Is digital leviathan a risk to fair competition in shipping?

The required level of co-operation and commitment involved in the implementation of container shipping services can only be achieved if IT programs are semantically interoperable

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by August Braakman

State-of-the-art logistics solutions deployed by container shipping services raise antitrust issues for which the legal competition frameworks in both the US and the EU are not suited to deal with adequately

DIGITALISATION HAS THROWN THE DOOR WIDE OPEN TO CO-OPERATION INITIATIVES ON ADVANCED LOGISTICS SOLUTIONS. *Source: Travel mania/Shutterstock.com*

DIGITALISATION has caused a virtual earthquake in the legal competition frameworks of the US and the European Union.

In the shipping industry it has thrown the door wide open to co-operation initiatives on logistics solutions with advanced state-of-the-art features.

This raises the question whether the US and EU legal competition frameworks are suited to deal with these issues.

In the course of this year the US Federal Maritime Commission was given the opportunity to address this question with regard to the collaboration among five of the world's biggest carriers resulting from the

conjoint implementation of the Digital Container Shipping Association Agreement and the TradeLens Agreement.

DCSA is a neutral, non-profit organisation that was officially established in Amsterdam, the Netherlands, in April 2019.

It develops common or compatible standards on the IT standards market, which standards are to apply to the exchange of data with respect to the international ocean transportation supply chain. The work undertaken is for the benefit of the entire industry. All standards are openly published and available free of charge to interested external parties.

Mediterranean Shipping Co, Maersk, Hapag-Lloyd, CMA CGM and ONE (also collectively referred to as 'the parties' below) have entered into a co-operative working arrangement on the implementation of the DCSA Agreement.

The purpose of this agreement is to permit the parties to co-operate on the development and utilisation of the DCSA IT standards.

TradeLens is a profit-oriented joint venture of Maersk (51%) and IBM (49%). TradeLens develops and utilises a blockchain-enabled, global trade digitised solution on the IT information market, intended to enable shippers, authorities and other stakeholders to exchange data on supply chain events and to collaborate on products to be offered on the TradeLens Platform and on the marketing of same.

MSC, Maersk, Hapag-Lloyd, CMA CGM and ONE have entered into a second co-operative working arrangement — the TradeLens Agreement.

The purpose of this agreement is to permit the parties to co-operate on the development and utilisation of products that are offered on the TradeLens Platform and on the marketing of same.

Active membership of the DCSA and TradeLens Agreements is limited to the parties, who have the exclusive right to vote regarding each agreement.

The DCSA Agreement has been filed with the Federal Maritime Commission and was given approval in March 2019. The TradeLens Agreement has also been filed and was given approval in February this year.

The commission has failed to address the antitrust issues emanating from the use made by both DCSA and TradeLens of logistics solutions with advanced state-of-the-art features.

I take the view that this has induced the FMC to ignore the aggregate impact of the conjoint implementation of the DCSA Agreement and the TradeLens Agreement on the IT standards market and on the IT information market, and the ensuing distortions of competition. This view may be illustrated as follows.

Apart from the 'parties', Evergreen, Hyundai Merchant Marine, Yang Ming and Zim support DCSA. This means that, with the exception of COSCO-OOCL, all significant carriers are involved. It follows that the collaboration resulting from the DCSA Agreement gives the parties a strong, if not dominant position on the IT standards market.

All in all, more than 170 companies have joined TradeLens. 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. No actor that wants to do business with a carrier that supports TradeLens can refuse to join.

In August 2019, at a press meeting on the occasion of the presentation of the company's half-year interim report Maersk chief executive Søren Skou said: "So we can basically force them to join the platform. Because if they want to do business with us they have to supply data."

It follows that the collaboration resulting from the TradeLens Agreement gives the parties a strong, if not dominant position on the IT information market.

Container liner shipping services is a global business. It demands a high level of co-operation and commitment of all actors involved in the implementation of the services.

The required level of co-operation and commitment can only be achieved if the computer programs of all actors involved in the services are semantically interoperable, both with each other and with the business intelligence and analytics system, which secures a proper and smooth operation of the entire logistics chain by storing and processing the data.

To achieve semantic interoperability, all computer programs and the BI&A system must use the same IT standards.

Shippers, authorities and other stakeholders that (are forced to) supply data to TradeLens have a thorough understanding of, and experience with the shipping industry. Part of the data they possess is likely to be of a strategically sensitive nature.

The advanced state-of-the-art features of the computer programs of the participants and of the BI&A system used by the TradeLens Platform, together with their semantic interoperability, make it very difficult, if not impossible, to dissociate strategically sensitive from strategically non-sensitive data. Therefore, the TradeLens database is likely to contain both types of data.

