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TRAMP SHIPPING IN THE NEW EC COMPETITION MARITIME REGIME

Analysis of the latest developments in the regulation
of Tramp Shipping and Tramp Shipping Pools

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PRÓLOGO

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I. Introduction

1.1 Background of this master thesis

This study comes at the heels of the latest developments in EC competition law in the maritime transport sector. The application of the Lisbon Strategy to maritime transport has proven very controversial.¹ Since June 2003, when the European Commission launched a consultation paper on the application of articles 81 and 82 of the EC Treaty to maritime transport, major changes have been taking place. The “old” rules were no longer considered to provide a suitable framework for the sector, given the new market conditions and the international legislative developments, and, on top of that, the block exemption from the competition rules that liner conference operators benefited from was no longer justifiable in the eyes of the Commission.

Following the adoption of Council Regulation 1419/2006 on September 2006, a new EC maritime competition policy is in force. This regulation provides for a transitional period of two years, ending 18 October 2008, after which liner conference practices will no longer be permitted under EC Competition Law.² In addition to that, the regulation is revolutionary in yet another aspect: tramp shipping and cabotage services, two fields that were in an anomalous position in the former regulatory framework are now subject to the full enforcement powers of the Commission.³

The shipping industry has always shown a strong will to comply with the regulatory framework envisaged by the Commission. Stakeholders do not want to risk sanctions and disturbances to the daily running of their business are to be avoided. They have, already from the beginning of this debate, asked for clear guidance from Brussels to adapt to the regulatory changes. Therefore, even if sector-specific guidance is very rarely provided, the Commission acceded to supply the shipping industry with a tool to

¹ The Lisbon Strategy, set out by the European Council in Lisbon in 2000, is a development plan for the EU, which has as one of its points to promote competition in some key sectors, among those, transport.

² This transitional period of two years is not applicable to tramp nor cabotage. Theoretically, with the adoption of Regulation 1419/2006, the Commission effectively acquired enforcement powers in these sectors.

³ Before the new regulation only NCAs in each Member State had enforcement powers as per art 84 EC

evaluate its practices and has recently published Guidelines “on the application of article 81 of the EC Treaty to maritime transport”.⁴

The period in which this thesis was written, summer 2008, was an extremely relevant point in the timeline of the application of maritime competition law for two main reasons. On the one hand, the two-year transitional period provided for by the Regulation 1419/2006 for the repeal of the block exemption for liner shipping was about to end (18 October 2008). On the other, with the publication on the 1st of July of the final version of the Guidelines on the application of Article 81 EC Treaty to maritime transport services, the industry was provided with a brand-new tool to evaluate its compliance with EC Competition law.

1.2 Purpose and sources of the work

In this study, one of the most crucial questions that have come up at this stage of the regulatory process will be addressed, namely: what impact does the new EC maritime transport competition policy have on tramp shipping and on the most usual cooperation form in the tramp shipping sector: shipping pools?

During the last years, legal literature has followed this debate, and has been updated to reflect changes in the regulatory framework focusing on liner conferences; nevertheless, after accepting the inevitability of the repeal of the block exemption, other relevant legal issues, as the above mentioned, have started attracting attention.

The primary sources of law in this work are the EC Treaty provisions and ECJ case law. However, shipping is particularly poor on ECJ jurisprudence, not because of the lack of disputes, but because the parties involved are neither interested in an open discussion, nor in being subject to the high fines imposed by the Commission. This provokes that the big majority of disputes do not end in the courts. There are plenty of individual decisions in this field; specially Commission decisions on the application of competition rules to joint ventures, nevertheless, such decisions are based on the contextual characteristics of each undertaking and in the market they are operating in.

⁴ Documents available at: <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>

Only general principles may be extracted from these decisions, and, extrapolating them to other cases may prove artificial and ineffective.

Other sources such as guidelines issued by the Commission and Commission Notices are important interpretational aids to the regulations adopted by the Commission. However, they are not sources of law. In this field, several relevant guidelines and notices have been published, among them: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, Notices on the Definition of the Relevant Market and on Agreements of Minor Importance, Guidelines on the Effect on Trade concept contained in articles 81 and 82 of the Treaty, Guidelines on the application of article 81 (3) of the Treaty, and last but not least, the draft and the final version of the Guidelines on the Application of Article 81 to Maritime Transport.

Other sources consulted include stakeholders' reports commenting the draft Guidelines on the application of article 81 to maritime transport, other submissions published by the Commission in their website, such as reports, memos or press releases, and, last but not least, legal literature and presentations on the subject.

1.3 Structure

The content of this master thesis can be divided in two thematic blocks. Firstly, chapter II addresses the tramp shipping sector, commenting its definition, its evolution through the legislative developments, its status in the EC competition legislative framework and its market definition; and secondly, chapters III and IV. Chapter III deals with shipping pools analyzing their main characteristics while chapter IV examines the application of article 81 EC Treaty to shipping pools. I have chosen to carry out the analysis on this article because it is the most relevant of the recent competition regulatory changes in the EC maritime law. This means that the competition analysis of shipping pools is carried out avoiding the analysis of article 82 EC Treaty, and also avoiding the study of shipping pools that, being full function joint ventures, fall into the merger rules.

II. The tramp shipping sector

2.1 What is tramp shipping?

2.1.1 The earliest developments of the concept of tramp shipping

While the terms “liner services” and “liner conferences” have a long history beginning in 1875 when the first liner conference started its activities between the UK and Calcutta, the term “tramp shipping services” is a relatively new concept.

This concept was originally built upon the dichotomy between liner and tramp services, as the first definitions show.⁵ Later, especially after the Second World War, national states’ approach of liner conferences became increasingly critical. This process culminated with the adoption of the 1974 UNCTAD Code of Conduct for Liner Conferences, that intended to regulate Conferences’ practices and which entered into force in 1983. It is in this code that the first legal definition of liner conferences is found.

With several members of the EC becoming parties to the UNCTAD Code, and with the accession of important shipping nations to the European Union, such as the UK, and especially Greece, the EC was forced to adapt its internal legislation to these new circumstances and to come up with some political concessions. This resulted in the publication of a new maritime policy in 1985 and in the adoption of a package of regulations concerning maritime transport, among those, Regulation 4056/86, which is by many regarded as a political victory of Greece’s bargaining while entering the EC.⁶ It was also in the context of this process, that a need for a classification of the different segments of the maritime industry arose, and even more, that the creation of a legal definition of tramp services started to take form.

⁵ Fayle (1932) p. 254

⁶ Progress towards a Common Transport Policy (1985)

2.1.2 The first legal definition

The first legal definition of tramp shipping was the result of a vivid discussion during the process of enactment of Regulation 4056/86, which is recorded in several working papers. Originally, in the first proposal, the Commission divided the maritime sector in “bulk” and “liner services”, a segmentation that proved too simplistic and too far from reflecting the complex reality of the sector.⁷ This definition was for many taken as an evidence of the Commissions’ lack of knowledge of the sector, a fact that the Commission itself admitted in later submissions.⁸

It was not long until such division was criticized, and in a opinion by the European Social Committee in 1983, it was argued that if “for the sake of simplicity” the maritime transport market had to fit into this bipartite division, the Commission must elaborate the concept of “bulk transport” further, and that moreover such a definition must be based on the nature of the transport and the intrinsic characteristics that made it different from liner conference services.⁹

Subsequently, in a second proposal, the Commission took into account the ESC critics and provided a first definition of tramp vessel services: “transport of goods as bulk or break-bulk in a vessel chartered to one or more shippers on the basis of a charter party or a booking-note for non-regularly and non-advertised sailings”.¹⁰

Yet, this second formulation was still not satisfactory, and the ESC came up with a new proposal for a definition. It was a much more general definition that focused not on the goods nor in the way such goods were carried, but on the contracts based on which the carriage took place. Moreover, the ESC definition incorporated a new element: the statement that freight is subject to free competition by the market forces.

Finally, with the enactment by the Commission of Regulation 4056/86, the first legal definition of tramp shipping services was published. This definition can be said to be a

⁷ COM (81) 423

⁸ COM (85) 90

⁹ ESC (1983)

¹⁰ See note 8

compromise between some elements of the Commissions' proposals and some suggestions of the ESC:

Tramp vessel services means the transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract that non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand.¹¹

This definition is not widely accepted by the industry and it is considered imprecise for the purpose of defining such an intricate market. Among some of the critics that have been addressed to it, the main have been the following:

-Tramp shipping as “transport of goods in bulk or in break bulk”: The industry does not support the view that factors as the type of vessels or the size of them are essential elements for the concept of tramp shipping. Each segment of the market has different transportation needs and provides different services; therefore, generalizing in this point must be avoided.

-Tramp shipping as “non-regularly scheduled and non-advertised”: The advertisement of shippings varies from the different segments of the market (i.e. from the dry bulk commodities market to the pure car carriers or reefers).¹² However, the most problematic part of the definition is the “non-regular schedules”: is this affirmation tied to the vessel used for performing the contract or to the contract of affreightment itself? and, if the contract of affreightment is entered into for a certain period of time and establishes regular shippings, could this be considered regular scheduling?

Legal literature believes that terms such as “non-regular” and “unscheduled” are ambiguous and that they are too open for interpretation in the context of tramp shipping services.¹³ Indeed, sailings often have a certain frequency, especially, in long contracts of affreightment, and also, loadings have to be agreed upon beforehand.

¹¹ Regulation 4056/86 art 1.3 (a)

¹² Fearnley report (2006) p.11

¹³ Fearnley report (2006) p.11

2.1.3 Latest developments of the concept

Among the most recent milestones on the development of the legal concept of “tramp shipping services” the following can be cited: the 1994 TAA decision defines tramp shipping as “unscheduled sea transport [...] that consists of unscheduled transport services using vessels chartered on demand and, nowadays, mainly involves the bulk transport of particular categories of goods (oil, ores, cereals, etc.) for which vessels are specially equipped”;¹⁴ the Clarkson report states that the term “tramp shipping” is used to include “bulk and specialized shipping segments collectively”;¹⁵ the Fearnley report provides that “in the sense in which it is normally used in the shipping industry, “tramp shipping” can be defined as the transport of a single commodity, which fills a single ship”¹⁶ and comments upon the legal definition given: “that definition was far more precise than an ordinary dictionary definition, or the general perception of the term”;¹⁷ and last but not least, the Commission’s investigation on the bulk liquids’ market case, which is the newest milestone in the understanding of the concept of tramp shipping services by the Commission.¹⁸

After more than five years of investigation, several companies in the bulk liquid market received in the spring of 2007 a Statement of Objections which stated that the Commission would initiate investigation proceedings for alleged breach of the EC Treaty’s antitrust provisions.

One of the legal questions that was decisive for the outcome of the investigation was whether these companies were, indeed, carrying out “tramp shipping services”, and therefore, were not subject to the EC’s Commission enforcement powers pursuant to the regulation applicable at the time of the alleged breach (Regulation 4056/86).

