Digitalisation and globalisation pose problems for competition authorities

With the consortia block exemption regulations due for a four-year extension, carriers will be breathing a sigh of relief. But risks still exist for consortium members

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by August Braakman

As carriers move to end-to-end services, questions arise over whether the level of integration they require will breach competition regulations

THE CONSORTIA BLOCK EXEMPTION REGULATION IS DUE TO BE EXTENDED FOR ANOTHER FOUR YEARS.

IN A speech at the Chillin' Competition Conference in December, European Union commissioner for competition Margrethe Vestager acknowledged that globalisation and digitalisation "have caused an earthquake on our markets".

She added that this earthquake causes the commission to revisit the definition of the relevant market as laid down in the 1997 Notice on Market Definition.

The commission proposes to prolong the consortia block exemption regulation in its current version until April 25, 2024. The definition of the relevant market is the applicability criterion. On the basis of this definition it must be decided whether the combined market share of the consortium members is less than 30% in the market in which the consortium operates.

All major lines have shifted their focus to containerised liner shipping end-to-end services. These services are embedded in a contract between the line and its customer. Inevitably, end-to-end services require other actors being engaged in the implementation of individual stages in these services, like other lines, ports, terminals, customs authorities, shipping lines, third-party logistics, inland transport companies and shippers.

One stage cannot be severed without seriously affecting the implementation of other stages, while linkage can only be achieved by digitalisation.

In order to achieve a perfect fit, all actors should use the same technology standards, while business intelligence and analytics systems should be semantically interoperable with the computer programmes used. This implies that, taken altogether, these stages constitute an indissoluble entity.

It would therefore seem safe to say that, from a competition point of view, all actors to be engaged in the implementation of individual stages of a contract on end-to-end services, whether lines or not, should be considered as consortium members.

Distortions of competition that fall within the cartel prohibition of Article 101(1) TFEU and are not exempted by virtue of the consortia BER or otherwise, are null and void. The indissoluble link between all consortium members implies that a distortion of competition that does not qualify for exemption of the cartel prohibition and occurs in only one stage of the end-to-end services may invalidate the agreements underlying all the other stages.

Anyone is entitled to invoke this invalidity. Moreover, it is absolute in nature and unlimited in time, catching all the past and future effects of the services concerned. In the occurring event, all consortium members will be exposed to huge fines and possibly even higher costs incurred for private actions.

To each and every consortium member, self-assessment is a must, even more so since it is required in the case of allegation of infringement of the cartel prohibition.

It should be made in light of the current state of the case law of the European Courts of Justice and guidance from the commission. Each case must be assessed after its own facts.

It will presumably take at least two years from April 25, 2020 for the commission to provide conclusive guidance on the effects that globalisation and digitalisation are likely to have on the definition of the relevant market.

Neither are there any cases at present pending before the European Courts that might provide the redemptive message at an earlier stage. As a result, at least during that two-year period, consortium members themselves should provide this definition in their self-assessments. This is a very tall order indeed, considering the following, non-exhaustive problems they are likely to encounter.

Globalisation

According to current case law and other sources of EU guidance, the relevant market in which to assess a given competition issue is established by the product and geographic markets combined. The relevant product market comprises all products and/or services regarded by consumers as interchangeable or substitutable by virtue of their characteristics, prices and intended use.

The definition of the relevant geographic market is based on the definition of the relevant product market. The determining factor for assessment of the relevant geographic market is the customer's situation and the transport and distribution possibilities offered by individual lines.

The European Courts held that the relevant geographic market consists of the area in which containerised liner shipping services are marketed. With regard to deepsea trades, the Courts held that the EU-end of the catchment areas consists of a range of ports in northern Europe and the Mediterranean and that this definition of the relevant geographic market is commensurate with the scope of an inland tariff.

The General Court held that the distinction between a relevant market for maritime and for inland services leads to the application of a different legal regime for assessment of anti-competitive behaviour in each of these geographic areas.

This case law relates to maritime transport and distribution services in deepsea trades. However, digitalisation has extended the scope of these services to end-to-end services.

