Brexit and its consequences for containerised liner shipping services

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The UK is leaving the EU. The fruits of European cooperation have failed to cure the germs of British nationalism. The UK government has announced a 'hard' Brexit. One of the key points of this approach is the exclusion of any direct role for the Court of Justice of the EU in the post-Brexit era. This demonstrates that the UK government does not wish to be restricted on any account in unilaterally adopting a policy that focuses on saving the British economy from decay. Further evidence for the adoption of this policy is the creation of a Department for Business, Energy and Industrial Strategy after the Brexit referendum of 23 June 2016. The measures implementing this policy may well prove to be contrary to the objectives of EU anti-trust law and thereby to the interests of EU businesses and citizens. This article addresses the question of whether EU anti-trust law offers adequate tools for challenging such measures in a situation where they relate to containerised liner shipping services on the Asia–North Europe routes.

Introduction

With around 80 per cent of global trade in volume and over 70 per cent of global trade in value carried by sea, maritime transport, including containerised liner shipping services, is highly important to international trade and the global economy.[1] The maritime industry is also highly important to the UK. It contributes around £14 billion annually to the UK economy,[2] while sustaining some 240,000 jobs.[3] On the Asia–North Europe routes, 15 out of 17 shipping loops call at a British port.[4]

The UK government has opted for a 'hard' Brexit. It is believed that the ensuing economic and political uncertainty and gross domestic product (GDP) slowdown will lead to a negative impact on box volumes.[5] The objectives of UK anti-trust law differ somewhat from those of the EU. While the main thrust of EU anti-trust law is the maintenance of fair and undistorted competition within the Union, under UK anti-trust law – apart from the promotion of competition, which is the principal concern – other issues, including the balance between payment, employment and foreign ownership of key companies, play a role.[6] Hence, the objectives of UK anti-trust law do not seem to interfere

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[1] UNCTAD, 'Liner shipping: is there a way for more competition?' Discussion Paper No 224 (March 2016) 7.

[2] 'Expanded ports immersed in dogfight for container traffic' *Financial Times* (22 March 2015).

[3] A&L Goodbody 'Brexit and shipping' *In Focus* http://www.algoodbody.com/media/Brexit%20and%20Shipping.pdf.

[4] www.johngood.co.uk/2017/05/23/brexit-shipping-industry/.

[5] BIFA 'What Brexit means for UK shipping (July 2016) http://www.bifa.org/news/articles/2016/jul/what-brexit-means-for-uk-shipping.

[6] See David Hall, James Flynn and Diana Good *National Report on the United Kingdom* in A J Braakman (co-author and editor) 'The application of Articles 85 and 86 of the EEC Treaty by National Courts in the Member States' European Commission ISBN 92-828-0901-3.

with the UK government adopting a policy that gives precedence to the neutralisation of the negative effects that Brexit may have on crucial parts of its economy such as the maritime industry, at the expense of fair and undistorted competition. The express exclusion of any direct role for the Court of Justice of the European Union (CJEU) in the post-Brexit era and the creation on 14 July 2016 – ie after the Brexit referendum of 23 June 2016 – of a Department for Business, Energy and Industrial Strategy (responsible for UK Government policy in the area of, amongst others, competition, sponsoring and overseeing the UK's Independent Competition and Markets Authority) seems to indicate that the adoption of such a policy is more than a chimera.[7] The implications this policy may have for the application of EU anti-trust law may be illustrated from the following (hypothetical) example.

In the post-Brexit era, the UK will no longer be subject to EU laws and regulations. As a result, the UK government will be free to negotiate trade agreements with Asian exporting countries. It will also be at liberty to develop new legislation that specifically suits these agreements. An important issue in the trade agreements between Asia and the UK is the transportation of containerised goods. For the intra-Asian leg of their routes, container lines that carry out these transports make use of the Singapore Competition (Block Exemption for Liner Shipping Agreements) Order 2006 which came into operation on 1st January 2006.[8] This block exemption allows for arrangements on (i) technical, operational or commercial matters, (ii) price, and (iii) remuneration terms. In order to make UK ports more attractive as first ports-of-call and to secure a constant flow of traffic to and employment within UK ports, the UK government may decide to extend the impact of the Singapore block exemption to the entirety of Asia–UK routes by adopting an exemption from the prohibition of Chapter I of the UK 1998 Competition Act along the same lines as those provided by the Singapore block exemption.

There can be little doubt that arrangements on the key parameters of the rates for the intra-Asian leg of the routes provide an important element – if not the basis, indeed – for the pricing policy adopted for cargo contingents that remain on board, destined for ports in the UK.[9] An extension of the Singapore block exemption in the above sense would considerably reinforce the anti-competitive effects of these arrangements.

The question now arises whether anti-competitive arrangements such as the above – that would appear to be in the interest of the UK maritime industry in the post-Brexit era – may have effects on competition within the EU and on intra-Union trade that fall within the scope of EU anti-trust law. An affirmative answer raises the issue of whether EU anti-trust law offers tools sufficiently effective for the protection of this law and the interests of EU businesses and citizens. Both issues must be primarily answered in light of the concepts of the extra-territorial application of EU anti-trust law and the relevant market and furthermore in light of the consortia block exemption.[10]

The concept of the extra-territorial application of EU anti-trust law

In order for Articles 101 and 102 of the of the Treaty on the Functioning of the European Union (TFEU) to apply, it must be demonstrated that anti-competitive agreements or practices involving third countries or undertakings located in third countries have the object or effect of substantially affecting intra-Union trade. It is consistent case law that a restriction of competition between global container liner shipping companies may very well meet this criterion.[11] It is important to note that the *situs* of the anti-competitive conduct is irrelevant. It is the effect that must be accounted for.[12]

[7] Bruce Lyons, David Reader, and Andreas Stephan 'UK competition policy post-Brexit: in the public interest?' Centre for Competition Policy Working Paper (4 November 2016) 16–12. Available at SSRN: https://ssrn.com/abstract=2864461.