During the investigation process the shipowning companies presented to the Commission their activities and made an effort to clarify the scope of their practices. Finally, on the 8th of May 2008, the Commission concluded that “there was a

¹⁴ TAA decision para 34

¹⁵ Clarkson report (2004) p.3

¹⁶ Fearnley report (2006) p. II

¹⁷ Fearnley report (2006) p. 11

¹⁸ See 2.5

possibility that the services at stake were indeed tramp vessel services”, and consequently, had to close the case for lack of jurisdiction.¹⁹

The new Regulation 1419/2006 does not contain any definition of “tramp services” and merely goes on to restate the reasons why it was seen necessary to grant the Commission with enforcement powers in the tramp and cabotage sectors. The Commission offered to provide guidance to the tramp industry in the form of sector-specific guidance, and has indeed, come up with guidelines on the 1st of July 2008.

Such guidelines, after restating the definition provided by Regulation 4056/86, add “it is mostly the unscheduled transport of one single commodity which fills a vessel”²⁰.

Another remark on the Commissions’ view on the definition of tramp shipping services is provided by the press release published along with the guidelines where tramp shipping services are defined as “non-regular, maritime transport of bulk cargo that is not containerised, and include a range of economically important services, such as the transport of oil, agricultural and chemical products”.²¹ This goes on to prove that the Commission is not willing to provide a new definition nor to rephrase the former criticized 4056/86 definition.

2.1.4 Conclusion on the legal definition of tramp shipping

To conclude, as for the legal definition of tramp shipping, the former provision on 1(3) of Regulation 4056/86 is still considered valid by the Commission. However, as such a definition extends long beyond the ordinary meaning given to it by the industry, many grey areas are still identified.

¹⁹ MEMO/08/297 (2008)

²⁰ Guidelines maritime transport (2008) p.3

²¹ Memo 08/460 (2008)

2.2 Characteristics of tramp shipping

There are two reports published on the tramp shipping market by independent actors which analyze and fragment the sector, the so-called “Clarkson” and “Fearnley” reports.²² These reports are meant to explain and outline the complexities of the market, in order to provide the Commission with a better understanding of the sector that is to be used in the regulative process. They do not contain a detailed definition of tramp shipping services; neither do they intend to come up with one. Nevertheless, what these two reports really do, and what they both agree upon, is that all of the tramp shipping segments have a series of key common characteristic features, these being:

- “Globally competitive markets
- Closeness to perfect competition model
- Different sub-market segments in response to customer needs
- Competition between sub-markets for cargo
- Volatile and unpredictable demand
- Many small entrepreneurial companies
- Global trade partners
- Ease of entry and exit
- Cost effectiveness
- Responsiveness to development of market and shippers needs”.²³

These characteristic features are found in all of the different economic markets that integrate the tramp shipping sector, and are also factors that distinguish tramp shipping from liner services. It is remarkable that non-regular and non-advertised services is not cited as a characteristic, however, it could be explain by the problematic nature of such a characteristic.

²² Both reports available at: <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>

²³ Fearnley report (2006) p. 14

2.3 The tramp shipping sector and the EC Competition rules

The regulation of tramp shipping has had a Copernican turn in recent decades. From a first period in which competition rules did apply to the tramp sector, but could not be enforced by the Commission, competition rules in tramp shipping are now fully enforceable with the adoption of Regulation 1419/2006.

2.3.1 Former regulatory regime of tramp shipping: the anomalous exclusion of tramp services from the scope of Regulation 4056/86

During the 1960s and 1970s, the underlying line of thought was that maritime services were services of a special nature and that, due to the characteristics of the industry, they deserved a special treatment. Indeed, article 84 (2) EC Treaty stated that the Council could decide the application of special provisions for sea transport. This policy meant that while Regulation 17/62 enabled the application of the Commission of articles 81 and 82 EC Treaty, transport was excluded from the scope of application pursuant to Regulation 141/62. The passing of Regulation 141/62 was a very special piece of legislation, which, limited the powers of the Commission to enforce competition rules in the transport sector.

In this context, even the application of the material EC Competition rules to maritime transport was questioned. It was not until the ECJ ruling on the “French Merchant Seaman” case, that it was absolutely clear that competition rules in the EC treaty were applicable to “the whole range of economic activities”, including maritime transport. Therefore, according to this ruling, the only way to render one of the EC Treaties’ provisions inapplicable was by “an express clause in the Treaty to that effect”²⁴.

Thus, in 1986, with the passing of Regulation 4056/86, the Commission first applied competition rules to maritime transport; and this was so, even if competition rules were already applicable to all of the other transportation modes since 1968, by virtue of Regulation 1017/68.

²⁴ Commission v. France, Goyder (2003) p.109

Regulation 4056/86 contained material and procedural rules in relation to the application of competition rules to shipping services. The scope of application of these rules comprises “international maritime transport services from or to one or more Community ports, other than tramp vessel services”. This means that both cabotage and tramp shipping services were excluded from the scope of application of the regulation. The exclusion of these two types of services is not seen as properly justified, and it is thought that such exclusion was a mere result of the lack of the expertise of the Commission in the field at that point.

As a legal tool this regulation had certain particularities: first of all, it was adopted by the Council, while usually block exemption regulations are adopted by the Commission, this is considered as an evidence of the strong political dimension of the provision; secondly, it was a regulation that limited the powers of action the Commission; thirdly, this regulation contained a block exemption for liner conference that was unlimited (while all other block exemptions are limited in time).

Therefore, given that the EC Treaty’s competition rules apply to all sectors, also tramp services were subject to the competition rules, however, no enforcement powers were granted to the Commission in order to implement the competition provisions. This meant that if a service could qualify as tramp, the Commission lacked jurisdiction to take actions against it in the framework of Regulation 4056/86 and it was only up to national competition authorities to enforce the competition rules.

The adoption of Regulation 1/2003 did not change the regulatory enforcement framework of tramp shipping services. Even if this so-called “modernization regulation” represented the new regulatory tool to apply EC Treaty’s competition rules to all sectors, article 32 of the Regulation contains an exclusion of tramp shipping and cabotage services. Thus not only did tramp services fall out of the enforcement powers of the Commission, and therefore, could only be enforced pursuant to 84 and 85 EC Treaty, but also due to this new decentralized system imposed by the Regulation, national authorities could not benefit from the cooperation schemes that Regulation 1/2003 provided.

2.3.2 New regulatory regime under Regulation 1419/2006

When the revision process of Regulation 4056/86 took off, the focus was on the review of the block exemption for liner conferences, however, seen by many as an obiter of that, the unification of procedural regime in all segments of the maritime transport was also being discussed. As the process developed, it was clear that this lack of effective enforcement powers was a regulatory anomaly. Tramp shipping and cabotage were the only “remaining sectors to be excluded from the Community competition implementing rules” and this was no longer accepted.²⁵

In the preamble of the Regulation, the Commission justifies this change of route as follows:

The exclusion of tramp vessel services from Regulation (EC) No 1/2003 was based on the fact that rates for these services are freely negotiated on a case by case basis in accordance with supply and demand conditions. However, such market conditions are present in other sectors and the substantive provisions of Article 81 and 82 already apply to these services. No convincing reason has been brought forward to maintain the current exclusion of these services from the rules implementing article 81 and 82 of the Treaty.²⁶

Therefore, now tramp shipping services fall within the enforcement powers of the Commission. This regulatory change will bring challenges for both parties of the industry: for the Commission it will be necessary to understand the structure and functioning of the market, not being influenced by the precedent found in liner services; while for the industry the fact that their practices will now fall within the enforcement powers of the Commission has to be accepted.²⁷

²⁵ Regulation 1419/2006 Preamble para. 12

²⁶ Regulation 1419/2006 Preamble para. 13

²⁷ Athanassiou (2008) p. 6

2.4 The tramp shipping market

2.4.1 Market definition under EC Competition Law and tramp shipping

The definition of tramp shipping services had a greater relevance in the old days, when falling within the definition of tramp shipping meant avoiding the enforcement powers of the Commission. For the competition analysis, on the other hand, what is crucial is the definition of tramp shipping market. Such a definition is the preliminary tool for the application of the competition rules.

The Commission has provided general guidance on the definition of the relevant market for competition purposes.²⁸ The main principle on establishing which is the relevant market and what it comprises is that: “the relevant market [...] is established by the combination of the product and geographic markets.”²⁹

The relevant product market includes “all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.”³⁰ On the other hand, the relevant geographical market comprises “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”³¹

The main difficulties that are faced while defining the relevant market in tramp shipping is that the term “tramp shipping” is legally provided a wider significance than the industry has ever given to it; and moreover, that “tramp shipping” is a generic term under which several different product markets are included.

²⁸ Notice on relevant markets (1997)

²⁹ Notice on relevant markets (1997) para. 9

³⁰ Notice on relevant markets (1997) para. 7

³¹ Notice on relevant markets (1997) para. 8

2.4.2 Subdivision of the tramp shipping market

Traditionally the market has been divided into two broad segments: “bulk shipping” including liquid, major and minor bulk; and “specialized shipping” covering refrigerated cargo, forest products, motor vehicles, gases transported as liquids and chemicals.³² The Fearnley report identifies, however, three market sectors: “liquid” and “dry” bulk, and “neo-bulk shipping”.³³ The two first sectors are subdivided according to the cargo shipped, while the third one is divided according to the specificity of the vessel used.

These segments may provide useful guidance for the analysis of certain competition features such as the geographical scope of operation of the vessels, entry barriers and demand and supply substitutability of the vessels, nevertheless, these segments may not be considered autonomous markets. What also needs to be examined is the interchangeability or substitutability in all these segments of the market. For example, can a shipper of dry bulk use the services of a liquid bulk vessel instead? or can this shipper use different vessel independently of their draught? This will provide aid in assessing the relevant market in tramp shipping.

2.4.3 The relevant market in tramp shipping: product and geographical market

The relevant product and the geographical market provide a basis for calculating the total market power and the market shares.³⁴

Firstly, in order to address the issue of the relevant market, the relevant product has to be delimited. In that aspect, the Guidelines on the application of articles 81 to maritime transport provide aid while defining the relevant product market in tramp shipping by stating that these elements should be taken into account:

³² Clarkson report (2004) p.12-14

³³ “Neo-bulk” is also known as “specialized”, “industrial”, or “semi-liner”.

³⁴ Notice on relevant markets (1997) p.17

-Demand substitution:

The “main terms of an individual transport request” are “the starting point for defining relevant services markets in tramp shipping”.³⁵ These elements and their negotiability will help assessing the interchangeability of services for the consumer. Moreover, the substitutability of the transport contract itself is a further element to take into account. Depending on whether the elements and the individual transport contracts are interchangeable, services may belong to the same relevant market or to a different one.

-Supply substitution:

The elements to take into account from the supply side are the physical and technical characteristics of the cargo; vessel types (if a vessel is able to adapt to transportation of different cargo types at a relatively low cost and in a relatively short time-frame, tramp shippers can compete in different cargo markets – such adaptability is relatively limited in specialized vessels); vessel size; and captive capacity.

Other factors to take into account in the analysis of the relevant market are the reliability of the service provider, security and safety and regulatory requirements.

