Consortia agreements need full access to data

Lines that participate in a vessel-sharing agreement are obliged to make a proper and reliable self-assessment of their liabilities under EU antitrust law. But this requires access to sufficient data

10 Jul 2020 | **OPINION**

by August Braakman

Is access to data on vessel-sharing agreements fit for participating lines to make a proper and reliable self-assessment under EU antitrust law?

SELF-ASSESSMENT OF CONSORTIA REQUIRES ACCESS TO DATA.

IN MY previous article for Lloyd's List, I arrived at two closely-related conclusions.

Firstly, all agreements and arrangements, as well as the underlying data that represent a vessel-sharing agreement equipped with logistics solutions with advanced state-of-the-art features form an indissoluble entity, meaning an entity that disintegrates once one of its constituting elements is being removed. Second, such VSAs serve as vehicles substituting practical co-operation for the risks of competition.

Vessel-sharing agreements of that kind are fully exposed to the prohibition of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Apart from the European courts and the European Commission, national courts are also obliged to draw the legal and economic inferences from infringements of this Article of their own accord.

Lines that participate in a vessel-sharing agreement are obliged to make a proper and reliable self-assessment of their liabilities under EU antitrust law. They are well advised to take this obligation very

seriously, for two reasons:

Firstly, companies that violate EU antitrust law are liable for the consequences.

Liability includes fines up to a maximum of 10% of the annual turnover of the company concerned, multiplied by the number of years and months the infringement lasted. If the parent company exercised a decisive influence over the company's operations during the infringement period, fines may be increased by up to 10% of the annual turnover of the group of companies to which it belongs.

In addition, private individuals may sue for recovery of damages resulting from infringements. The costs of these claims may well be in excess of the fines themselves.

Second, the prohibition of Article 101(1) TFEU has severe legal consequences. It implies that the agreement and/or arrangement concerned is not binding; nor can it be asserted in relation to third parties.

By the same token it cannot be asserted before the courts either. Nullity for the purpose of Article 101 (1) TFEU means complete invalidity. It is absolute in nature — especially as anyone can invoke it — and unlimited in time, thereby catching all the past and future effects of the agreement and/or arrangement concerned.

As the information and data underlying a vessel-sharing agreement of the above kind constitute an indissoluble entity, the agreement will be the prime target for actions pertaining to violations of EU antitrust law.

In case it can be established that the vessel-sharing agreement indeed constitutes a violation, this implies that the participating lines are jointly and severally liable for the consequences.

Therefore, in order to make a proper and reliable self-assessment, each line should have access to all information and data required for that purpose, regardless of whether or not these are wholly or partly confidential and/or protected by intellectual property rights.

Lines that possess the proprietary rights for (part of) the information and data underlying the logistics solutions deployed within the agreement will argue that this information and data have been acquired at high costs, are confidential and, where possible, protected by IP rights; that they are a cornerstone for the company to establish and implement its strategic and commercial policy and that submission to other lines that are party to the VSA would make them privy to their business secrets.

This line of reasoning will result in the argument that a participating line does not need to dispose of other than 'need-to-know' information and data for its performance.

The question however is whether this 'need-to-know' information and data are sufficient for a line to make a proper and reliable self-assessment of its liabilities ensuing from (the possibility of) the vessel-sharing agreement violating EU antitrust law.

In answering this question, guidance may be provided by a draft document issued by the European Commission, entitled: Communication on the Protection of Confidential Information for the Private Enforcement of EU Competition Law by National Courts, published in 2019.

This draft aims at striking a balance between the legitimate interests of both the requesting and the requested party to have access to confidential information.

With reference to consistent case law by the European courts, the commission acknowledges that the protection of business secrets and confidential information is a general principle of EU law, but that this is no absolute bar to its disclosure. The commission offers a number of suggestions regarding the sorts of measures possibly required to be put in place before confidential information is disclosed.

Right of access

I take the view that lines which participate in a vessel-sharing agreement equipped with logistics solutions with advanced state-of-the-art features should have the same right of access to confidential information as have private individuals who wish to institute an action for damages before a national court.

Therefore, provided there is adequate protection, lines which participate in an agreement of that kind should be privy to all underlying information and data needed for making a proper and reliable self-assessment under EU antitrust law.

The information required for that purpose might relate to information and data indicated on the contract of carriage in the possession of a party to the vessel-sharing agreement.

The soul of a contract of carriage is the bill of lading. This document serves as (i) an acknowledgement that the goods have been loaded; (ii) evidence of the contract of carriage and (iii) document of title. The functionality as a document of title allows for financing to be obtained from financial institutions by using the bill of lading as collateral. Once the collateral has been waived, presentation of the B/L makes the end customer party to the contract of carriage and enables this customer to assume full ownership of the goods.

There is no single international convention applicable to carriage by sea. The parties to a vessel-sharing agreement are free to determine their jurisdiction and choice of law. The mandatory provisions of the substantive law of a state in which the obligations arising out of a contract have to be or have been performed, in so far as these provisions render the performance of the contract unlawful, however restrict this freedom.

This may or may not be the law of the jurisdiction or venue in which legal action is brought. Regard must be had to the nature and purpose of these provisions and to the consequences of their (non-) application.

Most, if not all European Union/European Economic Area member states with ports-of-call for vessel-sharing agreements have mandatory provisions stipulating that only the paper version of a B/L, not the electronic one, has legal significance and validity, and can be used as legal and conclusive evidence in court. Disregard of this provision renders the B/L unlawful, and therefore null and void. In the occurring event, the carriage must be considered as carriage without documents. This is likely to give rise to claims, loss of the right to limit liability and loss of the right of indemnity and/or criminal prosecution.

During the past decades it has been widely discussed whether an electronic B/L could have the functional equivalence of an original paper B/L.

This debate has not been brought to an end yet. There are a few proprietary systems that seek to provide registered users (‘members’) with the ability to create, transfer and receive an electronic B/L.

However, none of the EU/EEA member states have any specific law currently supporting the use of electronic B/Ls. Therefore, it will be hard for a national court of these member states to deny a party to a vessel-sharing agreement the right to a paper version of the B/L in case it can be demonstrated that the information contained in this paper version is needed for making a proper and reliable self-assessment under EU antitrust law.

An important additional argument may be that an electronic B/L might obstruct a clear view of practices that may distort fair competition and are as such caught by EU antitrust law.

In sum, I take the view that a line that participates in a vessel-sharing agreement equipped with logistics solutions with advanced state-of-the-art features is entitled to all information and data underlying the functioning of the agreement in so far as this information is needed for making a proper and reliable self-assessment under EU antitrust law, and regardless of whether or not this information and data are protected by IP rights, or are confidential in their own right.

August J Braakman is an advocate practising in the Netherlands. He specialises in Dutch and European antitrust law, with a focus on European maritime antitrust law.