[8] Singapore Competition Act (Chapter 50 B) No S 420.

[9] A J Braakman 'Hub-and-spoke cartels in the container liner shipping industry' (2017) 23 *Journal of International Maritime Law* 54.

[10] [2009] OJ L 79 of 25 March 2009.

[11] Joined Cases T–24/93 to T–26/93 and T–28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II–1201 paras 202 and 203; Case T–395/94 *Atlantic Container Line v Commission* ECLI : EU : T : 2002 : 49 paras 72–74; Case COMP/37.396/D2 Rev *TACA* paras 73–75.

[12] Joined Cases 89/85, 104/85, 114/85, 116–17/85 and 125–129/85 *Ahlström Osakeyhtiö and Others v Commission ('Woodpulp')*; Case T–102/96 *Gencor Ltd v Commission* [1999] ECR II–753.

Anti-competitive arrangements of undertakings established in third countries instructing their subsidiaries established within the EU – either directly or indirectly by way of exercising 'decisive influence' over the policy of these subsidiaries – to act in accordance with these arrangements, are caught by the prohibition of Article 101(1) of the TFEU.[13] This is the so-called territoriality doctrine.

Collusive arrangements also fall within the scope of EU anti-trust law when anti-competitive conduct is implemented within EU territory:[14] 'Collective or unilateral conduct is implemented within the internal market – and thus unquestionably triggers the application of Articles 101 and 102 of the TFEU – when there is an element of intra-territorial conduct'.[15] In other words: 'when part of the unlawful conduct is executed, applied or put into effect within the internal market because one of its essential constituent elements takes place there'.[16] This so-called implementation doctrine is an extension of the territoriality doctrine.

Territoriality and implementation are not the only jurisdictional criteria triggering the application of EU anti-trust law. Such application may also be triggered by foreign conduct of entities that are neither nationals of an EU Member State nor physically or legally present in the Union, considering the effect produced by that conduct in the EU market: 'That is the case, for example, of a number of provisions governing transactions in financial instruments or other types of economic conduct'.[17,18]

In these circumstances, the application of EU anti-trust law cannot be based on a link or effect that is too remote or purely hypothetical: 'In a globalised economy, conduct that takes place anywhere in the world, for example in China, will almost inevitably have some sort of effect in the European Union'.[19] Such conduct can only be justified when the anti-competitive conduct has immediate, substantial and foreseeable effects in the EU market.[20] In other words, the effects must be 'qualified' and this so-called qualified effects doctrine falls outside the territoriality doctrine.

In the area of containerised liner shipping services, the litmus test for assessing whether the anti-competitive effects of agreements or practices directed at foreign markets satisfy the qualified effects doctrine is whether they make it possible for lines 'to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact, future developments that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States',[21] thus forming 'a sufficient basis for the participating undertakings to concert their market conduct and thus substitute practical cooperation between them for competition and the risks that that entails'.[22]

In spite of the advice issued by several Advocates General, until recently the CJEU has been reluctant to endorse the qualified effects doctrine.[23] The approach of the CJEU has presupposed anti-competitive conduct adequately linking up with EU territory.[24] As such, it ensures that 'the basic

[13] Case C–48/69 *Imperial Chemical Industries v Commission ('Dyestuffs')* [1972] ECR 619.

[14] *Ahlström Osakeyhtiö and Others v Commission* (n 12) paras 16, 18.

[15] Cf V Lowe and C Staker 'Jurisdiction' in M D Evans (ed) *International Law* (3rd edn Oxford University Press 2010) 322, 323.

[16] Case C–413/14 *Intel Corporation Inc v European Commission* EU:C:2017:632; Opinion of A-G Wahl (delivered on 20 October 2016) ECLI:EU:C: 2016:788, para 293.

[17] For an overview of those provisions and a critical assessment see J Scott 'The new EU "extraterritoriality" ' (2014) 51 *Common Market Law Review* 1343.

[18] *Intel Corporation Inc v European Commission* (n 16); Opinion of A-G Wahl (n 16) para 298.

[19] ibid para 299.

[20] *Gencor v Commission* (n 12) para 243.

[21] Case 42/84 *Remia and Others v Commission* [1985] ECR 2545 para 22.

[22] Case C–8/08 *T-Mobile Netherlands* [2009] ECR I-4529 para 59.

[23] *Intel Corporation Inc v European Commission* (n 16); Opinion of AG Wahl (n 16) para 293. See also see fn to para 295 'For endorsements of an effects based approach to jurisdiction see in particular Opinion of Advocate General Mayras in *Imperial Chemical Industries v Commission,* 48/69, EU:C:1972:32, points 693 et seq., and Opinion of Advocate General Darmon in Joined Cases *Ahlström Osakeyhtiö and Others v Commission,* 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU: C: 1988:258 ('Opinion in Woodpulp'), point 19 et seq. In a similar vein, Opinion of Advocate General Wathelet in *InnoLux v Commission*, C–231/14 P, EU: C: 2015:292, point 49 et seq'.