The product definition has been criticized in the comments submitted to the draft guidelines. Several submissions consider that taking the contractual terms and the contracts as the starting point for the definition of the market product from the demand side will provide the wrong picture on the market, and that cargo and vessel types should be the starting point instead.³⁶

Secondly, the geographical market definition should be tackled. On this issue, both the TAA and the Guidelines on maritime transport provide guidance. The TAA decision states that “the geographic market is the area in which the services defined above are marketed”;³⁷ while the Guidelines outline that, notwithstanding the final

³⁵ Guidelines maritime transport (2008) p.6

³⁶ ECSA (2007) p. 10, AEDC (2007) p.2, Hellenic Republic (2007) p.2.

³⁷ TAA decision para.37

definition of the relevant geographic market, “ports provide the first orientation for the definition of the relevant geographic market”.³⁸

Port interchangeability may, nevertheless, be limited due to the characteristics of the vessel, draught, safety restrictions, environmental standards, etc. Repositioning, ballast voyages and imbalances in trade must also be taken into account while outlining the relevant market.

Critics addressed to this relevant geographical market remark that the relevant market is the global market or “world-regional”; and this is rooted in the fact that both from the demand and from the supply side, ports in tramp shipping are usually interchangeable.³⁹

Lastly, market shares must be taken into account. The calculation of market shares has had an increasingly importance with the adoption of the “de minimis doctrine” pursuant to article 81 EC Treaty.⁴⁰ Moreover, market shares can also indicate dominance in the market in mergers and concentration levels.

The Commission states that several factors may be taken into account while determining the market shares in tramp shipping services, those being: (a) the number of voyages; (b) the parties' volume or value share in the overall transport of a specific cargo; (c) the parties' share in the market for time charter contracts; (d) data in relation to the parties' contract negotiations; (e) the parties' capacity shares in the relevant fleet (by vessel type and size).⁴¹

Calculating market shares in the tramp shipping market seems to be a troublesome task, given the lack of available information in the different markets of tramp shipping, the difficulty of identifying competition restraints on prices and demand from the supply side, the lack of data on sales of the products in relevant areas, and the interconnection with semi-liner trade and tramp shipping, among others.⁴²

³⁸ Guidelines maritime transport (2008) p.7

³⁹ ECSA (2007) p. 11, AEDC (2007) p.2

⁴⁰ See 4.7

⁴¹ Guidelines maritime transport (2008) p.7

⁴² Fearnley report (2006) p. 285

2.5 Conclusion

The definition of tramp shipping seemed to have much more relevance in the old days of Regulation 4056/86, when the distinction between tramp and liner services could mean that the block exemption for Liner Conferences could be applicable. With the passing of Regulation 1419/2006, this dual regime was abandoned and both sectors must now comply with the competition provisions of the EC treaty. However, the distinction between tramp and liner shipping is still relevant in other segments: for instance, in the context of consortia, where the block exemption is still in effect only applying to liner shipping; or in the context of an individual application of article 81 (3) EC treaty where collaboration in tramp services may have its own beneficial aspects and may be different to those produced by collaboration schemes in liner shipping.

Moreover, and even though the intention of the Commission seems to be that with adoption of Regulation 1419/2006 all the segments in the maritime transport market are now subject to its enforcement powers, a new question has arisen after the publication of the guidelines on maritime transport.

In these guidelines, the Commission states that several characteristics render specialized transport different from tramp shipping, without further elaborating on their difference.⁴³ Specialized services are said to involve “the provision of regular services for a particular cargo type.” These services are further characterized as provided “on the basis of contracts of affreightment using specialised vessels technically adapted and/or built to transport specific cargo”. If such services are regular, would not they be considered as liner services? If they are not liner services, can they be tramp? Does this mean that these services shall be treated differently than liner and tramp services? And if so, on which basis is that exclusion justifiable?

It could be that specialized services are in a regulatory limbo for the Commission; however, it may also be that the Commission is merely stating that they are services of a different nature without intending to point at a different treatment. For all the debate that this interpretation could cause, and for other potential repercussions (i.e. regarding

⁴³ Guidelines maritime transport (2008) Footnote 10 p.2

consortia), this formulation should be either abandoned or the effects of the characterization of a service as “specialized transport” should be spelt out.

This new polemic issue seems to confirm that the term “tramp shipping services” as understood by the Commission is basically an intellectual construction with blurred boundaries and an uncertain scope that not even the Commission seems to have a clear picture of. However, the recent outcome of the investigation on the bulk liquid market and the publication of the final guidelines seem to point to a more flexible and industry-friendly approach.

Such understanding of the industry is essential. If the final purpose of the EC competition policy is to contribute to the efficiency and growth of the European economy, imposing inexistent barriers and unfavourable regulatory frameworks to a market that accounts for more than 80% of the goods that are nowadays carried does not seem to be the right way to go.

It is not viable to tie the tramp shipping market to a pen-made definition that is not even outlined nor agreed upon by the industry. Maritime transport is a sector that evolves extremely quickly and therefore suitable maritime policies are essential, a proof of that being the fact that Regulation 4056/86 was repealed at the sweet age of 20. How long it will take for the maritime transport sector to grow old of regulation 1419/2006, is a mystery; however, what is clear is that a flexible and industry-friendly approach to tramp shipping seems to be the only way forward for the understanding and satisfaction of all parties involved.

On the other hand, the definition of the relevant market is the starting point for the competition analysis, not only for assessing restraints of competition under article 81 EC Treaty, but also for assessing the market dominance of an undertaking pursuant to article 82 EC Treaty, and last but not least, for addressing potential effects of structural changes under the Merger Regulation.

Being a crucial starting point and such a complicated issue, the Commission should provide a much clearer tool for the definition and delimitation of the relevant products and geographical markets in tramp shipping. These issues have been addressed by two

reports on the tramp shipping market and by several submissions commenting the draft guidelines in maritime transport services. The Commission should take into account the recommendations given in such papers.

Defining tramp shipping services is not an easy task. The complexity of the maritime transport market and the relationships between contractual parties must not be underestimated. The Commission has undertaken a very complex task while attempting to define and regulate “tramp shipping services”. From an earlier approach, that proved artificial and unsatisfactory, the Commission seems to be making progress in the understanding of the idiosyncrasy of the tramp industry.

III Tramp shipping pools

3.1 What is a tramp shipping pool?

Shipping pools are the most common form of horizontal cooperation between carriers in tramp shipping and they operate in the vast majority of segments of the market, although in some segments there is no evidence of their existence (i.e. PCC pools in the neo-bulk segment).⁴⁴

Not all the pools are identical, nor are their functions; nevertheless, some common features can be identified:⁴⁵

-The vessels appertaining to the pool are provided more or less with similar characteristics regarding tonnage, size and type of vessel.

-There is a central administration, in which a pool manager is appointed to be in charge of the daily operation of the pool. The standard tasks of the pool manager are the commercial management and operation of the fleet, and the negotiation of the freight rates. Depending on the nature of the pool, the pool manager can either be a separate company or one of the members of the pool. Technical management of the vessels and performance of the services are carried out individually by each member.

-The fleet is joint-marketed; this means that the group of vessels is marketed as a single entity, notwithstanding ownership.

-The freight rates are subject to the market forces: the pool manager negotiates the freight rates for the common fleet subject to the terms and conditions agreed in accordance with the ship owners' operating instructions for the pool.

-There is a centralised system to allocate profits and to cover variable expenses. The allocation of profits is carried out pursuant to a system of "pool points". Every vessel is assigned a number of points corresponding to its earning capacity for a fixed period. The total net profits of the pool (the sum of the net revenue -all hires, freights and other earnings, less all voyage and operation expenses) will then be divided by the total number of pool points for all the pool vessels. Finally, each shipowner will

⁴⁴ Fearnley report (2006) p.268

⁴⁵ Fearnley report (2006) p.245

receive an amount equal to this average amount of points multiplied by the number of pool points awarded to their vessels per day.⁴⁶

It is therefore possible to come up with a definition including all the common characteristics and provide a standard definition of shipping pool:

A standard shipping pool is a type of horizontal cooperation between carriers that brings together a number of similar vessels under different ownership and that is operated under the single administration of a pool manager who markets the pool vessels as a single cohesive fleet.

3.2 Aims and objectives of tramp shipping pools⁴⁷

There are several reasons that supported the creation of shipping pools. Nevertheless, the main reason was the search for a more efficient fleet deployment and the appealing possibility of risk distribution between pool members in such a volatile market.

Being a member of a shipping pool means for the vessels individually owned that the trading performance can be optimized. Coordination of fleet voyages and contracts of affreightment reduces the number of ballast voyages and dead freight. Moreover, the flexibility of carriers to provide services increases and by marketing bigger and stronger fleets, larger customers can be served and larger contracts can be obtained, things that are difficult to achieve in such a highly fragmented market by each member of the pool itself. Furthermore, in the cargo interest side, charterers can benefit from better capacity and more efficient services, better logistics, and a considerable reduction of the no show risk of the vessels. Last but not least, environmental considerations should also be taken into account. The reduction of ballast voyages and optimization of the performance of the fleet means a more environmental-friendly shipping of the vessels that are members of a pool.

3.3 Types of tramp shipping pools

⁴⁶ Falkanger (2004) p.153

⁴⁷ Lauritzen Presentation Shipping Pools BSEC

Even if the classification and categorization of shipping pools can not possibly be exhaustive, given the heterogeneity of the functional and structural features, two main criteria are used to classify pools: the segment of the market they are operating in and their organizational structure.

According to the Fearnley report, shipping pools are found in the following segments of the market:

- Liquid bulk (Tanker and LPG Pools)
- Dry bulk (Pacific basin, CSL International, CTM, Island View Shipping and Lauritzen Bulkers, Torvald Klaveness Group, JJ Ugland Bulk Transport, IMC Pools)
- Neo-bulk (Reefer pools, OHBC pools)

On the other hand, pursuant to their organizational structure, shipping pools could be divided in member-controlled, pools that are in reality controlled by their members; and administration controlled pools that are “operated, organized and controlled by an external administration”.⁴⁸

3.4 Contractual basis

The consensus of the parties while entering into a shipping pool structure is normally evidenced in a pool agreement. This agreement provides a legal framework for the cooperation of the parties which can either be all-embracing or which can merely deal with the fundamental features of cooperation.⁴⁹ No standard contract form is found in order to draft a pool agreement, and therefore each contract reflects the free will of the parties during the negotiation process.

A pool contract is normally entered into by the parties that will become members of the pool and the pool manager, however, this is not always the case and individual owners can also sign separate identical contracts between the pool manager and each shipowner, for instance.

⁴⁸ Fearnley report (2006) p. 252-272

⁴⁹ Packward (1995) p. 117

The usual content of the contract includes the object of the cooperation, the pool structure, the duties of the pool members, the specification of the organization, the standard chartering terms, confidentiality and hardship clause, and finally, clauses on dispute resolution and governing law. Further technicalities of the agreement may be regulated in separate annexes such as the enumeration of the number of pool vessels and pool contracts, quality and maintenance standards of the vessels, charterparties to be used in the marketing of the fleet and earning value of the pool vessels.