The EU-end of the catchment areas of end-to-end services is not a range of ports either in Northern Europe or the Mediterranean, but the inland terminal where the containers in question are loaded or unloaded. Thus, in defining the relevant geographic market that would apply to a specific case, consortium members should start from the assumption that there are no distinct legal regimes for maritime and inland transport and distribution services and that varying scopes of tariff for each type of services are not commensurate with EU antitrust law.

As case law and guidance is lacking, in defining the relevant geographic market consortium members will be abandoned to their fate for a period of at least two years.

Most containerised liner shipping end-to-end services have a global reach. This implies that other jurisdictions may be applicable. In 2017 the European Court of Justice confirmed that EU antitrust law catches agreements or practices that make it possible to foresee to a sufficient degree of probability future developments that may have a substantial effect, direct or indirect, actual or potential, on the pattern of trade between member states, thus forming a sufficient basis for each participating undertaking to concert its market conduct.

Global end-to-end services meet these criteria, particularly — though not necessarily — if they relate to an EU location to or from which containers are loaded or unloaded. As a result, consortium members cannot rely on the explicit or tacit allowance of distortions of competition by local jurisdictions while conducting their self-assessments. The determining factor is whether or not these distortions are allowed under EU antitrust law. There is a lack of proper guidance in this area as well.

Digitalisation

The question now focuses on the nature of the effect that the predominant impact of digitalisation has on the concept of establishing the relevant market on the basis of the product and geographic markets combined and, more particularly, on the calculation of the 30% threshold being the applicability criterion for the consortia BER.

The variety, volume and velocity of Big Data — the so-called three Vs — and consequently business intelligence and analytics systems, are extremely volatile and subject to rapid change. Change like this may well affect demand and supply in the market of containerised liner shipping end-to-end services. Therefore, the relevant market must also be defined in light of the three Vs in their then current capacities time and again.

As a consequence, not only the product and geographic dimensions, but also the temporal dimension should be considered as an independent dimension when defining the relevant market as such. This is another area that demonstrates a lack of proper guidance.

The source code is surely one of the most closely guarded trade secrets. Lines protect their source codes by intellectual property rights wherever possible. Other means for protection are (i) the use of non-English-based programming languages; (ii) encryption of the source code and (iii) the use of largely inaccessible jurisdictions.

Although consortium members have no access to source codes and consequently cannot see or modify them, they do have access to object codes. The computer language of the object code must be translated back into human language. As a rule, lines partition object codes by using so-called views that enable a line to only make that part of the object code human-readable that is required to enable a consortium member to

implement its stage of the services. As a result, this "need-to-know" data is both individual and highly confidential.

The source code is the essential determining factor when assessing competition issues. Object code translations that are not based on the underlying source codes are tantamount to mere explanation of the meaning of the computer language of the object code. Either intentionally or negligently, such explanation will blur the competition issues emanating from the source code. Combined with the fact that a consortium member only has access to the translation of the object code that relates to its stage of the end-to-end services, this will create a serious obstacle to a fair and reliable self-assessment and definition of the relevant market to all consortium members involved in end-to-end services. I end up saying that proper guidance is lacking here as well.

The lack of guidance on the anti-competitive effects of globalisation and digitalisation on the relevant market of end-to-end services precludes a reliable definition of that market. A prolongation of the consortia BER in its current version renders competition issues emanating from these phenomena unpredictable.

Consortium members that implement a stage of the end-to-end services need to be aware of these issues and the risks they entail. Small errors breed great mischief. While conducting their self-assessment they would therefore be well advised to hedge and control the risk of such errors. The key to this is to be found in transparent communication at all levels. A first, and in my opinion crucial step forward towards legal certainty would be the confirmation by the commission that disclosure by lines of the entire source code is a necessary evil, enabling all consortium members involved in the implementation of end-to-end services to monitor adherence to the EU antitrust rules on the basis of proper and reliable self-assessment. The principles of antitrust law must take precedence over the fruits of digitalisation acquired and paid for by lines, even if the nature of these fruits is highly confidential and, as the case may be, protected by IP rights.

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