[24] *Intel Corporation Inc v European Commission* (n 16); Opinion of AG Wahl (n 16) para 284, with references to the case law of the CJEU in note 172.

principle of territoriality under public international law is observed'.[25] This approach may well have been induced by the insistence on the part of the UK on the territoriality principle.[26]

On 20 October 2016, AG Wahl advised the CJEU once more to adopt the qualified effects doctrine.[27] One of the arguments underlying this advice is that the US has preceded the EU by fully adopting this doctrine.[28] In the US, anti-trust law applies if the anti-competitive conduct has a 'direct, substantial, and reasonably foreseeable' effect on US commerce, either domestic or non-direct import or export, and gives rise to an anti-trust claim.[29] This approach implies that international cartels, even when they operate entirely abroad, fall within the scope of US anti-trust law as soon as their anti-competitive effects harm US consumers.[30] In its judgment of 6 September 2017, the CJEU followed the advice of AG Wahl and his colleagues and adopted the qualified effects doctrine.[31]

In terms of the application of the qualified effects doctrine to containerised liner shipping services a word of caution seems appropriate, in particular with regard to the post-Brexit era. In applying this doctrine, a distinction must be made between anti-competitive conduct that has the object of preventing, restricting or distorting competition in the EU market, and conduct that only has this effect outside the EU:

> Where the object of the agreement is to restrict competition inside the Community, the requisite effect on trade between Member States is more readily established than when the object is predominantly to regulate competition outside the Community.[32]
>
> In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.[33] Special regard must be given to the question of whether the agreement or practice affect the activities of other undertakings inside the Community.[34]

In the post-Brexit era, anti-competitive arrangements concerning Asia–UK trade do not usually have the object of restricting competition inside the Union. Therefore, a more detailed case-by-case analysis must consider whether these arrangements have an immediate, substantial and foreseeable effect on the EU market, and one that substantially affects trade between Member States. In view of the economic interdependence between the UK and the EU which will continue to exist in the post-Brexit era, this analysis must particularly be carried out on the basis of the qualified effects doctrine.

The UK will argue that a robust application of this doctrine infringes the territoriality principle as set out in section 2(3) of the UK Competition Act 1998 and/or obstructs its sovereignty in adopting a policy that focuses on saving the British maritime industry from decay. The ensuing debate is not likely to be completed in the near future.[35]

The concept of the relevant market

EU anti-trust law aims at creating a system of undistorted competition within the internal market. The qualified effects doctrine having been accepted, it is clear that anti-competitive conduct that falls within the scope of this doctrine must also be analysed within the framework of the 'relevant market'. The definition of the relevant market establishes 'the framework within which competition policy is

[25] *Intel Corporation Inc v European Commission* (n 16); Opinion of AG Wahl (n 16) para 284.
[26] Section 2(3) of the UK Competition Act is based on the implementation doctrine and therefore favours the territoriality doctrine.
[27] *Intel Corporation Inc v European Commission* (n 16); Opinion of AG Wahl (n 16) para 296.
[28] *Hartford Fire Insurance v California*, 544 US 155 (1993) (US Supreme Ct).
[29] Foreign Trade Antitrust Improvements Act 1982 (FTAIA) 15 USC para 6a.
[30] HR Rep No 97–686, at 10 (1982), reprinted in 1982 USCCAN 2487, 2495.
[31] ECLI:EU:C:2017:632, para 46.
[32] Guidelines on the effect on trade concepts in Articles 81 and 82 of the Treaty, OJ C101/81, para 103.
[33] ibid para 106.
[34] ibid para 107.
[35] OECD Working Party No 2 'Competition Issues in Liner Shipping' (19 June 2015) DAF/COMP/WP2 (2015) 3, pt 30.

applied by the EU Commission. [Its objective is] to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and preventing them from behaving independently of effective competitive pressure'.[36] In other words, it must be determined whether an arrangement has the object or effect of preventing, restricting or distorting competition, thereby substantially restricting or eliminating competition on the relevant market and affecting trade between Member States.[37]

The 1997 European Commission Notice on the definition of the relevant market provides 'guidance as to how the Commission applies the concept of the relevant product and geographic market'.[38] The limitation of the definition of the relevant market to the product and the geographic market is out of date, particularly with regard to containerised liner shipping services. The reason for this limitation being out of date is that, over the past two decades, maritime logistics have developed more and more into a high-technology industry (HTI).

