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Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

(presented by the Commission)

Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

(Text with EEA relevance)

1. INTRODUCTION

1. These Guidelines set out the principles that the Commission of the European Communities will follow when defining markets and assessing cooperation agreements in those maritime transport services directly affected by the changes brought about by Council Regulation (EC) No 1419/2006 of 25 September 2006, i.e. liner shipping services, cabotage and international tramp services.([1])

2. These Guidelines are intended to help undertakings and associations of undertakings operating those services, mainly if operated to and/or from a port or ports in the European Union, to assess whether their agreements ([2]) are compatible with Article 81 of the Treaty establishing the European Community (hereinafter "the Treaty"). The Guidelines do not apply to other sectors.

3. Regulation (EC) No 1419/2006 extended the scope of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([3]) and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty ([4]) to include cabotage and tramp vessel services. Consequently, as of 18 October 2006, all maritime transport services sectors are subject to the generally applicable procedural framework.

4. Regulation (EC) No 1419/2006 also repealed Council Regulation (EEC) No 4056/1986 of 22 December 1986 on the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport ([5]) containing the liner conference block exemption which allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage, as the conference system no longer fulfils the criteria of Article 81(3) of the Treaty. The repeal of the block exemption takes effect as of 18 October 2008. Thereafter, liner carriers operating services to and/or from one or more ports in the European Union must cease all liner conference activity contrary to Article 81 of the Treaty. This is the case regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conferences or discussion agreements. Moreover, conference members should ensure that any agreement taken under the conference system complies with Article 81 as of 18 October 2008.

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1 Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269, 28.9.2006, p. 1.

2 The term "agreement" is used for agreements, decisions by associations of undertakings and concerted practices.

3 OJ L 1, 4.1.2003, p. 1.

4 OJ L 123, 27.4.2004, p. 18.

5 OJ L 378, 31.12.1986, p. 4.

5. These Guidelines complement the guidance already issued by the Commission in other notices. As maritime transport services are characterised by extensive cooperation agreements between competing carriers, the Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements ([6]) (the *Guidelines on Horizontal Cooperation*) and the Guidelines on the application of Article 81(3) of the Treaty ([7]) are particularly relevant.

6. Horizontal cooperation agreements in liner shipping regarding the provision of joint services are covered by Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ([8]). It sets out the conditions, pursuant to Article 81(3) of the Treaty, under which the prohibition in Article 81(1) of the Treaty does not apply to agreements between two or more vessel operating carriers (consortia). It will be reviewed following the changes introduced by Regulation (EC) No 1419/2006 ([9]).

7. These Guidelines are without prejudice to the interpretation of Article 81 of the Treaty which may be given by the Court of Justice or the Court of First Instance of the European Communities. The principles in the Guidelines are to be applied in the light of the circumstances specific to each case.

8. The Commission will apply these Guidelines for a period of five years.

2. MARITIME TRANSPORT SERVICES

2.1. Scope

9. Liner shipping services, cabotage and tramp services are the maritime transport sectors directly affected by the changes brought about by Regulation (EC) No 1419/2006.

10. Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user.

11. Article 1.3(a) of Regulation (EEC) No 4056/86 defined tramp vessel services as 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 for 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. It is mostly the unscheduled transport of one single commodity which fills a vessel ([10]).

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6 OJ C 3, 6.1.2001, p. 2.

7 OJ C 101, 27.4.2004, p. 97.

8 OJ L 100, 20.4.2000, p. 24, as amended by Commission Regulation (EC) 463/2004 of 12 March 2004, OJ L 77, 13.3.2004, p. 23 and by Commission Regulation (EC) 611/2005 of 20 April 2005, OJ L 101, 21.4.2005, p. 10.

9 Recital 3 of Commission Regulation (EC) 611/2005, cited above in footnote 8.

10 The Commission has identified a series of characteristics specific to specialised transport which render it distinct from liner services and tramp vessel services. They involve the provision of regular services for a particular cargo type. The service is usually provided on the basis of contracts of affreightment using specialised vessels technically adapted and/or built to transport specific cargo. Commission

12. Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State ([11]). Although these Guidelines do not specifically address cabotage services they nevertheless apply to these services insofar as they are provided either as liner or tramp shipping services.

