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August J. Braakman, shipping advocate | Oct 30, 2020 10:54 AM EDT

FMC wrongly gives TradeLens a pass

By approving two agreements among five of the world's biggest carriers, the US Federal Maritime Commission (FMC) has caused a major setback to fair competition in the shipping industry.

On March 14, 2019, the Federal Maritime Commission approved an agreement among Maersk, Mediterranean Shipping Co., Hapag-Lloyd, CMA CGM, and Ocean Network Express (ONE) on the development and free availability of common IT standards for the entire shipping industry (the Digital Container Shipping Association [DCSA] Agreement). On Feb. 6, 2020, the FMC approved an agreement among the same contractual parties on the development and commercial marketing of a cloud service that enables participants in the international ocean transportation supply chain to exchange data by means of a blockchain-enabled, global trade digitized solution (the TradeLens Agreement).

The FMC has reviewed both agreements on a solitary basis. I take the view that this approach constitutes not only a serious error, but also a violation of the law.

Container liner shipping services require all actors involved to supply data while using computer programs that are semantically interoperable, both with each other and with the business intelligence and analytics (BI&A) system, which secures a proper and smooth operation of the entire logistics chain by storing and processing these data. This implies that exchange of data by means of the TradeLens cloud service is only possible if all actors use the same information technology (IT) standards.

The data supplied by users of the TradeLens cloud service is stored in the TradeLens database. The object or effect of the decisive control held by the parties to the DCSA Agreement and the TradeLens Agreement in

the implementation of both Agreements is that full advantage will be taken of this database with a view to improving the DCSA IT standards. More often than not, the data stored in this database is of a strategically sensitive nature.

The advanced state-of-the-art features of the logistics solutions deployed in the computer programs of the users of the TradeLens cloud service and in the underlying BI&A system, together with their semantic interoperability, make it very difficult, if not impossible, to dissociate strategically sensitive from strategically non-sensitive data. Thus, by necessity, the use of the TradeLens database with a view to improving the DCSA IT standards would oblige the use of strategically sensitive data. Exclusivity as regards access gives the contractual parties a major competitive edge on the relevant market in which the DCSA Agreement is implemented.

The TradeLens cloud service uses the DCSA IT standards exclusively. The prerequisite of semantic interoperability between the computer programs of the users of the service, both with each other and with the underlying BI&A system, implies that each user must deploy DCSA IT standards. All in all, more than 170 companies have already joined the TradeLens cloud service. They include the majority of the world's biggest carriers that altogether represent a capacity equivalent to more than a third of the world capacity. In particular, the support of these carriers, together with the (growing) quality difference between the DCSA IT standards and competing IT standards, gives the contractual parties a major competitive edge on the relevant market in which the TradeLens Agreement is implemented.

Companies that want to do business with carriers that support the TradeLens cloud service have no option but to join and supply the required data. They have a vested interest in preventing the strategically sensitive parts of this data from falling into the wrong hands. As dissociation of strategically sensitive from strategically non-sensitive data is virtually impossible, they will insist on confidentiality of all the data they are required to supply.

In order to be able to research and develop new IT standards that, by virtue of their characteristics, prices and intended use are interchangeable and substitutable with DSCA standards, companies need to have access to the technical data underlying the DCSA IT standards. Therefore, they have a vested interest in access to the TradeLens database to the extent necessary for the development of such standards. Refusal of access would force them out of the markets in which the DSCA Agreement and the TradeLens Agreement operate, sooner rather than later.

The conjoint implementation of the DCSA Agreement and the TradeLens Agreement raises serious antitrust concerns on the relevant markets in which these agreements are implemented. Section 710 of the US Shipping Act as amended by the 2017 Federal Maritime Commission Authorization Act obliges the FMC to assess these concerns. The FMC has failed to consider both issues. I therefore take the view that there are compelling reasons for challenging the approval of these agreements in the US courts.

The TradeLens database is the source from which the anti-competitive effects of the conjoint implementation of the DCSA Agreement and the TradeLens Agreement emerge. These effects should be countered on the basis of the consideration that protection of confidential data is a general principle of law, but may never be an absolute barrier to disclosure of such data if disclosure is in the interest of fair and undistorted competition.

The competition frameworks of the US — and, for that matter, also of the EU — do not contain tools that provide guidance on the assessment of antitrust issues emanating from the advanced state-of-the-art digital solutions that are being applied in the shipping industry. Therefore, both EU and US regulators have some serious catching up to do. At the same time, increased focus is needed on updating and expanding these regulators' own skills and competences. It is inconceivable that carriers should take advantage of digitalization as a freeway to monopolization of the entire shipping industry.

August J Braakman is a Rotterdam-based advocate who specializes in EU maritime competition law: www.braakmanadvocaat.nl. He can be contacted at braakman@dutch.nl and aj.braakman@icloud.com