An HTI is 'characterised by rapid innovation with the creation of new products, platforms, or services, and by the reduction of production costs as a result of competitive pressure … [It relies heavily] on intellectual property'.[39] 'HTI markets feature high sunk costs, regulatory barriers to entry, and often involve strategic bottlenecks. They are characterized by a high degree of imperfect competition'.[40] The constant and extremely rapid pace of change in HTI causes this imperfect competition. A small advantage in early competition as a result of a new innovation in the field of business intelligence and analytics (BI&A) systems – which are entirely based on HTI – may 'tip' the market, particularly when the innovative product is protected by intellectual property (IP) rights.[41] BI&A is often referred to as 'the techniques, technologies, systems, practices, methodologies, and applications to analyse critical business data to help an enterprise better understand its business and market and make timely business decisions'.[42] It is especially this possibility of making or adjusting business decisions at very short notice that is 'provoking a move from supply chain models to commodity driven logistics solutions'.[43]

Lines and alliances increasingly rely on BI&A in making business decisions on arrangements that fall within the block exemption for consortia agreements, such as coordination of sailing timetables, cross-chartering of space or slots on vessels, pooling of services of port installations, the use of joint operating offices, the provision of containers etc. However, the block exemption specifically prohibits 'hard-core' restrictions, such as fixing prices with third parties, limitations of capacity or sales (other than temporary adjustments for coping with fluctuations in supply and demand) and allocation of customers.[44]

BI&A may push arrangements permitted under the consortia block exemption into the area of 'hard-core' restrictions prohibited under EU anti-trust law. This may be illustrated by the following (again, hypothetical) example. An alliance, either directly or indirectly through one of its participating lines, acquires exclusive rights on a new BI&A product protected by IP rights. This new product substantially improves the coordination of sailing timetables within the alliance. Other lines or alliances

[36] Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] OJ C 372 (9 December 1997) 5–13, point 2.

[37] Christian A Melishek *The Relevant Market in International Economic Law: A Comparative Antitrust and GATT Analysis* (Cambridge University Press 2013) 274.

[38] Commission Notice on the definition of relevant market for the purpose of Community competition law (n 36) 5–13 point 1.

[39] Alexander Italianer 'Level playing field and innovation in technology markets' Speech at the Conference on Antitrust in Technology (Palo Alto, 28 January 2013) 2.

[40] https://www.slideshare.net/dr_martyn_taylor/competition-law-in-high-technology-industries-lessons-for-australia.

[41] Jonathan B Baker 'Can antitrust keep up? Competition policy in high-tech markets' *Brookings* (1 December 2001).

[42] Hsinchun Chen and others 'Business intelligence and analytics: from big data to big impact' (2012) 36(4) *MIS Quarterly* 1165.

[43] The digital aspects of maritime transport will be discussed at the FEPORT Third Annual Stakeholders' Conference in Brussels on 30 November 2017, 'Maritime logistics chains and the perfect storm'.

[44] McDermott, Will & Emory 'Maritime transport subject to EU general competition guidelines from 26 September 2013' (25 February 2013) www.mwe.com.

cannot respond at short notice by bringing up a product that 'leapfrogs' the alliance's product. This causes shippers to opt for this new product disproportionally often. As a result, other lines and alliances lose their competitiveness for the duration of the validity of this new product's IP rights and may even be phased out of the market. Eventually, this will give the line, and thereby the alliance it belongs to, entrenched market power.[45] In this hypothetical situation, the BI&A product transforms the coordination of sailing timetables within the alliance offering this product into conduct that has immediate, substantial and foreseeable anti-competitive effects on the EU market. Such conduct falls within the prohibition of Article 101(1) and/or 102 of the TFEU, at least during the validity of the IP rights. This demonstrates that apart from the product and geographic dimension, the temporal dimension must also be taken into account in defining the relevant market.

Dispute resolution

As stated above, a 'hard' Brexit means the exclusion of any direct role for the CJEU in the post-Brexit era. Together with the absence of an allocation of jurisdiction between the courts of the EU and the UK and mutual recognition and enforcement of judgments in commercial cases, this would imply that in the post-Brexit era the current dispute resolution mechanisms would become ineffectual. Therefore, adequate alternative arrangements will have to be adopted in order to provide legal certainty.

The express exclusion of any direct role for the CJEU makes it impossible to create alternative dispute resolution mechanisms that will be as effective as the present ones. The idea that international arbitration can serve as a suitable alternative – as advocated by the UK[46] – is nonsensical. Apart from being less transparent than judicial awards, arbitral awards are ad hoc settlements that moreover do not create a body of case law.

I am pessimistic about the chances of this legal minefield being defused in the short term. Together with the definitions of the concepts of extra-territorial application of EU anti-trust law and of the relevant market and with the consortia block exemption, all three of them in their current form, the absence of adequate dispute-resolving mechanisms may culminate in an unparalleled burst of legal uncertainty. However, this does not relieve undertakings from their obligation to assess the possible applicability of Articles 101(1) and 102 of the TFEU to their activities. Therefore, the Commission should provide legal certainty.

I take the view that the first step to provide this legal certainty is for the EU Commission to revise the definitions of the concepts of the extra-territorial application of EU anti-trust law and of the relevant market, as well as the consortia block exemption, while accounting for the use of BI&A. The need to revise these concepts and the consortia block exemption in particular pertains to containerised liner shipping services. This is mainly due to the ever-increasing impact of BI&A systems such as big data[47] and blockchain technology[48] in the areas of alliances and ports. Before expanding on the way these revisions should be carried out, I will briefly focus on the present status quo of alliances and ports from an antitrust point of view.

Alliances

Lines take the view that alliances are full-blooded vessel-sharing agreements and that participation will not affect mutual competition.[49] This view is unacceptable. All lines that participate in one of

[45] This example is based on the decision of the Commission of 4 September 2012 in Case No COMP/M.6314 – *Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV* C(2012) 6063 final, Brussels (4 September 2012).

[46] The United Kingdom's exit from and new partnership with the European Union (web), section 2, Ref: ISBN 9781474140669, Cm 9417PDF, 1.48MB, 77 pages.