2.2. Effect on trade between Member States

13. Article 81 of the Treaty applies to all agreements which may appreciably affect trade between Member States. In order for there to be an 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 fact that the agreement or conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States ([12]). The Commission has issued guidance on how it will apply the concept of affectation of trade in its Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty ([13]).

14. Transport services offered by liner shipping and tramp operators are often international in nature linking Community ports with third countries and/or involving exports and imports between two or more Member States (i.e. intra Community trade) ([14]). In most cases they are likely to affect trade between Member States *inter alia* on account of the impact they have on the markets for the provision of transport and intermediary services ([15]).

15. Effect on trade between Member States is of particular relevance to maritime cabotage services since it determines the scope of application of Article 81 of the Treaty and its interaction with national competition law under Article 3 of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The extent to which such services may affect trade between Member States must be evaluated on a case by case basis ([16]).

Decision No 94/980/EC of 19 October 1994 in Case IV/34.446 – *Transatlantic Agreement*, OJ L 376, 31.12.1994, p. 1 *(hereinafter the TAA decision*), paragraphs 47-49.

[11] Article 1 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364, 12.12.1992, p. 7.

[12] Case 42/84 *Remia BV and others* v *Commission* [1985] ECR 2545, paragraph 22. Case 319/82 *Ciments et Bétons de l'Est* v *Kerpen & Kerpen* [1983] ECR 4173, paragraph 9.

[13] OJ C 101, 27.4.2004, p. 81.

[14] The fact that the service is to/from a non-EU port does not in itself preclude that trade between Member States is affected. A careful analysis of the effects on customers and other operators within the Community that rely on the services needs to be carried out to determine whether they fall under Community jurisdiction. See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, cited above in footnote 13.

[15] Commission Decision No. 93/82/EEC of 23 December 1992 (Cases IV/32.448 and IV/32.450, *CEWAL*), OJ L 34, 10.2.1993, p. 1, paragraph 90, confirmed by the Court of First Instance in Joined Cases T-24/93 to T-26/93 and T-28/93, *Compagnie Maritime Belge and others* v *Commission* [1996] ECR II-1201, paragraph 205. TAA decision, cited above in footnote 10, paragraphs 288-296, confirmed by the judgment of the Court of First Instance of 28 February 2002, in Case T-395/94, *Atlantic Container Line and others* v *Commission* (*hereinafter the TAA judgment*), paragraphs 72-74; Commission Decision No 1999/243/EC of 16 September 1998 (Case IV/35.134 – *Trans-Atlantic Conference Agreement*) (*hereinafter the TACA decision*), OJ L 95, 9.4.1999, p. 1, paragraphs 386-396; Commission Decision No 2003/68/EC of 14 November 2002 (Case COMP/37.396 – *Revised TACA*) (*hereinafter the Revised TACA decision*), OJ L 26, 31.1.2003, p. 53, paragraph 73.

[16] For guidance on the application of the effect on trade, see the Commission Guidelines cited above in footnote 13.

2.3. The relevant market

16. In order to assess the effects on competition of an agreement for the purposes of Article 81 of the Treaty, it is necessary to define the relevant product and geographic market(s). The main purpose of market definition is to identify in a systematic way the competitive constraints faced by an undertaking. Guidance on this issue can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law ([17]). This guidance is also relevant to market definition as regards maritime transport services.

17. The relevant product market comprises 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. The relevant geographic 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 ([18]). A carrier (or carriers) cannot have a significant impact on the prevailing conditions of the market if customers are in a position to switch easily to other service providers ([19]).

2.3.1. Liner shipping

18. Containerised liner shipping services have been identified as the relevant product market for liner shipping in several Commission decisions and Court judgments ([20]). Those decisions and judgments related to maritime transport in deep sea trades. Other modes of transport have not been included in the same service market even though in some cases these services may be, to a marginal extent, interchangeable. This was because only an insufficient proportion of the goods carried by container can easily be switched to other modes of transport, such as air transport services ([21]).

19. It may be appropriate under certain circumstances to define a narrower product market limited to a particular type of product transported by sea. For example, the transport of perishable goods could be limited to reefer containers or include transport in conventional reefer vessels. While it is possible in exceptional circumstances for some substitution to take place between break bulk and container transport ([22]), there appears to be no lasting change over from container towards bulk. For the vast majority of categories of goods and users of containerised goods, break bulk does not offer a reasonable alternative to containerised liner shipping ([23]). Once cargo becomes regularly containerised it is unlikely ever to be transported

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17 OJ C 372, 9.12.1997, p. 5.