Among the “standard” contractual terms, several of them may cause competition concerns at first sight, the main ones being: non-competition clauses, information exchange agreements, capacity deployment and price agreements, termination provisions, lay-up clauses and restrictions to access to the pool.⁵⁰

3.5 Conclusion

Shipping pools are a type of horizontal cooperation between carriers in the tramp shipping market that arose due to the characteristics of the tramp market and due to the need of the carriers to deploy a more efficient fleet and more competitive services. Even if no standard pool model exists, apart from the one created for analytical purposes, it seems that pools were established for all the right reasons and that this cooperation structure benefits, a priori, the whole set of stakeholders in the market.

IV. Competition analysis of shipping pools under article 81 EC

⁵⁰ See 4.4.2

4.1. Introduction

A common competition policy has been one of the fundamental pillars in the creation of an internal European market. Competition rules were in place since the earliest stages in the EU integration process.⁵¹ Nevertheless, the uniform implementation of competition rules is quite a recent achievement. Some sectors have benefited from particularly long-lived competition implementation exemptions, transport being the last policy area to be deprived of such a privilege.

The maritime transport sector, and per extension shipping pools, have always been subject to the primary material sources of EC Competition law, namely, Part III Chapter 1 of the EC Treaty, (articles 81 to 89).⁵² On the other hand, it is only recently that the sector has become bound by the general procedural competition framework contained in Regulation 1/2003.⁵³

It is necessary to reiterate, before going deeper into the competition analysis of these cooperation agreements that no universal model of shipping pool exists and that the concept of shipping pool used is the so-called “standard shipping pool.”⁵⁴ Such concept will be used as a basis to assess compliance of pools with articles 81 and 82 EC treaty; yet, the competition analysis has to be undertaken in a case-by-case basis and each shipping pool has to be individually analyzed in order to assess its compliance with EC competition rules.

Article 81 (ex. art 85) EC Treaty is structured in three paragraphs. In short, the content and structure of the article is as follows:

- Article 81 (1) establishes a prohibition of anticompetitive practices;
- Article 81 (2) spells out the legal effects of these anticompetitive practices, namely, that such agreements will be “automatically void”;

⁵¹ Treaty of Rome, part III

⁵² Notwithstanding any express exclusion, the EC Treaty is in principle applicable to “the whole range of economic activities” in the EC market. (French Seaman case, Goyder (2004) p.109. See 2.3.1

⁵³ This was a result, as explained in 2.3, of the adoption of Regulation 1419/2006.

⁵⁴ See 4.1

-and article 81 (3) provides for an exemption of the prohibition contained in article 81 (1) whenever four cumulative conditions are given.

Finally, article 81 EC Treaty provides for exemplification purposes a non-exhaustive list of agreements that are presumed to violate this article per se: directly or indirectly fixing prices (purchase or selling) or any other trading conditions; limiting and controlling “production, markets, technical development or investments”; sharing markets or sources of supply; applying different trading conditions to equivalent transactions with different trading parties; and concluding contracts subject to the acceptance of other parties or placing supplementary obligations that have no link to the conclusion of the contract in the first place.

The Commission, being aware of the difficulties that the interpretation of article 81 EC Treaty entails in the maritime transport sector, has provided sector specific guidance, that deals in some paragraphs with shipping pools⁵⁵. Moreover, a notice containing “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements” was published in 2001. Such guidelines assess horizontal cooperation in the light of article 81 EC treaty, however, they expressly provide their declaratory nature when, as it is the case in the maritime transport, sector-specific rules are found. In such cases they must be considered useful background.⁵⁶

4.2 Application of article 81 (1) EC to Shipping Pools

For Shipping Pools to contravene article 81 (1) EC Treaty four conditions have to be fulfilled:

- 1) The shipping pool has to fall within the definition of “undertakings” or “association of undertakings” pursuant to 81 (1) EC Treaty
- 2) The pooling agreement entered into by the shipowning companies must be an “agreement between undertakings, a decision by association of undertakings or a concerted practice” in terms of 81 (1) EC Treaty.

⁵⁵ Guidelines maritime transport (2008) p.14-17

⁵⁶ Guidelines horizontal cooperation (2001) p.2

3) Pooling agreements must affect trade within the Member States.

4) Pooling agreements must also have the object or effect to “prevent, restrict or distort competition within the common market”.⁵⁷

The first three requirements have limited relevance for our analysis, as they are not disputed issues within shipping pools; however, they deserve a brief mention.

4.2.1 Are shipping pools “agreements of undertakings, decisions by association of undertakings or concerted practices”?

At a first stage, it should be analyzed whether shipping pools can fall within the category of undertakings under EC competition law, if this is so, the next step is to determine whether they qualify as agreements of undertakings, decisions by association of undertakings, or concerted practices.

The term “undertaking” is not defined in the EC Treaty, even so, the meaning of this term has been widely discussed in EC jurisprudence. The ECJ provides a definition of the term undertaking in the ruling *Höfner v Macrotron*.⁵⁸ An undertaking is “every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed”. This functional approach can be developed further, and legal literature has summarized all the existent jurisprudence and identified three positive requirements of the relevant economic activity, these are: that the entity “must offer goods or services to the market”, “bear the economic or financial risk of the enterprise” and “have the potential to make profit from the activity”.⁵⁹

Shipping companies participating in pools are therefore undertakings in the meaning of article 81 (1) EC Treaty as they are engaged in shipping, which is an economic activity, and they also fulfil the three criteria of the economic activity. First of all, they can be said to provide services in the market at two different levels: in the downstream

⁵⁷ EC Treaty art 81 (1)

⁵⁸ *Höfner v Macrotron* para. 21

⁵⁹ *Odudu* (2007) p. 26, *Siragusa* (2007) p.31

market, by providing “relevant maritime transport services” to their clients, and also in the upstream market, by “making vessels available to other owners or operators”.⁶⁰ Secondly, they bear the economic or financial risk of the enterprise and they have the potential to make profits from their activities. In the case of shipping pools a centralised system that allocates pools profits and covers variable expenses exists. Therefore, shipping pools are undertakings in the meaning of the article.

The next step is, thus, to determine whether shipping pools can fall in one of the three categories of agreements that article 81 (1) EC Treaty is addressed to. If this article was only to apply to agreements as it is generally understood; it could be quite easy to escape the law.⁶¹ Therefore, these potential gaps are filled by clarifying that it applies to “agreements between undertakings”, “decisions by association of undertakings” and “concerted practices”.⁶²

An agreement is reached when there is a sufficient consensus between the parties in order to commit themselves to a common purpose.⁶³ The most common way of evidencing an agreement is by way of a written contract; nonetheless, there is also jurisprudence that has recognised verbal or partly-verbal agreements, “gentlemen agreements”, or even cases when the contract was never signed or dated. This was done by looking at the conduct of the parties.⁶⁴

A decision by an association of undertakings is “any provision of the rules of a trade association or any decision or recommendation made under those rules either for or by its members, or arrived at informally within the frame-work which they provide”.⁶⁵

Lastly, “concerted practises” is the widest and vaguest of all the three terms and tries to include any kind of cooperative agreement that can not be placed either under the term “agreement” or under “decision”. This concept applies when there is not a formal

⁶⁰ Fearnley report (2006) p. 276

⁶¹ Whish (2001) p. 91

⁶² EC Treaty art 81 (1)

⁶³ Goyder (2004) p.66

⁶⁴ ACF Chemiefarma NV v Commission Summary para. 9, Kerse (2004) 11, Atka A/S v BP Kemi A/S

⁶⁵ Goyder (2004) p. 67, Odudu (2007) p. 70

agreement between the parties. There is no need to include an actual plan of neither action nor proofs that such a plan is entered into.⁶⁶

Even if the Commission has stated in the Polypropylene case that “agreements” and “concerted practices” are different concepts, there is not much point in trying to elucidate the limits between an agreement and a concerted practice and this is so because usually the Commission focuses on the collusive practice and not so much on how to classify it. This point is explained in the PVC II case:

In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by article 81 [1] of the Treaty.⁶⁷

Shipping pools are normally organized as a separate entity from its members, and this organization can take different forms. Nevertheless, there is in the big majority of cases a written pool agreement that reflects among other things, the rights and duties of the parties to the pool. This is normally so because the signing of a contract provides more legal certainty to the cooperation scheme of the parties.

Therefore, a pooling agreement would normally fall within the above definition of agreement under article 81 EC Treaty. Furthermore, even in the case that a pool agreement was not able to be evidenced, if the conduct of the pool members reflected a cooperation scheme, then, that agreement, too, could fit in the definition of agreement. Concerted practices could exist in cases where carriers knowingly have cooperation schemes between them without reaching an agreement. This means that shipping pools will normally fall either in the wording of agreements of undertakings or in concerted practices.

Finally, it is important to point out that the nature of the agreement is also important. If the cooperation under the pool agreement amounts to a concentration within the

⁶⁶ See Commission Decision Polypropylene Cartel, Commission Decision PVC case and Commission Decision LdPE case

⁶⁷ Commission Decision PVC case para. 696

meaning of the merger regulation, i.e when it is drafted as a full-function joint venture agreement, then it will fall outside the scope of article 81 EC Treaty.

4.2.2 Are the object and the effect test established in article 81 (1) cumulative?

Article 81 (1) EC Treaty establishes a prohibition of the agreements that have as their object or effect to prevent, restrict or distort competition within the common market”.

⁶⁸

Jurisprudence has clarified that “object” and “effect” are not cumulative requirements, and that, at a first stage, it is necessary to assess whether an agreement has the object to prevent, restrict or distort competition. In the *STM* case, the ECJ ruled that in order to assess the object or purpose of the agreement, its express provisions have to be considered in their economic context.⁶⁹ This point has also been illustrated in the *European Night Services* case, where it was stated that:

it must be borne in mind that in assessing an agreement under article 81 (1), account should be taken of the actual conditions in which it functions [...] unless it is an agreement containing obvious restrictions of competition such as price fixing, market-sharing or the control of outlets [...] In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81 (3) of the Treaty, with a view to granting an exemption from the prohibition of Article 81 (1).⁷⁰

Thus, if the outcome of the assessment is that the agreement had, indeed, this object, then, there is no need to evaluate its effects.⁷¹ If on the other hand, the provisions do not reveal the existence of object competition restrictions, then, the next step is the analysis of its incidence of the effects in the common market.

Some contractual restrictions are a priori presumed to affect competition, for example, the list of agreements that are found under article 81 (1) EC Treaty sections a) to e). Over this list of presumed practices a), price fixing, and c), market sharing, are the main violations that could be potentially entered into by shipping pools. However, the

⁶⁸ EC Treaty art 81 (1)

⁶⁹ *Societe Technique Miniere v Maschinenbau Ulm* para. 249

⁷⁰ *European Night Services v Commission* para. 136

⁷¹ *Consten and Grundig v Commission* para. 343, Kerse (2004) 12

rest of the practices can not be categorically excluded. For instance, a priori, the big majority of shipping pools do not restrict output in the market, as the pooled resources contribute to provide consumers with a wider range of choice in the market. Nevertheless, it can not be excluded that the output may be reduced, as for example, when shipping pools would be forced to restrict output in order to achieve acceptable freight rates in the market. Consequently, the potential competition restrictions and their effects in the common market must be analyzed on a case by case basis.