[47] See Chen and others (n 42).

[48] For an introduction to blockchain technology see https://www.linkedin.com/pulse/blockchain-issues-competition-consumer-law-michael-milnes.

[49] See registration of the 2M alliance with the Chinese Ministry of Transport under the 'Bei-An' or 'filing for the record' procedure.

the three mega-alliances – 2M, The Alliance and The Ocean Alliance – also participate in one or more of the roughly 65 conference and discussion agreements that exist worldwide. These agreements serve as vehicles for exchanging strategically sensitive information including pricing data relating to routes that fall within jurisdictions that allow for such conduct, such as Singapore, for instance. In this context, it should be noted that lines may also influence prices through the joint setting of capacity. Because they share capacity, commonality of costs may lead to alignment of prices.[50]

To date, the EU Commission has turned a blind eye on the possible effects on the EU market of arrangements allowed for under the Singapore Competition (Block Exemption for Liner Shipping Agreements) Order 2006. This, in my view, cannot be justified. In cases where containers are en route from Asia to Northern Europe, with cooperation and exchange of strategically sensitive information concerning the intra-Asian leg of the routes, there can be no doubt that this enables lines to foresee, with a sufficient degree of probability, the strategically sensitive data that determine business on the second leg of the route. Therefore, it would appear that the Commission has turned a blind eye on forms of collusion that fall within Article 101(1) of the TFEU. This manifestation of negligence is made even worse owing to the fact that the anti-competitive effects these arrangements have on the EU market may well be reinforced by hub-and-spoke cartels that are active in the container liner shipping industry. Hub-and-spoke cartels can be defined as 'the exchange of strategically sensitive information between competitors through a third party that facilitates the cartelistic behaviour of the competitors involved'.[51] For containers that are en route from Asia to Northern Europe, a hub will take account of prices that have been fixed for the intra-Asia part of the routes in accordance with the Singapore Competition Order.[52] Thus, it may well reinforce the effects of cartelistic behaviour permitted for the intra-Asia leg of the route under the Singapore block-exemption on the second leg of the route to Northern Europe route, where this behaviour is prohibited under EU anti-trust law.

The consortia block exemption offers generous allowances on exchange of information between parties to an alliance. It has been argued above that the disposal by a line or the alliance it belongs to of a new BI&A product protected by IP rights may push these exchanges of information into the area of 'hard-core' restrictions prohibited under EU anti-trust law. Shipping exchanges may reinforce the ensuing anti-competitive effects by providing a line with information on the offers it has released and the contracts that were accepted for that line. The rules of shipping exchanges may provide for this information to be confidential so it will not be made available to other lines. However, it can be argued that under the consortia block exemption a line is permitted to share this information with its partners in the alliance. If this argument was to remain convincing, it could subsequently be argued that, from the perspective of alliances and the consortia block exemption in its current form, shipping exchanges unintentionally serve as a hub, which makes the strategic variables of the parties to an alliance mutually transparent, thereby serving as a benchmark, which makes it easier for the parties in the alliance to collude tacitly.[53,54] Therefore, particularly in the event that the information being exchanged is couched in a new BI&A product that is protected by IP rights and is solely under the control of a line or the alliance it belongs to, special regard must be had to the ensuing anti-competitive effects.

There is no sound theory indicating the moment when tacit collusion falls within the scope of Article 101(1) of the TFEU.[55] In the absence of an adequate economic theory, 'each case must be assessed

[50] Speech by Henrik Moersch given at the 22nd EMLO Conference that was held in London on 30 September 2016.

[51] For the purposes of this article I shall use the definition of B Vereecken for hub-and-spoke cartels in B Vereecken *Hub and Spoke Cartels in EU Competition Law* (Universiteit Gent 2014–15) 3.

[52] See A J Braakman 'Hub-and-spoke cartels in the container liner industry' (n 9) 50 ff.

[53] Horizontal guidelines, OJ C11/1 of 14 January 2011, para 77.

[54] See for benchmarking in the US, J Thomas Ross, 'antitrust issues related to benchmarking and other information exchanges' ABA Section of Antitrust Law and ABA Center for Continuing Legal Education's Teleseminar on Benchmarking and Other Information Exchanges among Competitors (3 May 2011).

[55] Mike Walker in EMLO Roundtable Discussion (19 June 2012) 13 http://www.emlo.org.

on its own facts according to the general principles set out in these … [Horizontal] guidelines'.[56] Since lines involved in this assessment will call upon the confidential nature of the data they were forced to submit, a case-by-case approach will not provide any legal certainty as to whether a case would give proof of tacit collusion within the scope of Article 101(1) of the TFEU. With regard to alliances, this lack of legal certainty is aggravated by the fact that the cooperation between lines within an alliance is increasingly based on BI&A and that there is no guidance on when BI&A – particularly when protected by IP rights – transforms arrangements that are explicitly permitted under the consortia block exemption into forms of tacit collusion prohibited under EU anti-trust law.

A robust application of the concept of the extra-territorial application of EU anti-trust law in the post-Brexit era is called for in order to protect the objectives of EU anti-trust law and the ensuing interests of EU businesses and citizens vis-à-vis explicit or tacit collusion by lines that have substantial effects on trade between Member States. Among other things, this would mean that the effects of this collusion on the EU market as a result of arrangements allowed for under the laws of Singapore and, as the case may be, the UK in the post-Brexit era, must be addressed, and all the more so since their anti-competitive effects are substantially reinforced by BI&A that is solely under the control of a line or the alliance it belongs to, particularly when protected by IP rights.