18 Notice on market definition, cited above in footnote 17, paragraph 8.

19 Notice on market definition, cited above in footnote 17, paragraph 13.

20 Commission Decision No 1999/485/EC of 30 April 1999 (Case IV/34.250 – *Europe Asia Trades Agreement*), OJ L 193, 26.7.1999, p. 23; TAA decision, cited above in footnote 10, and the TACA decision, cited above in footnote 15, paragraphs 60-84. The market definition in the TACA decision was confirmed by the Court of First Instance in its judgment in Joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and others* v *Commission*, [2003] ECR II-3275 (*hereinafter the TACA judgment*), paragraphs 781-883.

21 Paragraph 62 of the TACA decision, cited above in footnote 15 and paragraphs 783-789 of the TACA judgment, cited above in footnote 20.

22 TACA decision, cited above in footnote 15, paragraph 71.

23 TAA judgement, cited above in footnote 15, paragraph 273 and TACA judgment, cited above in footnote 20, paragraph 809.

again as non-containerised cargo ([24]). To date containerised liner shipping is therefore mainly subject to one way substitutability ([25]).

20. The relevant geographic market consists of the area where the services are marketed, generally a range of ports at each end of the service, determined by ports' overlapping catchment areas. As far as the European end of the service is concerned, to date the geographical market in liner cases has been identified as a range of ports in Northern Europe or in the Mediterranean. As liner shipping services from the Mediterranean are only marginally substitutable for those from Northern European ports, these have been identified as separate markets ([26]).

2.3.2. Tramp services

21. The Commission has not yet applied Article 81 of the Treaty to tramp shipping. Undertakings may consider the following elements in their assessment inasmuch as they are relevant to the tramp shipping services they provide.

Elements to take into account when determining the relevant product market from the demand side (demand substitution)

22. The "*main terms*" of an individual transport request are a starting point for defining relevant service markets in tramp shipping since they generally identify the essential elements ([27]) of the transport requirement at issue. Depending on the transport users' specific needs, they will be made up of negotiable and non-negotiable elements. Once identified, a negotiable element of the main terms, for example the vessel type or size, may indicate, for instance, that the relevant market with respect to this specific element is wider than laid down in the initial transport requirement.

23. The nature of the service in tramp shipping may differ and there is a variety of transport contracts. It may be necessary, therefore, to ascertain whether the demand side considers the services provided under time charter contracts, voyage charter contracts and contracts of affreightment to be substitutable. Should this be the case they may belong to the same relevant market.

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[24] TAA judgment, cited above in footnote 15, paragraph 281. Commission Decision in Case No COMP/M.3829 – *MAERSK/PONL*, 29.07.2005, paragraph 13.

[25] TACA decision, cited above in footnote 15, paragraphs 62-75; TACA judgment, cited above in footnote 20, paragraph 795 and Commission Decision in *MAERSK/PONL*, cited above in footnote 24, paragraphs 13 and 112-117.

[26] TACA decision, cited above in footnote 15, paragraphs 76-83 and Revised TACA decision, cited above in footnote 15, paragraph 39.

[27] For voyage charter for instance the essential elements of a transport requirement are the cargo to be carried, the cargo volume, the loading and discharging ports, the laydays or the ultimate date by which the cargo has to arrive and technical details regarding the vessel required.

24. Vessel types are usually subdivided into a number of standard industrial sizes ([28]). Due to considerable economies of scale, a service with a significant mismatch between cargo volume and vessel size may not be able to offer a competitive freight rate. Therefore, the substitutability of different vessel sizes needs to be assessed case by case so as to ascertain whether each vessel size constitutes a separate relevant market.

Elements to take into account when determining the relevant product market from the supply-side (supply substitution)

25. The physical and technical conditions of the cargo to be carried and the vessel type provide the first indications as to the relevant market from the supply side ([29]). If vessels can be adjusted to transport a particular cargo at negligible cost and in a short time-frame ([30]), different tramp shipping service providers are able to compete for the transport of this cargo. In such circumstances, the relevant market from the supply side will comprise more than one type of vessel.