4.3. Competition constraints by object in pool agreements

If a tramp pool imposes a hardcore restriction on competition, it could be considered to have the object to restrict competition.⁷²

In order to assess the potential competition concerns on the object of pool agreements the following questions are relevant: do shipping pools engage in price fixing?; are shipping pools joint production or joint selling schemes?; and, are shipping pools sharing the market, and consequently, falling under article 81 (1) e) EC Treaty?

4.3.1 Do shipping pools engage in price fixing?

Article 81 EC Treaty provides a list of practices that are presumed to be anticompetitive practices per se under EC Competition Law.⁷³ Among them, the first category of agreements is agreements that “directly or indirectly fix purchase or selling prices or any other trading conditions”.

Such agreements are usually, after the decision in “European Night Services”, considered to have the object of restricting competition. Yet, this position “oversimplifies the law” as there is also jurisprudence that, despite the existence of one of the so-called “per se” restrictions has considered the effects of the agreements.⁷⁴ Examples of this are found in Visa International Multilateral exchange, a case in which despite the fact that banks agreed the commission to be charged to

⁷² Whish (2001) p.110

⁷³ Siragusa (2007) p. 41

⁷⁴ Whish (2001) p.114

Visa card users, the Commission decided that this did not constitute a restriction by object, but by effect.⁷⁵

Whether this provision is applicable to vertical and horizontal agreements is clear after the ruling in *Italy v Council and Commission*, which established that this prohibition is applicable to both -horizontal and vertical agreements.

The Guidelines on the application of article 81 to maritime transport also deal with this subject outlining that “pool agreements between competitors limited to joint selling have as a rule the object and effect of coordinating the pricing policy of these competitors”; while a footnote attached adds that “price-fixing activities of independent ship-brokers when fixing a vessel do not fall under this category”.⁷⁶

This paragraph has indeed suffered a major transformation from its original wording in the draft Guidelines, when it read:

If a pool agreement between competitors has as its object the restriction of competition by means of price fixing, output limitation or sharing of markets or customers it will fall under Article 81(1) of the Treaty. Agreements between competitors involving price fixing will always fall under Article 81(1) of the Treaty irrespective of the market power of the parties.⁷⁷

The wording of this paragraph in the final version of the Guidelines is less categorical. The same wording in the draft guidelines states that the agreements between competitors involving price fixing will *always* fall under article 81 (1) of the Treaty, while now the paragraph reads that pool agreements between competitors limited to *joint selling* will *as a rule* have the object *and effect* of coordinating their pricing policy. However, as mentioned above, if those agreements have the object to restrict competition, there is no need to show that they have the effect of doing so.⁷⁸ Furthermore, in the final drafts all mentions of output limitation or sharing of markets in shipping pools are erased.

⁷⁵ Visa Multilateral case

⁷⁶ Guidelines maritime transport (2008) p.14

⁷⁷ Draft guidelines maritime transport (2007) p. 14

⁷⁸ See 4.2.3

The concept of price fixing is quite wide and any kind of price fixing is caught, both directly and indirectly. Examples of this are found in EC jurisprudence such as the Polypropylene case, where tables of agreed target prices for different markets were found; British Sugar, where a collaboration scheme that led to high pricing was discovered, and the extreme Pre-Insulated Pipes which was defined as one of the worse cartel cases in the EC history with elements of price fixing, market sharing, information sharing and strategies to virtually eliminate any other competitor in the market; and last but not least, in the Greek Ferries case, where several ferry operators were found to engage in price fixing on their routes between Italy and Greece.⁷⁹

If this jurisprudence is extrapolated to shipping pools it can be affirmed that the danger of price fixing appears when shipping pools engage in systematic rate fixing, if pool members engage in collusive tendering eliminating the competition in the market, if pool members offer the same discounts on routes, or if there is an isolation of a national market, and if this has a consequence higher prices in the market. It looks as if in the normal scheme of price fixing cases, the final objective is that prices in the market are increased or that competitors are not able to bring prices to a lower level.

This is not the case in the normal scheme of shipping pools, where the market is the driving force behind the prices and the output is increased. Moreover, the Commission in the Woodpulp case, considered that even if there was a concentration of producers both on the sale and the purchase price which infringed article 81 (1) EC Treaty, the system per se did not infringe the provision.⁸⁰ This is another proof that potential price violations have to be examined in their industrial context.⁸¹

The industry refuses to accept that “price fixing” could be considered as a characteristic feature of the functioning of a shipping pool and has repeatedly argued that the pool manager is indeed a “price-taker” and not a price fixer.⁸²

First of all, the characteristics of the tramp market provide for a bidding system in order for the price to be agreed. It is not the pool manager that sets a price; the price is

⁷⁹ Commission Decision Polypropylene Cartel, Suiker Unie v Commission, Pre-Insulated Cartel case, Commission v Minoan Lines

⁸⁰ Commission Decision Woodpulp

⁸¹ Siragusa (2007) p.46

⁸² Torvald Klaveness Group submission (2007) para. 3.12, Intertanko (2007) para. 5.6, International Chamber of Shipping (2007) p.1

actually agreed through a negotiation process, a bidding process, between the customer and the pool manager. This is a process that takes into account the nature of the service offered, the ship to be used and the conditions of the supply and demand at that point of time in the market. This is what is meant with the affirmation that the pool manager is not a price-fixer but merely a “price-taker”.

Therefore, price-fixing should not be considered as a characteristic feature of the standard shipping pools, as the conditions in the market and the role of the pool manager do not seem to constitute anticompetitive practices per se. Nevertheless, it can not be excluded that naked price fixing is found in individual shipping pools, and that would normally classify as an agreement that has the object of restricting competition under article 81 (1) a) EC Treaty; however, even there, the pool may still fall within article 81 (3) EC Treaty.

4.3.2 Are shipping pools joint production or joint selling schemes?

Linked to the question of whether shipping pools have per se an anticompetitive object is also the classification of shipping pools as either joint production or joint selling. This is indeed an extremely relevant question in terms of competition law as if services are considered to be jointly produced, a block exemption may apply in some cases, while if not, individual self-assessment is the only potential way out left.

In order to find out whether shipping pools are indeed horizontal cooperation agreements that fall in the category of joint production or joint selling, it is in the Guidelines on the application of article 81 to Horizontal agreements that guidance should be sought. Moreover, the Guidelines on the application of article 81 to maritime transport also contribute to the debate.

The Guidelines on maritime transport establish that the “key feature of shipping pools is joint selling coupled with features of joint production” and that each pool has to be analyzed in the light of its “centre of gravity”.⁸³ This approach to shipping pools has

⁸³ Guidelines maritime transport (2008) p.14

also been criticised in several stakeholders' submissions regarding the publication of the draft maritime transport guidelines.⁸⁴

Joint selling is one of the forms that a commercialisation agreement can take place, it involves that there is “a joint determination of all commercial aspects related to the sale of the product including price”;⁸⁵ moreover, a further characteristic of this type of agreements is that they “do not only intend to eliminate price, but also limit the choice of purchasers”.⁸⁶ This does not seem to be a suitable category to place shipping pools at all, as first of all, and reiterating the above mentioned, the setting of the prices in shipping pools should not be considered “price-fixing” but “price-taking”; secondly, the final object of shipping pools is not pricing policy coordination; and, lastly, far from restricting the volume of services, output in the supply side can be generally said to increase.

Another category in which shipping pools could fall is “production agreements”. The term production agreements is said to “vary in scope and form”.⁸⁷ This term is used both for the production of goods and services, and it is said to include three different types of agreements: joint production, specialisation and sub-contracting agreements. Shipping pools could not fit in the descriptions of specialization and subcontracting agreements, however, the label “joint production” seems to be quite adequate.

Joint production are “agreements whereby the parties agree to produce certain products jointly, (unilateral or reciprocal)”.⁸⁸ Pursuant to article 81 (1) EC Treaty shipping pools seem to fit in the category of agreements that may fall under this article:

Production agreements that cannot be characterised as clearly restrictive or non-restrictive on the basis of the above factors may fall under Article 81(1) and have to be analysed in their economic context. This applies to cooperation agreements between competitors which create a significant

⁸⁴ Guidelines maritime transport (2008) p.14

⁸⁵ Whish (2001) p.570, Guidelines horizontal cooperation (2001) p.21

⁸⁶ Guidelines horizontal cooperation (2001) p.21

⁸⁷ Guidelines horizontal cooperation (2001) p.12

⁸⁸ Guidelines horizontal cooperation (2001) p. 12

degree of commonality of costs, but do not involve hard core restrictions as described above.⁸⁹

This leads again, to the analysis under article 81 (3) EC Treaty, where the four cumulative criteria for exemption must be satisfied. Even so, while assessing the efficiencies that production agreements can bring about, the Guidelines provide the following:

[...] It appears reasonable to provide for the exemption of such agreements which result in a restriction of competition up to a market share threshold below which it can, for the application of Article 81(3), in general, be presumed that the positive effects of production agreements will outweigh any negative effects on competition. Therefore, agreements [...] as joint production are block exempted (Specialisation block exemption Regulation) provided that they do not contain hard core restrictions and that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s).⁹⁰

Consequently, if pool agreements are indeed, able to fall within the category “production agreements”, those pools with a market share of 20% could fall within the scope of the Specialization Block exemption⁹¹.

4.3.3 Are shipping pools sharing the market, and consequently, falling under the prohibition of article 81 (1) e)?

Not only is price fixing a way of eliminating competition in the market for horizontal agreements. The members of these collaboration agreements can also restrict competition by “apportioning particular markets between themselves”.⁹² Market sharing is probably a much more comfortable means to charge higher rates than price fixing. Among other reasons, market sharing agreements are much easier to monitor, and cartel members do not have to find a compromise on price level.

Legal literature has identified mainly two types of market sharing: geographical market sharing, where actors in the market provide services to certain areas and could

⁸⁹ Guidelines horizontal cooperation (2001) p. 12

⁹⁰ Guidelines horizontal cooperation (2001) p. 15

⁹¹ Specialization Block Exemption (2000)

⁹² Whish (2001) p. 477

perpetuate the isolation of others, while also preventing the integration in the common market; and market sharing according to the types of customers, where suppliers divide their participation in their market according to their clients, i.e. a firm which will only supply private customers, while other will supply public entities.

The Commission has usually focused on two concerns of market sharing under article 81 (1) EC Treaty: first of all, geographical market sharing and its incompatibility with the single market integration goal and, secondly, the prevention of market penetration.

Shipping pools do not seem to be at the risk of contravening this provision. On the one hand, the characteristics of the tramp sector do not allow for geographical market sharing as the geographical tramp shipping market is global, and moreover the contracts of affreightment entered into can not be predictable beforehand as in liner shipping. Tramp services are not regular transport services between two fixed ports; they operate the routes the market demands at a certain moment of time. Consequently, geographical market sharing becomes per definition very difficult in the tramp sector, but not impossible.