Ports

A line, including the alliance it belongs to, determines the port-of-call; not policy-makers or regulators.[57] The same goes for the determination of a container marine terminal operator. This is the entity for negotiation on the demurrage,[58] detention[59] and *per diem*[60] charges for the use of terminal space and equipment.

Shippers, consignees and drayage providers cannot independently select a terminal operator or negotiate the charges for its services. Consequently, in concluding contracts with lines, they depend on the charges agreed between the line and the terminal operator. These charges do not accrue until the expiration of a 'free time' period, being an initial period for the efficient removal of cargo or return of equipment. Free time is not a gratuity but forms part of a line's transportation obligation and is therefore included in the tariffs for transportation. Lines will set out specific free time periods in their tariffs. They may also specify free time in their service contracts. Free time may be different both at the origin and the destination of the cargo on account of the unique transportation and port operations involving cargo loading and tendering of cargo for delivery.[61] There is no generally used formula to determine when a line should adjust the normal allowance for free time in a situation where the terminal operator is unable to load or tender cargo for delivery as a result of factors beyond the control of shippers, consignees and/or drayage providers. Thus, there is tremendous inconsistency in the conduct of lines with respect to free time and thereby in charges for container handling services.

The choice of a port-of-call and a container marine terminal operator is increasingly influenced by the facilities offered for the handling of ultra-large container ships (ULCSs). The current increase in the deployment of ULCSs is spectacular, with 10–15 new ULCSs joining the fleet every three months. This development has put ports and terminal operators under ever-increasing pressure to adjust their infrastructure and technical superstructure to be able to receive and handle ULCSs successfully. The investments that must be made in this respect are considerable. They vary from special facilities for transhipment to rail, road and barge to tailor-made cranes, berths, terminals, quays and staff well versed in handling ULCSs.

[56] Horizontal Guidelines (n 53) para 22.

[57] V Flitsch 'Port cooperation between European seaports: fundamentals, challenges and good practices' Frauenhofer Center for Maritime Logistics and Services CML (23 September 2016) para 2 www.guengl.eu.

[58] Demurrage is the charge assessed for cargo occupying terminal space.

[59] Detention is the charge to shippers and consignees for use of ocean containers and other equipment (eg chassis).

[60] The *per diem* is the daily charge to drayage providers for use of ocean containers and equipment.

[61] FMC Report 'Rules, rates and practices relating to detention, demurrage, and free time for containerized imports and exports moving through selected United States ports' (2015) 12.

Financial participation by governments in ports is decreasing rapidly. Therefore, lines that deploy ULCSs – or the group of companies these lines belong to – have become the most prominent private investors where the infrastructure and technical superstructure of ports is concerned. This is owing to the fact that instant handling of ULCSs is of critical importance to the economies of scale that lines seek to realise by deploying such vessels.

Lines that are party to one of the three mega-alliances are the ones that deploy most ULCSs, if not all of them. Therefore, it is not only these lines but also the mega-alliance they form part of that take a vested interest in priority access to a port's essential facilities. This may result in a situation where lines that participate in a mega-alliance collectively decide on the actions that one of them will take individually in order to achieve this goal of priority access, not only for itself but also for the alliance to which it belongs. As a consequence, in the port concerned, this line and thereby its alliance may well acquire a dominant position on the market of container marine terminal services provided to ULCSs.

Should a line, either directly or through a sister-company, have a dominant position in the provision of container marine terminal services to ULCSs and then refuse a (potential) competitor access to its facilities, this conduct must be addressed within the scope of Article 102 of the TFEU. Such refusal of access would only constitute an abuse in cases where the line or its sister company has a genuine stranglehold on the market of these services. It does not suffice that its control over a facility should give it a competitive advantage.[62] Under section 2 of the 1890 Sherman Act, the US authorities take the same view. However, they add that a company in a dominant position and in control of an essential facility may justify a refusal to contract for legitimate technical or commercial reasons or – possibly – on grounds of efficiency.[63]

In cases where a dominant undertaking is required to allow access to essential facilities installed for its own use, it must be fully compensated for by being allowed to allocate an appropriate portion of its investment costs to the supply and to make an appropriate return on this investment, having regard to the risk level involved.[64] These fees will be significantly higher than those charged for the handling of non-ULCSs and, as a consequence, may well be prohibitive. Therefore, the lines and alliances that – either directly or indirectly through a sister-company – provide container terminal handling services to ULCSs may well acquire a dominant position on the market of container marine terminal services, both of ULCSs and non-ULCSs.

The investments that lines are forced to make in order to secure the handling of ULCSs are such that, directly or indirectly, many lines that deploy ULCSs have become port service providers rather than merely port users. Vertical integration of lines with container marine terminal operators mainly occurs in the case of lines taking over existing terminals. In the period between 2000 and 2011, lines buying shares in container marine terminal operators carried out about 30 transactions.[65] In this context, it should be noted that during a plenary session on 28 March 2017, the European Parliament adopted the revised Port Services Regulation (PSR). The overall objective of the PSR is to promote intra- and inter-port competition by creating a level playing field for all stakeholders in deep-sea ports. Although weak in terms of enforcing competition, it seems safe to assume that the PSR will facilitate vertical integration even further.