26. However, there are a number of vessel types that are technically adapted and/or specially built to provide specialised transport services. Although specialised vessels may also carry other types of cargo, they may be at a competitive disadvantage. The ability of specialised service providers to compete for the transport of other cargo may, therefore, be limited.

27. In tramp shipping, port calls are made in response to individual demand. Mobility of vessels may however be limited by terminal and draught restrictions or environmental standards for particular vessel types in certain ports or regions.

Additional considerations to take into account when determining the relevant product market

28. The existence of chains of substitution between vessel sizes in tramp shipping should also be considered. In certain tramp shipping markets, vessel sizes at the extreme of the market are not directly substitutable. Chain substitution effects may nevertheless constrain pricing at the extremes and lead to their inclusion in a broader market definition.

29. In certain tramp shipping markets, consideration must be given to whether vessels can be considered as captive capacity and should not be taken into account when assessing the relevant market on a case by case basis.

30. Additional factors such as the reliability of the service provider, security, safety and regulatory requirements may influence supply and demand-side substitutability, for example the double hull requirement for tankers in Community waters ([31]).

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[28] It appears to be the industry's perception that vessel sizes constitute separate markets. The trade press and the Baltic Exchange publish price indexes for each standard vessel size. Consultants' reports divide the market on the basis of vessel sizes.

[29] For example, liquid bulk cargo cannot be carried on dry bulk vessels or reefer cargo cannot be transported on car carriers. Many oil tankers are able to carry dirty and clean petroleum products. However, a tanker cannot immediately carry clean products after having transported dirty products.

[30] Switching a dry bulk vessel from the transport of coal to grain might require only a one-day cleaning process that might be done during a ballast voyage. In other tramp shipping markets this cleaning period may be longer.

[31] Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, L 64, 7.3.2002.

Geographic dimension

31. Transport requirements usually contain geographic elements such as the loading and discharging ports or regions. These ports provide the first orientation for the definition of the relevant geographic market from the demand-side, without prejudice to the final definition of the relevant geographic market.

32. Certain geographic markets may be defined on a directional basis or may occur only temporarily for instance when climatic conditions or harvest periods periodically affect the demand for transport of particular cargos. In this context, repositioning of vessels, ballast voyages and trade imbalances should be considered for the delineation of relevant geographic markets.

2.4. Market shares

33. Market shares provide useful first indications of the market structure and of the competitive importance of the parties and their competitors. The Commission interprets market shares in the light of the market conditions on a case-by-case basis. In liner shipping, volume and/or capacity data have been identified as the basis for calculating market shares in several Commission decisions and Court judgments ([32]).

34. In tramp shipping markets, service providers compete for the award of transport contracts, that is to say, they sell voyages or transport capacity. Depending on the specific services in question, various data may allow operators to calculate their annual market shares ([33]), for instance:

(a) the number of voyages;

(b) the parties' volume or value share in the overall transport of a specific cargo (between port pairs or port ranges);

(c) the parties' share in the market for time charter contracts;

(d) the parties' capacity shares in the relevant fleet (by vessel type and size).

3. HORIZONTAL AGREEMENTS IN THE MARITIME TRANSPORT SECTOR

35. Cooperation agreements are a common feature of maritime transport markets. Considering that these agreements may be entered into by actual or potential competitors and may adversely affect the parameters of competition, undertakings must take special care to ensure that they comply with the competition rules. In service markets, such as maritime transport, the following elements are particularly relevant for the assessment of the effect an agreement may have in the relevant market: prices, costs, quality, frequency and differentiation of the service provided, innovation, marketing and commercialisation of the service.

36. Three issues are of particular relevance to the services covered by these guidelines: technical agreements, exchanges of information and pools.

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[32] TACA decision, cited above in footnote 15, paragraph 85; Revised TACA decision, cited above in footnote 15, paragraphs 85 and 86 and the TACA judgment, cited above in footnote 20, paragraphs 924, 925 and 927.

[33] Depending on the specificities of the relevant tramp shipping market shorter periods may be envisaged, e.g. in markets where contracts of affreightment are tendered for periods of less than one year.

