countries such as France and Germany lagging slightly behind at 7.2 and 7 per cent, respectively. At present, we do not have a clear picture of the duration and vehemence of the crisis for the future. If, after 2020, the crisis persists (or recurs, or maybe both), the economic damage will multiply.

The impact of the Covid-19 crisis on the economies of the Member States is such that it is highly uncertain whether, in the period from 2020 to 2030, the European Parliament and the Council of Ministers will agree to a proposal of the Commission to apportion an extra 10–15 per cent of the collective GHG emission reductions within the scope of the regulation during the period 2020–2030, and as such remove it from the scope of the political arena during the period 2020 to 2030. This possibility implies a (serious) impairment of the political consensus that serves as the foundation for the Paris Agreement and the Green Deal.

This political consensus will be impaired even more seriously as soon as a Member State contends that, even without being increased, its annual limit values cannot be achieved in the period from 2020 to 2030. This viewpoint will be underpinned, amongst others, with the argument that the financial support given to its economy – apart from healthcare support, if such extension of financial support were to be decided on anyhow – is inadequate for it to be able to (continue to) comply with its Community obligations. If, following intervention on the part of the Commission, the Member State sticks to its viewpoint, the Commission will be left with no option but to institute the TFEU infringement proceedings or appealing directly to the Court. Should it come to proceedings before the Court, the Commission is more or less obliged to appeal to the Court to impose a fine as well as a periodic penalty. As stated above, if the Court consents, this fine will remain in effect, even in the case of the Member State backing down in the course of the proceedings and the periodic penalty consequently being cancelled.

If the Commission does not take the appropriate action in the period from 2020 to 2030, other Member States may lodge a complaint stating that the Member State concerned has directly infringed applicable EU law. In this event, the Commission is obliged to deal with the complaint: because the GHG emissions obligations have been set out in an EU regulation there seems to be little scope for the Commission not to deal with the complaint, as it will be based on its own findings.

When a Member State fails to comply with its emissions obligations either consciously or unconsciously, it thereby improves the competitive position of its own enterprises compared with enterprises in other Member States that do indeed comply with their Community obligations. The same applies when aid measures create an exceptional position for certain sectors and/or enterprises, as a result of which these are not, or only to a lesser extent, faced with the financial consequences of EU emission reduction obligations.

In addition to this right accorded to Member States, enterprises which qualify as interested parties, such as for example stakeholders in the market for containerised liner shipping services, have a right to lodge a complaint with the Commission, stating that the non-compliance of a Member State with its obligations under the regulation has caused them, and will continue to cause them, to suffer severe and irreparable damage during the period from 2020 to 2030. Also, in these cases the Commission cannot but deal with the complaint.

If the Commission concurs with a complaint lodged by a Member State and/or an enterprise which qualifies as an interested party, the Member State in default will be severely fined. Once maritime transport has been included in the EU ETS, shipping companies that are found not to meet their EEAs will also be subject to heavy fines. However, the nature of both fines is that they pertain to public law and as such do not constitute compensation for the damage suffered.

Enterprises may consider instituting proceedings under private law to determine compensation for the harm that has been suffered. Consistent case law by the Court ensures that a Member State is obliged to compensate for damage that has been incurred as a result of an infringement of EU law it has committed.

Non-compliance by Member States and/or enterprises with their GHG emission reduction obligations as a result of the Covid-19 crisis may well have serious effects on fair and undistorted competition. These effects are aggravated by the lack of up-to-date and reliable concepts for addressing competition issues, being the definition of the relevant market and the Consortia Block Exemption Regulation. The ever-increasing use of logistics solutions with very advanced state-of-the-art features has made the current concepts obsolete and totally inadequate. Therefore, the Covid-19 crisis may well result in a long-term disruption of fair competition and a level playing field in the market for containerised liner shipping services.

Conclusion

The discussion set out above demonstrates that it is a tall order indeed for the EU institutions to strike the right balance between the measures Member States take to combat climate change and the measures they take, and private enterprises which qualify as interested parties may take, to combat the effects of the Covid-19 crisis. The degree to which this battle will be fought in the political arena will increase proportionally with the duration of the crisis. As a result, the risk that the Covid-19 crisis will also undermine the political consensus that serves as the foundation for the Paris Agreement and the Green Deal will increase proportionally. It is up to the European institutions to create both the juristic scope and the atmosphere required in order to induce both Member States and enterprises to make the proper choices. If either this scope and/or atmosphere are wanting or inadequate, the lack of the right balance between climate change and Covid 19 just might prove to herald the Armageddon of a climate-neutral EU. Let us hope that Thetis will guide the Union on its passage between this Scylla and Charybdis.