Vertical integration of lines with container marine terminal operators improves the quality of door-to-door services and thereby matches shippers' expectations.[66] The most efficient way to support this

[62] Case C–7/97 *Oscar Bronner* [1998] ECR I–7791.

[63] On the essential facilities doctrine under US law see Phillip Areeda 'Essential facilities: an epithet in need of limiting principles' (1989) 58 *Antitrust Law Journal* 841; Abbott Lipsky, J Gregory Sidak 'Essential facilities' (1999) 51 *Stanford Law Review* 1187; Robert Pitofski, Dona Patterson and Jonathan Hooks 'The essential facilities doctrine under US antitrust law' (2002) 70 *Antitrust Law Journal* 443; William Blumenthal 'Compulsory access under the antitrust laws' http://www.kslaw.com/library/pdf/blumcompulsory.pdf.

[64] See the excellent Opinion of AG Jacobs in Case C–7/97 *Oscar Bronner* [1998] ECR I–7791 para 39. See also Case 53/87 *CICRA and Another v Renault* [1988] ECR 6039.

[65] OECD Competition Issues in Liner Shipping (10 June 2015) DAF/COMP/WP2(2015) 3, para 161.

[66] H E Haralambides and others 'Costs, benefits and pricing of dedicated container terminals' (2002) 4(1) *International Journal of Maritime Economics* 21.

improvement is to manage the entire logistics chain of door-to-door services by using BI&A systems that are solely under the control of the line or the alliance it belongs to and, where possible, by protecting (parts of) these systems by IP rights. This is the best way to remain a step ahead of competition and to achieve profitability.[67]

When assessed from the perspective of container marine terminal services, this development may well create a divergence in the competitive position of container marine terminal operators that are vertically integrated with a line – either directly or though a sister-company thereof – on the one hand, and non-vertically integrated terminal operators on the other. BI&A that is solely under the control of a vertically integrated terminal operator enables a far quicker and more efficient reaction to sudden unexpected changes in the logistics chain than do data, which – after all – are publicly available and for non-vertically integrated terminal operators to make do with. Although non-vertically integrated terminal operators may consider setting up BI&A systems of their own, it seems unlikely that these systems will close the competitive gap, if only because BI&A systems, which relate to their vertically integrated competitors, account for data that concern the transport phase of the route and are not publicly available. Therefore, it seems safe to say that vertical integration of lines with container marine terminal operators together with the use of BI&A solely under the control of the integrated entity may well have a considerable effect on competition on the market of containerised liner shipping services – and more specifically on the markets of container marine terminal services and ports, in particular if (part of) the BI&A is protected by IP rights.

Brexit

Brexit exempts the UK government from the obligation to apply the PSR. This will come as a relief to most, if not all, undertakings operating on the UK market of containerised liner shipping services. The ground for this relief is that, over the years, the UK has conducted a policy aimed at transferring property rights, duties and obligations to private sector organisations, as a consequence of which private companies have by now become major port authorities. As in the UK ports do not appear to rely heavily on state aid, ownership structures have changed to ports owned and run by private companies.[68]

In arguing against the PSR, the UK Major Ports Group (UKMPG) and the British Ports Association (BPA) have pointed out that its application could result in private ports losing freedom over port charges and in commercial confidentiality being threatened.[69] These arguments demonstrate that in the post-Brexit era the anti-competitive effects of conduct that relates to port activities may be much harder to assess than on the Continent. This would apply all the more so if the UK government were to adopt a policy that gives precedence to the neutralisation of the negative effects that Brexit may have on crucial parts of its economy, such as the maritime industry, at the expense of fair and undistorted competition and a level playing field for all stakeholders.

I take the view that, even if the UK government were not to adopt such a policy, UK competition authorities will show restraint in taking action against distortions of competition that result from the combined effects of the deployment of ULCSs, the vertical integration of lines with container marine terminal operators and the management of the entire logistics chain of door-to-door services by BI&A systems solely under the control of a line or the alliance it belongs to. The economic consequences of a robust stance may well turn out to be too severe in comparison to the other issues of public interest that must be taken into account while applying UK anti-trust law.

A restrained approach by the UK competition authorities increases the risk that the ensuing distortions of competition on the UK market produce immediate, substantial and foreseeable effects on the EU market. That would, for example, be the case if lines were to divert their ULCSs to UK ports such as Felixstowe instead of Rotterdam or Antwerp, since distortions of competition allowed by UK anti-trust law offer more favourable conditions there.

[67] McKinsey 'The hidden opportunity in container shipping' (November 2014) www.mckinsey.com.our-insights.
[68] See Flitsch (n 57) para 3.3.
[69] *CM Container Management* (24 July 2017).

Brexit provides all the more reason for applying the qualified effects doctrine. Only a robust application of this doctrine in the post-Brexit era will prevent anti-competitive conduct directed at the UK market, and allowed for under UK anti-trust law, from having immediate, substantial and foreseeable effects on the EU market and on trade between Member States, despite not having this object.

Conclusion

The market of containerised liner shipping services is a global market, dominated by lines and the alliances they belong to. The ultimate goal of a line is to ensure its vessels, and particularly its ULCSs, are fully loaded during the year. Competition between lines being cut-throat, lines have formed alliances in order to improve their chances of survival.