3.1. Technical agreements

37. Certain types of technical agreements may not fall under the prohibition set out in Article 81 of the Treaty on the ground that they do not restrict competition. This is the case, for instance, of horizontal agreements the sole object and effect of which is to implement technical improvements or to achieve technical cooperation. Agreements relating to the implementation of environmental standards can also be considered to fall into this category. Agreements between competitors relating to price, capacity, or other parameters of competition will, in principle, not fall into this category ([34]).

3.2. Information exchanges between competitors in liner shipping

38. An information exchange system entails an arrangement on the basis of which undertakings exchange information amongst themselves or supply it to a common agency responsible for centralizing, compiling and processing it before returning it to the participants in the form and at the frequency agreed.

39. It is common practice in many industries for aggregate statistics and general market information to be gathered, exchanged and published. This published market information is a good means to increase market transparency and customer knowledge, and thus may produce efficiencies. However, the exchange of commercially sensitive and individualised market data can, under certain circumstances, breach Article 81 of the Treaty. These guidelines are intended to assist providers of liner shipping services in assessing when such exchanges breach the competition rules.

40. In the liner shipping sector, exchanges of information between shipping lines taking part in liner consortia which otherwise would fall under Article 81(1) of the Treaty are permitted to the extent that they are ancillary to the joint operation of liner transport services and the other forms of co-operation covered by the block exemption in Regulation (EC) No 823/2000 ([35]). The present Guidelines do not deal with these information exchanges.

3.2.1. In general

41. In assessing information exchange systems under Community competition law, the following distinctions must be made.

42. The exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel; where an exchange of information is ancillary to such an anti-competitive practice its assessment must be carried out in combination with an assessment of that practice. An exchange of information may even have in itself the object of restricting competition ([36]). These Guidelines do not address such exchanges of information.

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[34] Commission Decision No 2000/627/EC of 16 May 2000 (Case IV/34.018 – *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)*), OJ L 268, 20.10.2000, p. 1, paragraph 153. Judgment of the Court of First Instance in Case T-229/94, *Deutsche Bahn AG* v *Commission*, [1997] ECR II-1689, paragraph 37.

[35] Regulation (EC) No 823/2000, cited above in footnote 8, applies to international liner transport services from or to one or more Community ports exclusively for the carriage of cargo chiefly by container – see Articles 1, 2 and Article 3(2)(g) thereof.

[36] Judgment of the Court of Justice in Case C-49/92 P, *Commission* v *Anic Partecipazioni*, [1999] ECR I-4125, paragraphs 121 to 126.

43. However, an exchange of information, in its own right, might constitute an infringement of Article 81 of the Treaty by reason of its effect. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted ([37]). Every economic operator must determine autonomously the policy which it intends to pursue on the market. The Court further considered that undertakings are, therefore, precluded from direct or indirect contacts with other operators which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to restrict competition, i.e. to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and the volume of the market ([38]). By contrast, in the wood pulp market, the Court has found that unilateral quarterly price announcements made independently by producers to users constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors and hence, in the absence of any preliminary concerted practice between producers, do not constitute in themselves an infringement of Article 81(1) of the Treaty ([39]).

44. The case law of the Community Courts provides some general guidance in examining the likely effects of an information exchange. The Court has found that where there is a truly competitive market, transparency is likely to lead to intensification of competition between suppliers ([40]). However, on a highly concentrated oligopolistic market, on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and of consumers, are likely to impair substantially the competition that exists between suppliers. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors ([41]). The Court has also found that an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings' decision-making autonomy resulting from pressure during subsequent discussions with competitors ([42]).

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37 Judgment of the Court of Justice in Case C-7/95 P, *John Deere* v *Commission*, [1998] ECR I-3111, paragraph 90 and Judgment of the Court of Justice in Case C-194/99 P, *Thyssen Stahl* v *Commission*, [2003] ECR I-10821, paragraph 81.

38 Judgment of the Court of Justice of 23 November 2006 in Case C-238/05, *Asnef-Equifax* v *Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, [2006] ECR I-11125, paragraph 52 and Judgment of the Court of Justice in Case C-49/92 P, *Commission* v *Anic Partecipazioni*, cited above in footnote 36, paragraphs 116 and 117.

39 Judgment of the Court of Justice in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others* v *Commission*, [1993] ECR I-1307, paragraphs 59 to 65.

