Are vessel-sharing agreements fit for purpose in a digital age?

The conditions of the EU's Consortia Block Exemption Regulation were formed in the pre-digital era, but with vessel-sharing agreements now equipped with logistics solutions and advanced state-of-the-art features there are serious questions as to whether these are satisfied

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by **August Braakman**

The Consortia Block Exemption Regulation was adopted in the pre-digital era of 2009. Today, the exchange of much more digital data presents a different landscape

THE CBER, UNDER CERTAIN CONDITIONS, ALLOWS CARRIERS POSSESSING A COMBINED MARKET SHARE OF LESS THAN 30% TO ENTER INTO CO-OPERATION AGREEMENTS TO PROVIDE JOINT LINER SHIPPING SERVICES.

Source: Janet Porter

THE European Commission has decided on unamended prolongation until April 24, 2024, of the regulation outlining the conditions under which container line shipping consortia can provide joint services without infringing European Union antitrust rules that prohibit anti-competitive agreements between companies.

This so-called Consortia Block Exemption Regulation was adopted in the pre-digital era of 2009. It allows, under certain conditions, container line shipping operators that possess a combined market share of less than 30% to enter into co-operation agreements to provide joint liner shipping services.

It can be argued that these conditions are not fulfilled with regard to vessel-sharing agreements equipped with logistics solutions with advanced state-of-the-art features that are available in the current digital era.

A VSA is an agreement concluded between lines, whereby the parties to the agreement discuss and agree on operational arrangements relating to the provision of liner shipping services, including the co-ordination or joint operation of vessel services and the exchange or chartering of vessel space.

They are usually reached among various partners within a shipping consortium who agree to operate a container line service along a specified route, using a specified number of vessels.

It is not necessary for each of the partners to have an equal number of vessels. The quantum of space obtained by each partner may vary from port to port and could depend on the number of vessels operated by the various partners. So the space available for loading and unloading at each of the ports-of-call is shared among the partners.

Agreements ensure reliable schedules and higher frequencies of service. The required co-operation is only for operational purposes. Each party retains its own market identity and pursues its own market strategy.

This implies that, from a commercial point of view, the parties to an agreement operate entirely separate from one another. Competition among them must remain unaffected.

Slot-reallocation is the hard core of VSAs. A party to an agreement that has a temporary lack of capacity can purchase slots from another party. The purchase price is set in addition and is based solely on the operational costs. All other costs, inclusive of initial pricing, are included in the formation of the tariffs that were determined by each party individually.

The market value of a VSA is determined by the quality of its co-ordination of the various operational issues.

The only way to achieve a perfect co-ordination is to make use of logistics solutions with the most advanced state-of-the-art features. Therefore, when deciding which line will be used, customers will choose for the line — and as such for the agreement to which it is a contracting party — that is best able to realise this degree of co-ordination. The decisive criteria are the service features, quality of service and functionality; not the price.

Most lines have moved from supply chain models to commodity-driven logistics solutions, incurring high costs. It follows that they will extend the scope of these logistics solutions to all VSAs to which they are party.

The core element of each agreement that makes use of logistics solutions with the most recent and advanced state-of-the-art features is the semantic interoperability of the computer programmes used by all the participating lines and possible other actors involved, both towards one another and towards the business and analytics, known as BI&A, system, which stores and processes Big Data and ensures a proper and smooth operation of the logistics chain.

Can shipping chart a green course in a post-coronavirus climate?

By August Braakman

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An EU regulation covering the period 2020-2030 determines both the percentage by which the member states must collectively have restricted their greenhouse gas emissions in the next decade, and the annual linear limit value to be achieved by each individual member state

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Semantic interoperability can only be achieved if all parties to the VSA use the same information technology standards. This would imply that all computer programmes should either be written in the same language, or be able to process each other's standardised output. These conditions having been met, all the agreements and arrangements, as well as the underlying

data that govern the operation of a VSA form an indissoluble legal entity, in other words, an entity that disintegrates once one of its constituting elements is being removed.

The data that is being exchanged is both structured and unstructured. Structured data follows a model that defines the various stages of the transportation process, the type of data these stages contain and the way in which they relate to each other. Traditional platforms for the aggregation of structured data are electronic data interchange, known as EDI, enterprise resource planning. known as ERP, systems and extensible mark-up language, known as XML.

