

EU antitrust law and the China trade question

by

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European Navigation



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August Braakman, the former secretary-general of the European Maritime Law Organisation, writes for Splash today. Geopolitical, economic and legal considerations force the EU Commission to delay extraterritorial implementation of EU antitrust law in the area of global seaborne trade. This article argues that parties involved in this trade should take legal action in order to protect their legitimate interests.

The EU Commission abstains from voluntary extraterritorial implementation of EU antitrust law on seaborne trade between China and the EU. The main reasons are:

1. Geopolitical. Implementation is independent of and contrary to global power politics.
2. Economic. Implementation distorts supply of China-origin primary and secondary necessities of life to the EU.
3. Legal. Implementation obviates mandatory simultaneous and equal pursuit of EU law on climate change.

However, the law is the law. It demands absolute compliance also from the EU Commission. Refusal, or clear failure, to apply EU antitrust law has severe consequences.

The framework for assessing distortions of competition under EU antitrust law, is called the relevant market. This is the market where undertakings capable of constraining their actual or potential competitors' behaviour and of preventing the latter from behaving independently of effective competitive pressure, must be identified and on which their conduct must be assessed.

The European Court of Justice held that this definition of the relevant market implies that EU antitrust law applies to areas outside the geographic scope of the Union. Anti-competitive conduct of entities that are neither nationals of an EU Member State nor physically or legally present in the EU, may produce effects in the Union that are caught by EU antitrust law if they have immediate, substantial and foreseeable effects on patterns of trade between Member States.

The situs of the anti-competitive conduct is irrelevant; it is the object or effect that must be accounted for. It is also irrelevant whether the conduct at issue is permitted by foreign jurisdictions. If in the matter at hand such conduct has the object of infringing EU antitrust law in the way referred to above, this law prevails.

Singapore is by far the most important port-of-call for intra-Asia trade and for mega-carriers cooperating within an alliance, to unload cargo destined for Asia and to continue their route with cargo destined for the European Union.

With regard to the intra-Asia part of the route cooperation between shipping lines is allowed under the block exemption of Singapore Competition Law. This law allows for arrangements on (i) technical, operational or commercial issues; (ii) price; and (iii) remuneration terms.

Shipping alliances organise China-EU seaborne trade through rigorous coordination of the organisational decision-making processes in the logistics chain by semantic interoperability of business intelligence and analytics systems and related computer programmes. This requires exchange of strategically sensitive information.

Such exchange must be assessed under EU antitrust law. Parameters are the subject matter of the information exchanged, the objective of the exchange, the economic and legal context in which that exchange takes place, the nature

of the goods or services affected and the real conditions of the functioning and structure of the market(s) in question.

Coordination of the kind referred to above necessarily covers the entire route. It must therefore be assessed whether rigorous coordination of anti-competitive arrangements pertaining to one or several of said parameters on the intra-Asia leg of the route prevents members of the alliance from (i) maintaining a separate identity, (ii) having separate sales, pricing and marketing functions, and (iii) having the sole object of promoting internal and external competition on the EU leg.

The Commission is legally obliged to implement EU antitrust law out of its accord, also where extraterritorial implementation is concerned. Complaints are not required.

In cases of a request or complaint by interested parties to apply EU antitrust law with regard to a specific case relating to China-EU seaborne trade and involving anti-competitive conduct on the intra-Asia part of the route that significantly affects patterns of trade between EU Member States, the Commission must take action within two months after having received the request or complaint. Failure to act allows applicants to lodge an appeal with the European General Court, arguing and providing evidence that such failure directly affects their commercial interests and leads to irreparable damage.

Interested parties may hold the Commission liable for damages resulting from refusal, or clear failure, to apply EU antitrust law in a case underlying a request or complaint. Damages take immediate effect. Hence, injunctive relief aimed at avoiding damages c.q. keep those as small as possible, is crucial.

In EU Member States claims for damages are awarded only following a full trial on the claim. Although gaining ground, the concept of awarding provisional damages is still in its infancy. Implementation of this concept may be done in case there is no doubt about the existence of an unlawful act and its causal links with the alleged damages, nor about the assessment of the damages, or at least part of it, being certain, uncontested and quantifiable.

In cases where evidence is provided that there is substantial likelihood of the conduct at issue being caught by EU antitrust law, provisional damages should be awarded. Failure to do so would deprive EU antitrust law of its function of protecting the interests of injured parties and safeguarding law-based reliability.

Considering the above, it is perfectly possible – and indeed probable – that sometime soon an interested party submits a request or a complaint to the Commission for extraterritorial implementation of EU antitrust law with regard to a specific case relating to China-EU seaborne trade and involving anti-competitive conduct on the intra-Asia part of the route that significantly affects patterns of trade between EU Member States.