40 Judgment in *John Deere* v *Commission*, Case C-7/95 P, cited above in footnote 37, paragraph 88.

41 Judgment of the Court of First Instance in Case T-35/92 *John Deere Ltd* v *Commission*, [1994] ECR II-957, paragraph 51, upheld on appeal by the Judgment in *John Deere Ltd* v *Commission*, Case C-7/95 P, cited above in footnote 37, paragraph 89; and more recently, the judgment in *Asnef-Equifax* v *Ausbanc*, cited above in footnote 38.

42 Judgment of the Court of First Instance in Case T-141/94 *Thyssen Stahl AG* v *Commission* [1999] ECR II-347, paragraphs 402 and 403.

45. It follows that the actual or potential effects of an information exchange must be considered on a case-by-case basis as the results of the assessment depend on a combination of factors, each specific to an individual case. The structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange. The assessment must consider the actual or potential effects of the information exchange compared to the competitive situation that would result in the absence of the information exchange agreement ([43]). To be caught by Article 81(1) of the Treaty, the exchange must have an appreciable adverse impact on the parameters of competition ([44]).

46. The guidance below mainly relates to the analysis of a restriction of competition under Article 81(1) of the Treaty. Guidance on the application of Article 81(3) of the Treaty is to be found in paragraph 58 below and in the general notice on the subject ([45]).

3.2.2. Market structure

47. The level of concentration and the structure of supply and demand on a given market are key issues in considering whether an exchange falls within the scope of Article 81(1) of the Treaty ([46]).

48. The level of concentration is particularly relevant since, on highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Greater transparency in a concentrated market may strengthen the interdependence of firms and reduce the intensity of competition.

49. The structure of supply and demand is also important, notably the number of competing operators and the symmetry and stability of their market shares and the existence of any structural links between competitors ([47]).The Commission may also analyse other factors such as the homogeneity of services and the overall transparency in the market.

3.2.3. Characteristics of the information exchanged

50. The exchange of commercially sensitive data relating to the parameters of competition, such as price, capacity or costs, between competitors, is more likely to be caught by Article 81(1) of the Treaty than other exchanges of information. The commercial sensitivity of information should be assessed taking into account the criteria set out below.

51. The exchange of information already in the public domain does not in principle constitute an infringement of Article 81(1) of the Treaty ([48]). However, it is

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43 Judgment in *John Deere Ltd* v *Commission*, Case C-7/95 P, cited above in footnote 37, paragraphs 75-77.

44 Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 16.

45 Guidelines on the application of Article 81(3), cited above in footnote 7.

46 Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 25.

47 In liner shipping there are operational and/or structural links between competitors, for example membership of consortia agreements that allow shipping lines to share information for the purposes of providing a joint service. The existence of any such link, will have to be taken into account on a case by case basis when assessing the impact an additional exchange of information has in the market in question.

48 TACA judgment, cited above in footnote 20, paragraph 1154.

important to establish the level of transparency of the market and whether the exchange enhances information by making it more accessible and/or combines publicly available information with other information. The resulting information may become commercially sensitive and its exchange potentially restrictive of competition.

52. Information may be individual or aggregated. Individual data relates to a designated or identifiable undertaking. Aggregate data combines the data from a sufficient number of independent undertakings so that the recognition of individual data is impossible. The exchange of individual information between competitors is more likely to be caught by Article 81(1) of the Treaty ([49]) than the exchange of aggregated information which, in principle, does not fall within Article 81(1) of the Treaty. The Commission will pay particular attention to the level of aggregation. It should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.

53. However, in liner shipping caution should be used when assessing exchanges of capacity forecasts even in aggregate form, especially when they take place in concentrated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.

54. The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertakings' future behaviour. In past cases, the Commission has considered information which was more than one year old as historic ([50]) whereas information less than one year old has been viewed as recent ([51]). The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers' or carriers' transactions cannot be identified either directly or indirectly. Future data relates to an undertaking's view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an undertaking intends to adopt in

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49 Commission Decision No 78/252/EEC of 23 December 1977 in Case IV/29.176 – *Vegetable Parchment*, OJ L 70, 13.3.1978, p. 54.

50 Commission Decision No 92/157/EEC of 17 February 1992 in Case IV/31.370 – *UK Agricultural Tractor Registration Exchange*, OJ L 68, 13.3.1992, p. 19, paragraph 50.