On the other hand, market sharing as conceived by the ECJ jurisprudence requires output limitation, a feature that is totally contrary of what the market reality in tramp shipping offers.⁹³

Finally, the barriers of entering the market must be analyzed in every segment of the market, however, few barriers of entry can be said to be particular to the tramp shipping market. As in the majority of markets, a major capital investment can be expected at the earliest stages of entering the market, and also usual technological and management challenges that are present while entering the majority of markets. Furthermore, shipping pools ease market entrance by their presence in a market segment, for instance, offering long term charters with “potential for a profit share in addition to hire and which secures a steady source of income for the vessel”.⁹⁴

4.4 Competition constraints by effect in pool agreements

⁹³ See Peryxogen Products case, Sodaash – Solvay /ICI, Quinine case, Pre-Insulated Cartel case

⁹⁴ Fearnley report (2006) p.XXIII

If an agreement does not have the object of preventing, restricting or distorting competition in the common market, as it seems to be the case with shipping pools, then the next stage under the competition analysis under article 81 (1) EC Treaty will be asserting the restrictive effects of the agreement in the market. This is, indeed, a much more onerous mission both for the Commission and also for any other undertaking wishing to establish the inexistence of an anticompetitive practice under article 81 EC Treaty.

The effects of a restrictive practice can be identified in horizontal cooperation agreements by assessing “the economic context taking into account the nature of the agreement and the parties combined market power which together with structural factors determines the capability of the cooperation to face overall competition”.⁹⁵ Furthermore, the Guidelines on the application of article 81 to maritime transport reiterate this principle and add that the effects of pool agreements in the neighbouring markets shall also be considered.⁹⁶

4.4.1 The nature of the agreement

The Guidelines on the application of article 81 to maritime transport provide relevant guidance in order to assess the nature of the agreement in shipping pools. The factors to analyze are the existence of “clauses prohibiting members from being active in the same market outside the pool” (non-competition clauses) and the “exchanges of commercially sensitive information which could for example unduly influence the competitive behaviour of pool member operating in the same market outside the pool in relation to the pools commercial policy”.⁹⁷

Furthermore, it is added that “any links between pools should also be considered”, a sentence that has been criticised by its vagueness and that several submissions commenting the draft Guidelines wanted it either removed or clarified.⁹⁸ Now, in the

⁹⁵ Guidelines horizontal cooperation (2001) p.3

⁹⁶ Guidelines maritime transport (2008) p.15

⁹⁷ Guidelines maritime transport (2008) p.16

⁹⁸ Danish Shipowner Association (2007) p.2, ECSA (2007) p. 17.

final version of the guidelines, some examples of links are provided, these are: links “in terms as management or members as well as cost and revenue sharing”.⁹⁹

4.4.2 Which clauses could potentially have the effect of restricting competition?

There are a priori several clauses commonly contained in shipping pool agreements that can bring about competition concerns. Given that there is not an agreed standard form for pool agreements, the wording of these clauses can vary significantly, therefore, such clauses have to be analyzed on a case by case basis in order to determine whether, they do encourage anticompetitive-practices:

-Non competition clauses:

The DG Competition provides a general definition of a non-competition clause as being a “contractual clause bringing about a direct or indirect obligation causing the parties to an acquisition agreement, or at least one of them, not to manufacture, purchase, sell or resell independently goods or services which compete with the contract goods or services”.¹⁰⁰

Non-competition clauses are not automatically void under article 81 (1) EC Treaty, and indeed, this type of clauses can sometimes be considered ancillary restrictions on competition, which are “clauses that do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by the agreement”.¹⁰¹ The Commission has in many rulings considered non-competition clauses as ancillary restrictions, and thus, allowed them, given the facts of the case.¹⁰² Therefore, even if the competition clause can a priori bring about a restriction of competition, it will be tolerated if it is evident that it constitutes a “condition sine qua non” the transaction takes place. Non-competition clauses are also an issue under the Merger Regulation, and also there, it has to be considered the necessity of this kind of clauses in order for the merger to be properly implemented.

⁹⁹ Guidelines maritime transport (2008) p.16

¹⁰⁰ Glossary of terms used in EC competition p. 33

¹⁰¹ Glossary of terms used in EC Competition, p. 5

¹⁰² See *Remia v. Commission, Pronuptia GmbH v. Pronuptia de Paris*

In pool agreements the most common type of non-competition clause is the one stating that vessels of the same type committed to the pool can not engage in trade that is in competition with the activities of the pool. However, other non-competition clauses can be drafted in order to hinder pool participants from purchasing similar vessels to operate on their own or in other collaboration schemes. Lately, “no restriction on competition” clauses are also found in pool agreements.

These clauses have to be analyzed in the basis of their indispensability and they could either have a neutral competition effect in the market, for instance, in the cases that “parent companies would not have the incentive to compete with each other in the market” anyway;¹⁰³ or they could have indeed competition effects up to a certain extent as in cases of “spill over” effects on other markets or the imposition of unnecessary burdens to competition (in the case for example that the competition restrictions were “unconnected to the specific business of the pool”).¹⁰⁴ However, it may be an issue to analyze and discuss whether collaboration schemes in certain sectors of the market eliminate incentives for small shipowners to grow by themselves and to compete outside the pool of their membership.

To sum up, it can be concluded that generally non-competition clauses in pool agreements should only be included when they are strictly necessary for the collaboration scheme to be workable (condition sine qua non). Special attention should be devoted to them at the drafting stage of the pool agreement.

-Exit clauses:

This type of clauses is designed to provide the patterns of a business partnership” break-up”. Defining the rights and obligations of a commercial partner at an earlier stage can solve many disputes at later stages of the business relationship.

Normally a good exit clause will thoroughly define the rights and obligations of the parties while abandoning the partnership, and provide what will be done regarding

¹⁰³ Fearnley report (2006) p.354, Notice agreements minor importance p.14

¹⁰⁴ Fearnley report (2006) p.354

assets, investments, equipment, etc. However, the obligations imposed on the party leaving the partnership can not be too burdensome and can sometimes awake competition concerns. An example of this type of problem can be found in the European Night Services case, a case on rail transport where the Commissions' claim that a joint venture agreement restricted competition between the parties to the agreement themselves and third party rail operators, was disregarded.

In pool agreements the most common type of exit clauses provides for certain requirements in order for individual vessels to abandon the collaboration scheme. Depending on the pool in question, termination provisions can provide for a longer or shorter notice period or for some minimum initial periods for new members, for instance. These clauses can potentially have negative effects in the market, and therefore, a thorough analysis of the economic context of the pool is required.

However, some arguments from the European Night Services case can be extrapolated here, and the review of all the facts can also follow in the case of a shipping pool to the finding that the pool does not violate the competition provisions in the EC treaty. This could be the case when the termination clause is also indispensable, for instance, when two vessels are pooled to perform a long-lasting contract of affreightment. If when one of the vessels decided to leave the cooperation scheme, the other one would be unable to perform its obligations under the contract of affreightment, thus the inclusion of a termination clause would have to be regarded as indispensable, and therefore, should not be held to contravene article 81 (1) EC Treaty.

-Information exchange system:

Flows of information within shipping pools are also an important factor to take into account. The market can not be too transparent in order to exist competition between pool participants. The Fearnley report established that "none of the pool agreements assessed contained provisions for information sharing other than information

necessary to operate the pool”.¹⁰⁵ Even if the term “necessary” was not defined in the agreements evaluated, it seems logical that it would be the will of the parties to limit the information flow to a minimum, especially information regarding types of commercial operations that are outside the scope of the pool, future projects, etc. However, this should be evaluated in the light of each individual clause in order to search for potential competition infringements.

Finally, other types of pool agreement clauses that could have the effect to restrict competition must be specially examined, such as space sharing agreements, bilateral contracts of affreightment or joint outsourcing of the management of the vessel.

4.4.3 Market power of the members to a collaboration agreement

While considering the anti-competitive effects of an agreement, the analysis of the position of the parties on the market is fundamental.

The Guidelines on horizontal cooperation provide that the starting point is the definition of the relevant market, and therefore, the Notice on Market Definition and especially in tramp shipping, the Guidelines on the application of article 81 to maritime transport are to be considered. Moreover, the next step is the analysis of the market shares in the market.¹⁰⁶

Market shares reflect the market power of the undertaking in the market and according to the guidelines the relevance of the market shares, Richard Whish summarizes the provisions of the Guidelines as follows:¹⁰⁷

Market shares and horizontal agreements

50% An undertaking with a market share of more than 50% is presumed to be dominant

40% An undertaking of more than 40% may be dominant

25% An undertaking with a market share of more than 25% will not benefit from the block exemption under R&D agreements

20% An undertaking with a market share of more than 20% will not benefit from the block exemption on specialisation agreements

15% An undertaking with a market share of less than 15% will find that its purchasing or commercialisation agreements usually fall outside Article 81 (1)

10% An undertaking with a market share below 10% will usually benefit from the de minimis doctrine

ECJ jurisprudence has also addressed this issue in several cases. One of those is the above cited *European Night Services*, which states:

Where horizontal agreements between undertakings reach or only very slightly exceed the 5% threshold regarded by the Commission itself as critical and such as to justify application of Article 81(1) of the Treaty, the Commission must provide an adequate statement of its reasons in relation to the analytical data examined, particularly with regard to the market shares of the undertakings concerned, for concluding that the essential elements of a situation in which Article 81 applies are in fact present, unless such data were not challenged by the parties during the prior administrative procedure.¹⁰⁸

In the case of shipping pools, further guidance in order to calculate market shares is found in the Guidelines.¹⁰⁹

What is more, the Guidelines also point out that if a pool has a low market share, it is unlikely to be caught by the prohibition of article 81 (1) EC Treaty.¹¹⁰ This presumption is, however, contested from an economic point of view. When a pool has a low market share but contains a hardcore restriction it will be caught by article 81 (1) EC Treaty. Economists believe that if this low threshold is satisfied, even a hardcore restriction of an individual actor in the market would have very little impact in the market.¹¹¹

Other structural factors are mentioned in the Guidelines in order to be considered while carrying out the competition analysis: “market concentration, the position and the number of competitors, the stability of the market shares over time, multi-

¹⁰⁸ See 2.4.3, *European Night Services v. Commission* para.103

¹⁰⁹ Guidelines maritime transport (2008) p.8

¹¹⁰ Guidelines maritime transport (2008) p.16

¹¹¹ Majumdar (2007) p. 2

membership in pools, market-entry barriers and the likelihood of entry, market transparency, countervailing buying power of transport users and the nature of the services should be taken into account as additional factors in the assessing the impact of a given pool in the relevant market”.¹¹²

The Fearnley report provides a thorough analysis of all the segments in the tramp shipping market, including approximate market shares of the actors in the sector, dealing both with pools and independent actors.

4.5 Do pooling agreements affect trade within the Member States and restrict competition within the common market?

Article 81 (1) EC Treaty prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States”. The effect on trade requirement is very widely interpreted in EC jurisprudence. Proof of this liberal interpretation is the ruling in *Societe Technique Miniere v. Maschinenbau Ulm* when the ECJ ruled that in order to establish the inter-member state effect on trade “it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential on the pattern of trade between member states”.¹¹³ Moreover, the Commission has provided further guidance in the effect on trade by Guidelines on the effect of trade concept contained in articles 81 and 82 EC Treaty, and also in the Guidelines of the application of article 81 to maritime transport, where several paragraphs deal with this subject.¹¹⁴ Finally, there is jurisprudence specifically dealing with the effect on trade on maritime transport services. In the *CMBT* case the ECJ ruled that in order to establish the effect on trade of an agreement between providers of liner transport services, it is sufficient that such services relate to transport to or from Community ports.¹¹⁵ This ruling is easily extrapolated to the tramp shipping sector, as tramp services can usually relate to transport to or from community ports.¹¹⁶

¹¹² Guidelines maritime transport (2008) p.16

¹¹³ *Societe Technique Minier v Maschenbau* p.250

¹¹⁴ Guidelines maritime transport (2008) p.4

¹¹⁵ *CMBT v Commission* para.5

¹¹⁶ *TAA* case

Therefore, given all these features it is possible to conclude, as the Fearnley report also does, that the inter-state trade test is likely to be satisfied by all the pool arrangements acting within the European market.¹¹⁷ Nevertheless, this is has to be assessed on a case-by-case basis.