The parties have a decisive control in the implementation of both the DCSA and the TradeLens Agreement. The object or effect of this control is that the Agreements are implemented in close conjunction with each other. This implies that DCSA will take full advantage of the TradeLens database with a view to improving its IT standards.

This database is a real treasure trove, particularly if the data participants (are forced to) supply is of a strategically sensitive nature, either as such or because it cannot be dissociated from strategically non-sensitive data. It enables DCSA to constantly promote the quality of its standards.

The ever-increasing quality of the DCSA IT standards together with the ever-increasing support of TradeLens may well result in a situation where only DCSA IT standards are used in regard to (i) blockchain-enabled, global trade digitised solutions for the exchange of data on supply chain events and (ii) products offered and marketed for that purpose. This will affect competition on the IT standards market and on the IT information market.

These effects will be exacerbated by the fact that shippers, authorities and other stakeholders that (are forced to) supply data will require

TradeLens to keep their data strictly confidential, particularly if it is of a strategically sensitive and/or technical nature.

Exclusive access by DCSA to the TradeLens database, together with the blocking of confidential data it contains — data that is indispensable for competitors of DCSA in order to develop competing IT standards and for competitors of TradeLens to develop competing services and products — will have the object or effect of turning the TradeLens database into an instrument for raising barriers obstructing entry into both the IT standards market and the IT information market.

Taken together, the above effects will be to the ultimate detriment of shippers, authorities and other stakeholders, as they would have less choice. This would enable TradeLens to fully optimise its profitability. In August, Maersk confirmed that monetisation of TradeLens is indeed one of the key objectives for the near future.

In my opinion, the above indicates that there are compelling reasons for concluding that the FMC was under the obligation to address the antitrust issues emanating from the use made by both DCSA and TradeLens of logistics solutions with advanced state-of-the-art features.

But also, the ensuing conjoint implementation of the DCSA Agreement and the TradeLens Agreement on the IT standards market and on the IT information market.

Failure to do so constitutes a violation of the 2017 Federal Maritime Commission Authorization Act. The Act amends the 1984 US Shipping Act and was signed into law on December 4, 2018, so well before the approval by the FMC of both Agreements. Section 710 grants the FMC authority to seek injunction relief in court against actions of regulated entities that "substantially lessen competition in the purchasing of certain covered services". This section expands the scope of factors the FMC must consider in order to include the aggregate impact of agreements on competition, rather than reviewing the impact of each individual agreement.

Therefore, I take the view that challenging the solitary approval by the FMC of the DCSA Agreement and the TradeLens Agreement would have an above-average chance of success in US courts.

In their investigations of the proposed acquisition of Fitbit by Google, EU regulators have adopted an approach that differs from the FMC approach.

Although Fitbit and Google are active on different relevant markets, their concern is that the key insights into the life and health situation of the users of Fitbit devices stored in the Fitbit database would further entrench Google's market position in the online advertising markets by increasing the already vast amount of data that Google could use for personalisation of the ads it serves and displays.

This approach indicates that the manner in which the parties take benefit from the TradeLens database should be the focal point in the assessment of the antitrust issues in the DCSA/TradeLens case.

The dominant position held by the joint parties on the IT standards market and on the IT information market implies that the findings of the EU Commission in the Fitbit/Google merger case may well apply mutatis mutandis in the DCSA/TradeLens case.

I take the view that, if it were to be approved at all under EU antitrust law, the conjoint implementation of the DCSA Agreement and the TradeLens Agreement would first and foremost depend on acceptance by the parties of concessions in the deployment of the TradeLens database.

In the Fitbit/Google case, Google has proposed a number of such concessions.

The EU Commission, however, has rejected them and has started an in-depth investigation due to be completed by December 9, 2020. The outcome of this investigation may well be a major determinant in the assessment of the manner in which the parties will be allowed to take benefit from the TradeLens database, as well as of the extent in which this benefit is in keeping with the objective they pursue with the conjoint implementation of the DCSA Agreement and the TradeLens Agreement.

US and EU antitrust law do not provide any guidance on the assessment of antitrust issues emanating from the advanced state-of-the-art digital solutions applied in the shipping industry.

It follows that regulatory authorities as well as market operators are left to their fate. This imposes high requirements in terms of knowledge and experience. Current practice seems to indicate that this is not always forthcoming.

Both the US and EU regulatory authorities therefore have some serious catching up to do. They need to adopt a range of supplementary tools that provide suitable guidelines to market operators and likewise to themselves.

At the same time, increased focus is needed on updating and expanding their own skills and competences. Not until then will the US and the EU legal competition frameworks provide a solid basis to prevent the digital leviathan from spelling the end of fair competition in the shipping industry.

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