51 Commission Decision No 98/4/ECSC of 26 November 1997 in Case IV/36.069 – *Wirtschaftsvereinigung Stahl*, OJ L 1, 3.1.1998, p. 10, paragraph 17.

the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.

55. The frequency of the exchange should also be considered. The more frequently the data is exchanged, the more swiftly competitors can react. This facilitates retaliation and ultimately lowers the incentives to initiate competitive actions on the market. So-called hidden competition could be restricted.

56. How data is released should also be looked into to assess the effect(s) it may have on the market(s). The more the information is shared with customers, the less likely it is to be problematic. Conversely, if market transparency is improved for the benefit of suppliers only, it may deprive customers of the possibility of getting the advantage of increased "hidden competition".

57. In liner shipping, price indexes are used to show average price movements for the transport of a sea container. A price index based on appropriately aggregated price data is unlikely to infringe Article 81(1) of the Treaty, provided that the level of aggregation is such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors. If a price index reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted, it would violate Article 81(1) of the Treaty. In assessing the likely effect of such a price index on a given relevant market, account should be given to the level of aggregation of the data and its historical or recent nature and the frequency at which the index is published. In general it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other.

58. An exchange of information between carriers that restricts competition may nonetheless create efficiencies, such as better planning of investments and more efficient use of capacity. Such efficiencies will have to be substantiated and passed on to customers and weighed against the anti-competitive effects of the information exchange in the framework of Article 81(3) of the Treaty. In this context, it is important to note that one of the conditions of Article 81(3) is that consumers should receive a fair share of the benefits generated by the restrictive agreement. If all four cumulative conditions set out in Article 81(3) are fulfilled, the prohibition of Article 81(1) does not apply ([52]).

3.2.4. Trade associations

59. In liner shipping, as in any other sector, discussions and exchanges of information can take place in a trade association provided the association is not used as (a) a forum for cartel meetings ([53]), (b) a structure that issues anti-competitive decisions or recommendations to its members ([54]) or (c) a means of exchanging information that reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted while not fulfilling the

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52 Guidelines on the application of Article 81(3) of the Treaty, cited above in footnote 7.

53 Commission Decision No 2004/421/EC of 16 December 2003 in Case COMP/38.240 – *Industrial tubes*, OJ L 125, 28.4.2004, p. 50.

54 Commission Decision No. 82/896/EEC of 15 December 1982 in Case IV/29.883 – *AROW/BNIC*, OJ L 379, 31.12.1982, p. 1; Commission Decision No. 96/438/EC of 5 June 1996 in Case IV/34.983 – *Fenex*, OJ L 181, 20.07.1996, p. 28.

Article 81(3) conditions ([55]). This should be distinguished from the discussions that are legitimately conducted within trade associations, for example on technical and environmental standards.

3.3. Pool agreements in tramp shipping

60. The most recurrent form of horizontal cooperation in the tramp shipping sector is the shipping pool. There is no universal model for a pool. Some features do, however, appear to be common to most pools in the different market segments as set out below.

61. A standard shipping pool brings together a number of similar vessels ([56]) under different ownership and operated under a single administration. A pool manager is normally responsible for the commercial management (for example, joint marketing ([57]), negotiation of freight rates and centralization of incomes and voyage costs ([58])) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices, ordering bunkers, collecting the vessels' earnings and distributing them under a pre-arranged weighting system etc.). The pool manager often acts under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels is usually the responsibility of each owner (safety, crew, repairs, maintenance etc.). Although they market their services jointly, the pool members often perform the services individually.

62. It follows from this description that the key feature of standard shipping pools is joint selling, coupled with features of joint production. The guidance on both joint selling, as a variant of a joint commercialisation agreement, and joint production in the Commission Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements ([59]) is therefore relevant. Given the variation in pools' characteristics, each pool must be analysed on a case-by-case basis to determine, by reference to its centre of gravity ([60]), whether it is caught by Article 81(1) and, in the affirmative, if it fulfils the four cumulative conditions of Article 81(3).

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55 Commission Decision No. 92/157/EEC (*UK Agricultural Tractor Registration Exchange*), cited above in footnote 50.