4.6 “The de minimis doctrine”

Finally, while dealing with market shares and the impact of inter-state trade it is necessary to mention that there are some agreements that are specifically excluded from vulnerating EC competition provisions due to their weak effects in the market or their almost inexistent impact in the inter-state trade. This is known as the “de minimis doctrine”.

This doctrine states that “an agreement falls outside the prohibition of article 81 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market or the product in question”.¹¹⁸ The Commission, therefore, will not usually investigate those horizontal or vertical agreements which have a market share of 10 or 15 per cent or less, which do not constitute hardcore restrictions.¹¹⁹

This doctrine first formulated in ECJ’ s case law of, is considerably importance as many agreements that do not fulfill the thresholds established escape the need to notify and the possibility of being prohibited.¹²⁰ The Commission has provided guidance on this doctrine in a series of Notices, the last one dating from 2001.¹²¹ Even if this doctrine is usually applied, there have been some cases that have shown the limits of the doctrines, such cases have as a common characteristic that all took place in extremely oligopolistic markets.¹²²

¹¹⁷ Fearnley report (2006) p.341

¹¹⁸ Volk v Vervaecke para. 5-7

¹¹⁹ Odudu (2007) p. 100

¹²⁰ Völk v Vervaecke

¹²¹ Notice on agreements of minor importance

¹²² Distillers Co Ltd v Commission, Musique Diffusion Francaise v. Commission

The main limit of this doctrine regards certain hardcore restrictions. The Notice specifically names certain type of agreements to which the “de minimis doctrine” does not apply, among those: horizontal agreements to fix prices, limit output or sales and to allocate market or customers”.¹²³ Consequently, not even if such hardcore restrictions fall under the thresholds set by the Commission, would these agreements be provided with a safe harbour.¹²⁴

4.7 Application of article 81 (3) EC to Shipping Pools

Any agreement which restricts competition under article 81 (1) EC Treaty, whether by its effects or by its object, may in principle benefit from an exemption under Article 81(3) EC Treaty;¹²⁵ however object infringements are very unlikely to satisfy 81 (3) because, as stated above, there is a “sliding scale”, according to which, “the greater the restriction of competition found under Article 81(1), the greater the efficiencies and the pass-on to consumers must be”.¹²⁶

Therefore, even if an agreement is caught by article 81 (1) EC Treaty, it is not automatically void pursuant to article 81 (2) if it satisfies the requirements for exemption under 81 (3).

Article 81 (3) EC Treaty has been subject to different enforcement regimes in the last decades. Under the old framework regulation for the enforcement of the competition provisions of the EC treaty, regulation 17/62, the Commission had “the sole power” to apply article 81 (3) to agreements notified to it.¹²⁷ In the current competition regime with the passing of the “modernization regulation”, Regulation 1/2003, article 81 (3) EC Treaty becomes directly applicable and it is now enforceable by both the Commission and the National Authorities. “Individual exemptions” under this article do no longer exist, and it is up the undertakings and their lawyers to conduct a “self-assessment” of their compliance with competition rules.¹²⁸

¹²³ Notice agreement minor importance (2001) para.11

¹²⁴ Commission v Minoan Lines

¹²⁵ GlaxoSmith v Commission para. 13

¹²⁶ Guidelines maritime transport (2008) p.16

¹²⁷ Regulation 17/62 article 9 (1)

¹²⁸ Kerse (2004) 14

In order for article 81 (3) EC Treaty to be applicable four cumulative conditions must be satisfied: efficiency gains, fair share for consumers of the resulting benefits, indispensability of the restrictions and no elimination of competition. An alternative way of falling into the scope the article is when agreements satisfy the conditions of one of the block exemptions issued by the Commission. In such cases, individual notification is not necessary and the agreement is valid and enforceable automatically.

The Commission has issued general guidance on the application of article 81 (3) EC Treaty in order to help undertakings carry out their “self-assessment” and also specific guidelines on the application of this article to shipping pools.¹²⁹

It is remarkable the change that the Guidelines on the application of competition to maritime transport have suffered in this point from the draft to its final version. The draft version of the Guidelines barely incorporated three vague and short paragraphs on this point, without providing much information. In its final version, the guidelines devote a whole page to this issue, illustrating each point with examples and giving to this issue the relevance it merits.

4.7.1 Efficiency gains

The first requirement imposed by article 81 (3) EC Treaty is that the agreement “contributes to improving the production or distribution of goods or to promoting technical or economical progress”. Even if the provision expressly deals with goods, it is per analogy applicable to services.¹³⁰

The efficiencies have to be objective, and they have to provide benefits to the Community as a whole and not merely to the undertakings involved in the agreement.¹³¹ Moreover, the nature of the claimed efficiencies, their likelihood and magnitude and how and when they would be achieved must be verified, and last but not least, also the link between the agreement and the efficiencies has to be

¹²⁹ Guidelines Article 81(3) (2004), Kerse (2004) 14, Guidelines maritime transport (2008) p. 16-17

¹³⁰ Guidelines Article 81 (3) (2004) p.104, Siragusa (2007) 89

¹³¹ Consten and Grundig v Commission

evidenced.¹³² The Guidelines distinguish between two broad types of efficiencies: cost efficiencies and dynamic efficiencies, where value is measured by new or improved products/services.

The Guidelines on the application of article 81 EC to maritime transport provide some examples as to the efficiencies that can be argued from the shipping pools' side: "better utilisation rates and economies of scale", "jointly plan vessels to spread their fleets geographically" and "reduction of the number of ballast voyages which may increase overall capacity utilisation of the pool and lead to economies of scale".¹³³

Shipping pools can benefit from the following efficiency gains of economies of scale:¹³⁴

-Cost efficiencies:

The fact that the pool manager is marketing the fleet as a cohesive unit means less management costs, and can create efficiencies both "in terms of vessel operation and utilisation". Many costs can be saved with this joint marketing, among them: crew costs, supplies costs, savings on IT material, marketing costs, and staff costs in general.

-Dynamic efficiencies:

-Larger fleets mean increased capacity, more flexibility for shippers and finally, better and more adequate services, or to put it short, higher capacity utilisation and output.

-Larger shippers are able to be targeted and larger contracts of affreightments easier to be obtained with an increased fleet. Moreover, large clients can be furnished with specialized vessels required for their trades, and such vessels can be built specially to satisfy the need of particular clients.

¹³² Guidelines Article 81 (3) (2004) p. 105

¹³³ Guidelines maritime transport, (2008) p.16

¹³⁴ Fearnley report (2006) p.343

-Customers enjoy also the benefit of dealing with larger companies that offer both flexibility and reliability, the security that long-term business relations provide is highly relevant in the shipping industry; lower trading risks; and finally, quality and technical improvements.

-Pooling of resources means more possibilities of investing in research and development.

It seems from the wording of the final Guidelines that the Commission is, nowadays, increasingly eager to acknowledge the efficiency gains that shipping pools might bring to the market.

4.7.2 Consumer pass-on

Economic benefits have to favour consumers, too, and not only the parties to the agreement.¹³⁵ The concept of fair share has not been elaborated further by the Commission, however it is generally understood to mean that the efficiency gains have to be passed on to the consumers, i.e. for example if competition pressure is transmitted to the customers in the form of lower prices. Such benefits have to be balanced as a whole to consider their positive/negative impacts in competition.

The Guidelines on the application of competition to maritime transport also deal with the point on consumer pass-on and point out that the following factors needs to be considered to determine that the efficiencies have a consumer pass-on: “consumers must receive a fair share of the efficiencies generated”, “beneficial effects” must be assessed collectively and not individually; the pass-on must at least compensate consumers for potential negative effects caused by competition restrictions”; and lastly, also “the structure of the market and the elasticity of the demand” must be taken into account.¹³⁶

Some of the benefits that shipping pools provide to the consumers in the market are the following:

¹³⁵ Guidelines Article 81 (3) (2004) p.102, Siragusa (2007) p.89

¹³⁶ Guidelines maritime transport (2008) p.16

- Better flexibility of services and, consequently, wider choice span for customers.
- More commercial flexibility for cargo shippers in what COAs are concerned.
- Easier access to port equipment and port facilities in general.
- More reliability and lower transactional costs.¹³⁷

Also in this point, the Commission seems to be increasingly willing to acknowledge the consumer pass-on when certain market conditions are given.

4.7.3 Indispensability

Indispensability in this context means that no other practicable and less restricting way of achieving the efficiency gains exists, such a restriction is, therefore, “necessary to achieve the economic benefits”.¹³⁸

The Guidelines establish that what is necessary to examine is whether “the parties could have achieved the efficiencies on their own”, “what was the minimum efficient scale to provide various types of services” and also what the individual clauses of the agreement provide. However such clauses “may be justified for a longer period or the whole life of the pool or for a transitional period only”¹³⁹.

This indispensability test has to be assessed on a case-by-case basis taking into account all of the elements mentioned above. Furthermore, the party applying for exemption has to carry out a detailed analysis of the indispensability of restrictions that the agreement in question can cause in the market, otherwise, the exemption may be disregarded.¹⁴⁰

Yet, for our analysis, if a shipping pool is established for all the right reasons, non-competition and termination clauses prove to be provisions sine qua non the pool can not function, and moreover, a detailed review of the indispensability of the restriction

¹³⁷ Fearnley report (2006) p.351

¹³⁸ Guidelines Article 81 (3) (2004) p.102, Siragusa (2007) p. 90

¹³⁹ European Night Services v. Commission para.230

¹⁴⁰ European Night Services v Commission, Visa Multilateral case

of competition is provided, it will be more than likely that the potential competition restrictions provided for in the pool agreement are indispensable.

4.7.4 Elimination of competition in substantial parts of shipping services

The last cumulative requirement is that elimination of competition in the market is prohibited. The Guidelines on the application of article 81(3) provide that “where an undertaking is dominant or becoming dominant as a consequence of a horizontal agreement, an agreement which produces anti-competitive effects in the meaning of article 81 can in principle not be expected”.¹⁴¹

The Guidelines on the application of article 81 to maritime transport add that “the pool must not be afforded the possibility of eliminating competition in respect of a substantial part of the services in question”.¹⁴² This formulation was the only one regarding article 81 (3) that has suffered no modifications from the draft version.

Competition effects are to be analysed in the context of the market power of the undertakings in the relevant market, and potential effects in other markets.