Unstructured data does not conform to a specific model. It flows outside the normal channels and is mined from multiple sources. As a rule, structured data is confidential, whereas unstructured data is not, unless bound by strict confidentiality provisions. BI&A systems blend structured data with unstructured data. The Holy Grail is to present the data in high-quality visualisation formats that help laypersons understand what they are looking at, and (ideally) make the better decisions based on hard information.

The Consortia Block Exemption Regulation

Article 101(1) of the Treaty on the Functioning of the European Union, known as TFEU, 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 company to concert its market conduct.

The CBER ordains that the cartel prohibition of Article 101(1) TFEU shall not apply to activities that have the sole effect of promoting competition and do not affect the separate identity and/or the separate sales, pricing and marketing functions of the parties to a VSA. Exemptions relate to the following activities:
"1. the joint operation of liner shipping services including:
(a) the co-ordination and/or joint fixing of sailing timetables and the determination of ports-of-call;
(b) the exchange, sale or cross-chartering of space or slots on vessels;
(c) the pooling of vessels and/or port installations;" and
"4. any other activity ancillary to those referred to above which is necessary for their implementation, such as:
(a) the use of a computerised data exchange system."

The CBER contains a per se prohibition for "hard core" restrictions of competition. These restrictions include activities which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have for their object:
1. the fixing of prices when selling liner shipping services to third parties;
2. the limitation of capacity or sale, except for capacity adjustments in response to fluctuations in supply and demand;
3. the allocation of markets or customers.

Application of Article 101(1) TFEU presupposes that restriction of competition is an "object or effect". The "hard core" prohibition of the restrictions of competition, which are mentioned in the CBER, only refers to arrangements that have this for their object. Pursuant to the established case law of the European Courts, circumstances surrounding the attainment of fair and undistorted competition may also be used in interpreting the wording of arrangements for those areas, which are unclear. This means for example that, apart from the fixing of prices, price recommendations and tariff impositions by any person on transport users fall within the scope of the "hard core" prohibition of the CBER, provided they have a similar anti-competitive impact.

Arrangements that do not have a restriction on competition for their object may also be caught by the cartel prohibition because they have it for their effect. This effect does not need to have actually occurred. It is sufficient for it to appear likely in the near future. This second alternative for application of the cartel

prohibition therefore permits the Commission to intervene to prevent distortions of competition at an early stage.

Lines argue that the exemption, which the CBER provides for computerised data exchange systems in support of activities it exempts from the cartel prohibition, allows for the use of BI&A systems with their current state-of-the-art features.

This implies that, in their view, the use of this technology does not prevent lines that are party to a VSA that calls at a port situated within the EU/EEA (i) from maintaining a separate identity, (ii) from having separate sales, pricing and marketing functions and (iii) from having the sole object of promoting competition. This argumentation cannot be upheld.

All lines are party to one or more of the vast number of conference and discussion agreements that exist worldwide. These agreements serve as vehicles for exchanging strategically sensitive data. They are exempt from the application of antitrust laws in the United States and some Asian countries, like Singapore, but they were never exempt from application in the EU.

There can be no doubt that the data exchanged between lines within the framework of these agreements on the key parameters for the non-EU leg of the route provides an important indicator, if not the basis indeed, for the key parameters for the EU-leg of the route. In the occurring event, lines participating in a VSA would not meet the criteria of the CBER pertaining to the promotion of competition and the maintenance of a separate identity and/or separate sales, pricing and marketing functions.

The effects of the exchange of strategically sensitive data within the framework of conference and discussion agreements are significantly reinforced within VSAs that make use of advanced state-of-the-art logistics solutions and the ensuing semantic interoperability of the computer programmes used by participating lines and possible other actors involved, both towards one another and towards the BI&A system that governs the logistics chain.

Semantic interoperability is needed to enable machine computable logic, inferencing, knowledge discovery, and data federation between information systems in human readable language.

It is therefore concerned not just with the packaging of data (syntax), but also with the simultaneous transmission of the meaning together with the corresponding data (semantics).

It seems inconceivable that this exchange of data between lines participating in a VSA has the sole effect of promoting competition and does not add further strength to the co-ordination of their sales, pricing and marketing functions already resulting from their participation to one or more conference and discussion agreements.

The above demonstrates that, without having reached the stage where an agreement properly so-called has been concluded, VSAs equipped with logistics solutions with advanced state-of-the-art features serve as a vehicle substituting practical co-operation for the risks of competition.

Therefore, I take the view that, irrespective of whether the participating lines have a combined market share either exceeding or under 30%, VSAs of this kind cannot benefit from the CBER and are fully exposed to the prohibition of Article 101(1) TFEU.

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.