The consortia block exemption offers generous allowances for the exchange of information between parties to an alliance. As this information relies heavily on BI&A, it seems safe to say that BI&A permeates the whole implementation process of the mainstreaming strategy of a line from its origin right through to the destination of the containers. As it will be impossible to break BI&A down into parts that relate to arrangements that are and are not allowed for under the consortia block exemption, lines will argue that the consortia block exemption allows them to cooperate with their alliance partners on the basis of the entire BI&A systems solely under the control of that line or of the alliance to which it also belongs, when part of the BI&A is also protected by IP rights. I am not overly convinced by these arguments. Cooperation in this sense almost inevitably results in the line or the alliance it belongs to acquiring a dominant position on the market of container marine terminal services, in particular when related to ULCSs. Refusal of access to these facilities to non-ULCSs or excessive fees for their use may well push cooperation as allowed for under the consortia block exemption into the area of 'hard-core' restrictions, prohibited under EU anti-trust law. Thus, the spectacular increase in the deployment of ULCSs and the vertical integration of lines – either directly or through sister-companies – with container marine terminal operators together with the management of the entire logistics chain of door-to-door services by BI&A systems solely under the control of a line or the alliance it belongs to, particularly if protected by IP rights, may lead to a situation that may be characterised as incoherent, irregular and generally very remote from satisfactory, considering the common transport needs that occur in the EU. In more specific terms, these developments may give rise to significant forms of distortion of competition on the market of containerised liner shipping services, and thereby on the markets of container marine terminal services and ports.

This is the perspective from which undertakings that operate on the EU market of containerised liner shipping services must make their self-assessment under EU anti-trust law. It is especially BI&A that has created new structures of this market. It is also especially BI&A that has made obsolete the tools at the disposal of the Commission for ensuring fair and undistorted competition on this market, particularly as they do not account for the temporal dimension of anti-competitive conduct resulting from the use of BI&A and are too limited in geographical scope to take globally effective, predictable and consistent decisions that in turn promote transparency and accountability and instil confidence.

This absence of adequate tools creates a burst of legal uncertainty and would in practice be a source of legal conflict. As a result, in making a self-assessment of their commercial strategies under EU anti-trust law, undertakings are abandoned to their fate. Brexit will seriously exacerbate this inappropriate state of affairs, which is unacceptable. Undertakings cannot afford to make mistakes. The resulting penalties in the form of fines imposed by the EU Commission and damages imposed by national judiciaries or arbitral tribunals are too severe by far, so the Commission should provide legal certainty.

The self-assessment that lines and the alliances they belong to are obliged to make with regard to the logistics chain of containerised liner shipping services mainly rests on (i) the definition of the extra-territorial application of EU anti-trust law; (ii) the definition of the relevant market; (iii) arrangements that are exempted from the prohibition of Article 101(1) of the TFEU under the consortia block exemption; (iv) the role shipping exchanges play in this regard and, first and foremost, (v) the use of BI&A.

A first step in providing legal certainty is for the EU Commission to adopt guidelines on the concept of the extra-territorial application of EU anti-trust law and an update of the 1997 Guidelines on the definition of the relevant market, both of these from the perspective of BI&A.

The concept of the extra-territorial application of EU competition law should be revisited, taking account of the qualified effects doctrine. As a consequence, conduct that is directed at foreign markets, also when not having this for its object, must be addressed in case it has an immediate, substantial and foreseeable effect on competition on the EU market. This implies that an assessment must be made of the conditions of competition on these foreign markets from a EU law perspective and that, as such, the guidance that the Commission should provide must be formulated from the perspective of BI&A and the temporal dimensions of the ensuing anti-competitive conduct. As the relevant market should be defined from the perspective of the constant and extremely rapid pace of change in BI&A, this means that here too the temporal dimension of this market should be accounted for.

BI&A has severely obscured the demarcation between arrangements that are and are not exempted from the prohibition of Articles 101(1) and 102 of the TFEU under EU anti-trust law. The Commission should redress the ensuing legal uncertainty by paying special attention to distortions of competition, which may follow from BI&A, in particular when protected by IP rights. Distortions of competition, which may result from the involvement of shipping exchanges in the logistics chain of alliances, should also be accounted for.

In executing the above tasks, the Commission should adopt a holistic approach. A fragmented approach, whereby each element of the logistics chain of the market of containerised liner shipping services generated by BI&A is assessed on its own merits is insufficient to cover the full impact of the entire chain on competition on this market.

It is an absolute necessity for the Commission to strangle distortions of competition on the market of containerised liner shipping services at birth. Time is of the essence, while delays may cause irreparable damage. Therefore, the measures the Commission is obliged to adopt in order to guarantee a situation of fair and undistorted competition and a level playing field for all stakeholders on this market, as well as on the above-mentioned submarkets, and the legal certainty it is bound to provide to undertakings that are obliged to self-assess the possible applicability of EU anti-trust law, cannot be postponed in light of the Brexit negotiations until, for instance, the adoption of the revised version of the consortia block exemption, due in 2020. These measures should take precedence over political considerations, in particular to considerations that play a role in the Brexit negotiations. In case the Commission were to remain silent, it should be forced to act, with a view to defining EU anti-trust law and to ensuring coherent application of Articles 101 and 102 of the TFEU. The Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty[70] (now Articles 101 and 102 TFEU) provides the means for such action.

[70] [2004] OJ C101 of 27 April 2004, 65–77.