Firstly, the Fearnley report has concluded that there is no evidence that “pools have been able to use their joint resources and combined market power to push prices up at any time in any segment of the history”.¹⁴³ Secondly, the tramp shipping market has historically been regarded as a highly competitive market.¹⁴⁴ However, a study of every segment of the market in question has to be conducted, and pools with high market shares in a market that face weaker competition from outside the pool may be at risk. Consequently, it is necessary for the purpose of this provision to exclude any risk of abuse of market power or elimination of competition in the relevant market.

4.8 Conclusions: general compliance of Shipping Pools with articles 81 (1) and (3) EC

¹⁴¹ Guidelines Article 81 (3) (2004) p.102, Siragusa (2007) p. 91

¹⁴² Guidelines maritime transport (2008) p.17

¹⁴³ Fearnley report (2006) p.359

¹⁴⁴ Regulation 4056/86 preamble para. 9

First of all, shipping pools will generally fulfil the first three preliminary requirements under article 81 (1) EC Treaty: they can be considered “agreements of undertakings” or “concerted practices”, they are indeed undertakings due to the fact that they carry out an economic activity, and last but not least, in the big majority of cases they will be found to have an effect on intra-member state trade.

Whether shipping pools have as an object and effect restriction, distortion and limitation of competition is a question that has to be closely looked at on a case by case basis. It seems that shipping pools in the vast majority of cases will be quite unlikely to fail the “object test” in article 81 (1) EC Treaty, with the only exceptions being pools engaged involved in hardcore competition restrictions such as pure price-fixing practices or in certain information sharing schemes. Therefore, the uncertainty under the actual competition law regime lies on the “effect test” under this article.

For the effect test it will be necessary to consider the appreciability and the market effects of the agreements, and this is an analysis that is only possible to carry out on a case-by-case basis. The anticompetitive effects would be dependant on the nature of the agreement and on the market power of the undertaking in question, assessed in the basis of its market shares in the relevant market. Agreements reaching certain thresholds may be held to contravene article 81 (1) EC Treaty while agreements falling under certain thresholds would be not caught thanks to the de minimis doctrine.

According to their level of risk under the current EC legislation shipping pools can be classified as follows:

-Low risk Pools

“Low risk” pools are those pools that are very unlikely to breach article 81 (1) and that, therefore, almost always fall outside of the scope of this provision.

-Pools that are not actual or potential competitors: such pools are rare in the tramp shipping market, as one of the usual characteristics of the pools is that they market

vessels to supply the same market, and therefore, the fleet is quite homogeneous and competes among itself. However, it could be possible to have a pool that markets its ships in different segments of the market, or that serves complementary segments. In those cases, pools would not be direct competitors for business. This type of agreement is said to be found in, for example, when the KG structure is used in the two Jacob-Scorpio tanker pools.¹⁴⁵

-Pools that are competing companies that cannot by any means provide the service covered individually: There are plenty of pools that have been established to provide services that the members would not be able to individually provide and to win larger contracts that otherwise would not be possible to bid for. Pools in which small shipowning companies join forces to be more attractive in the market are likely to fall under this category. For this requirement to be fulfilled it is not necessary that the pool has the sole purpose to tender contracts of affreightment¹⁴⁶.

-Pools whose activity does not influence the relevant parameters of competition because they are of minor importance: the Fearnley report identifies two types of agreements that can be presumed to fall in this category: “purely technical information-exchanging agreements covering technical matters such as ISM and ISPS Code compliance, class issues, environmental law and technology , crew or vessel safety” and “exchanges of information comprising solely historical statistical information of the sort held not to fall within art 81 (1) case law”.¹⁴⁷

-Pools whose activity does not appreciably affect trade between Member States: Given that usually the scope of the tramp shipping pools is global, pools falling into this category can not be excluded. A pool can operate outside the European Union and have little repercussion on the European transport market.

These four categories of low risk pools are unlikely to fail the tests under article 81 (1) EC Treaty, therefore if they are assessed under the “rule of reason” they will not often contravene this article. Nevertheless, if such pools are involved in hardcore

¹⁴⁵ Fearnley report (2006) p. 331

¹⁴⁶ This is a significant change from the Draft Guidelines, where this sole purpose was required.

¹⁴⁷ Fearnley report (2006) p. 330

competition restrictions, if they have a significant market power and/or also prevent competition for competitors in the market, they could breach article 81 (1) EC Treaty, and therefore self-assessment under 81 (3) EC Treaty will be the possible way out.¹⁴⁸

If the Commission initiates an investigation against this type of pools it is quite likely to be abandoned at one of the earliest stages of the process.

-Mid- risk Pools

These are a type of pools that the Guidelines calls “agreements that almost always fall under Article 81 (1)”. In principle, they do not have the object of restricting competition as such, albeit, they might fail the effects test under Article 81 (1). The Guidelines give as an example of this case, pools that are engaged in joint scheduling or joint purchasing, such pools would only be subject to articles’ 81 (1) analysis when the companies involved have a certain degree of market power.¹⁴⁹

These undertakings must be analyzed in the basis of their market power and other structural and functional factors in the relevant market, and last but not least, the impact of their effects in trade must be assessed in order to identify anti-competitive practices. If such undertakings breach article 81 (1) EC Treaty, they should carry out a self assessment in terms of article 81 (3) EC Treaty. If the requirements established in article 81 (3) EC Treaty can be proved to be achieved, then the pool will be cleared. If not, then it would be prohibited under EC competition law.

-High risk Pools

This category of pools is almost always a contravention of EC competition law. Their practices are regarded as dangerous for the well functioning of the internal market and significant fines are to be expected according to the latest EC policy punishing cartels.

¹⁴⁸ Fearnley report (2006) p.330

¹⁴⁹ Guidelines maritime transport (2008) p.15

Pools that are likely to breach article 81 (1) EC Treaty entail hardcore competition restrictions, for instance, pools that are involved into price fixing, output limitation, market sharing or customers.

These pools with a high risk of non-compliance are in danger of contravening EC Competition law. They have three options available: prove that they fulfil the requirements of 81 (3) EC Treaty, which will not often be the case in hardcore restrictions, also because there is a “sliding scale”, according to which, “the greater the restriction of competition found under Article 81(1) EC Treaty, the greater the efficiencies and the pass-on to consumers must be”;¹⁵⁰ reconsider their activities and abandon the anticompetitive practices; or restructure themselves as a full function joint ventures or merge, in order to fall within the scope of the Merger Regulation. This last seems to be the most suitable option and the one that will provide these pools with a higher level of legal security.

Normally, undertakings being caught by EC Competition law can face very high fines imposed by the European Commission -EC Competition law provides for a maximum fine of 10% of an undertakings’ total turnover in the former business year, and moreover periodic penalty payments can be imposed¹⁵¹. It is also important to remark that processes in Brussels are usually long and entail particularly high legal costs. On the other hand, in the EC jurisdiction, the Commission has no power to fine natural persons or charge them with imprisonment penalties.

Finally, if pools are caught by article 81 (1) EC Treaty there is still a possibility for clearance under EC Competition law, and this is self-assessment under article 81 (3) EC treaty. It is clear that this self-assessment must be carried out on a case by case basis. However, on the context of shipping pools it can be affirmed that if an agreement implies an object violation of article 81 (1) EC Treaty, it will be extremely difficult to satisfy the four cumulative requirements of article 81 (3) EC Treaty. On the other hand, shipping pools are apt to primarily fulfil the four conditions established by such article.

¹⁵⁰ Guidelines maritime transport (2008) p.16

¹⁵¹ Regulation 1/2003 art 23, art 24

To sum up, it seems that a priori not many pools seem to be at risk in the new maritime transport competition legislative framework. Pools with a high market power and collusive practices are targeted, but it does not seem that the standard shipping pool responds to such a description. Nevertheless, it will be interesting to follow how the Commission applies the regulation and also the potential developments or modifications of the Guidelines after the period of five years for revision provided for in the regulation.

V. Present and Future challenges in EC maritime competition

EC maritime competition law has increasingly been in the public eye ever since the Lisbon Strategy pointed at maritime transport as one of the sectors that urged for a renovated competition policy. After years of debate, the adoption of Regulation 1419/2006 did not only mean that all sectors of the maritime transport industry now

fall within the enforcement powers of the Commission but has also brought many other novelties for all segments of the sector.

In liner shipping, the repeal of the block exemption for liner conferences meant nothing but a revolution. Price fixing will no longer be permitted after the 18th of October 2008 and the liner market has had two years to adjust to this change. However, it seems that there are still some issues that are not completely clear in the new regime, the main issue needing a clearer treatment is information exchanges between competitors in the liner market, whose formulation as it is opens the road for plenty of debate.

In the field of tramp shipping, apart from the new enforcement regime, some points deserve a brief comment. First of all, the definition of the tramp shipping market is still a very complicated issue to tackle and it has not been addressed clearly enough by the Commission through all these years. Secondly, the final version of the Guidelines on maritime transport restates the line of thought that the Commission has followed until now. However, the guidelines provide for a revision period in 5 years time, therefore, only time will tell how useful the current guidelines really are and how much changes they will suffer in the near future. And last, but not least, it is still to see how this regulation will be applied and how much litigation it will bring with it.

The legal problems around the compliance of shipping pools with the new EC competition law are still depending on the Commissions future approach to shipping pools. A priori, it can not be categorically affirmed that shipping pools contravene EC Competition law per se, as this was the case with most liner conference agreements.

Nevertheless, the practical application of the Regulation 1419/2006 in this field is still to be seen. Particularly challenging is the question of how far the Commission will apply the concept of price fixing to shipping pools. A narrow concept of price fixing in this field would most certainly mean that while shipping pools would be allowed under EC competition law per se, and the standard shipping pool concept accepted, the essence of their existence, the fact that pool members bring together their vessels and jointly operate, would be illegal. This paradoxical approach is clearly not acceptable. On the other hand, too wide a concept can differ with the established doctrine set by

European jurisprudence on price fixing. Lastly, more clarity is needed on the key feature of shipping pools as the current formulation” joint selling coupled with features of joint production” is quite obscure.

Tramp shipping is indeed a highly competitive sector, and even if each pool has to be analyzed individually in order to assess its compliance with the new regime, it seems that not many shipping pools are nowadays in a position that could contravene the new EC competition regime. Therefore, it seems that the big majority of pools will not be forced to merge or restructure in order to comply with the new regulatory framework.

Pools were established for all the right reasons and the strongest argument to their favour is that, as seen in this work, they strongly enhance competition in the shipping market and they increase the quality, quantity and flexibility of services to the customers in the market. Some studies point also that if pools were no longer to exist, freight rates would become volatile and higher and the reliability and flexibility of the services offered will be much poorer. This volatility in the market would be likely to be passed on to customers, and prices would be likely to rise, especially in the context of periods of economic recession such as the one that is not being experienced. Let us not forget that shipping is a sector where exogenities (especially oil prices) have enormous repercussions.

Last but not least, the debate on maritime competition law is still bound to go on for the next decades. There are still many issues that are likely to be object of the study of the Commission, among those, the potential revision of the block exemption for consortia, the application of competition law to cabotage and ferry services, and lastly, a borderline question with Insurance law: the legal status of the International Group of P&I Clubs’ agreement in the light of the current competition law regime.

VI. Literature

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