56 This results in the pool being able to attract large contracts of affeightment, combine various contracts of affeightment and reduce the number of ballast legs by careful fleet planning.

57 For example, the pool's vessels are marketed as one commercial unit offering transport solutions regardless of which ship performs the actual voyage.

58 For example, the pool's income is collected by the central administration and revenue is distributed to the participants based on a complex weighting system.

59 Respectively in section 5 and section 3 of the Guidelines, cited above in footnote 6.

60 Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 12.

63. Pools that fall within the scope of Council Regulation (EC) No 139/2004 ([61]) because they are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures, see Art. 3(4) of Council Regulation (EC) No 139/2004) are not directly affected by the changes brought about by Regulation (EC) No 1419/2006 and are not dealt with in these Guidelines. Guidance on full-functionality can be found, inter alia, in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([62]). Insofar as such pools have as their object or effect the coordination of the competitive behaviour of their parents, the coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) EC of the Treaty with a view to establishing whether or not the operation is compatible with the common market ([63]).

3.3.1. Pools that do not fall under Article 81(1) of the Treaty

64. Pool agreements do not fall under the prohibition of Article 81(1) of the Treaty if the participants to the pool are not actual or potential competitors. This would be the case, for instance, when two or more ship-owners set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry out on their own. This conclusion is not invalidated in cases where such pools occasionally carry other cargo representing a small part of the overall volume.

65. Pools whose activity does not influence the relevant parameters of competition because they are of minor importance and/or do not appreciably affect trade between Member States ([64]), are not caught by Article 81(1) of the Treaty.

3.3.2. Pools that generally fall under Article 81(1) of the Treaty

66. Pool agreements between competitors limited to joint selling have as a rule the object and effect of coordinating the pricing policy of these competitors ([65]).

3.3.3. Pools that may fall under Article 81(1) of the Treaty

67. If the pool does not have as its object a restriction of competition, an analysis of its effects in the market concerned is necessary. An agreement is caught by Article 81 (1) of the Treaty when it is likely to have an appreciable adverse impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties ([66]).

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61 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

62 OJ C 95, 16.4.2008, p. 1.

63 Article 2(4) of Council Regulation (EC) No 139/2004.

64 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty, OJ C 368, 22.12.2001, p. 13 and Guidelines on the effect on trade concept, cited above in footnote 13.

65 Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, section 5. The activities of an independent ship-broker when "fixing a vessel" do not fall under this category.

66 Guidelines on the application of Article 81(3), cited above in footnote 7.

68. Some tramp shipping pools do not involve joint selling but nevertheless entail some degree of coordination on the parameters of competition (e.g. joint scheduling or joint purchasing). Such cases are only subject to Article 81(1) of the Treaty if the parties to the agreement have some degree of market power ([67]).

69. The pool's ability to cause appreciable negative market effects depends on the economic context, taking into account the parties' combined market power and the nature of the agreement together with other structural factors in the relevant market. It must also be considered whether the pool agreement affects the behaviour of the parties in neighbouring markets closely related to the market directly affected by the cooperation ([68]). This may be the case for example where the pool's market is that for the transport of forest products in specialised box shaped vessels (market A) and the pool's members also operate ships in the dry bulk market (market B).

70. Concerning the structural factors in the relevant market, if the pool has a low market share, it is unlikely to produce restrictive effects. Market concentration, the position and number of competitors, the stability of market shares over time, multi-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 (for example, homogenous versus differentiated services) should be taken into account as additional factors in assessing the impact of a given pool on the relevant market.

71. With regard to the nature of the agreement, consideration should be given to clauses affecting the pool or its members' competitive behaviour in the market such as clauses prohibiting members from being active in the same market outside the pool (non-compete clauses), lock-in periods and notice periods (exit clauses) and exchanges of commercially sensitive information. Any links between pools, whether in terms of management or members as well as cost and revenue sharing should also be considered.

3.3.4. Applicability of Article 81(3) of the Treaty

72. Where pools are caught by Article 81(1) of the Treaty, the undertakings involved need to ensure that they fulfil the four cumulative conditions of Article 81(3) ([69]). Article 81(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule. This analysis incorporates a sliding scale. The greater the restriction of competition found under Article 81(1), the greater the efficiencies and the pass-on to consumers must be.

73. It is up to the undertakings involved to demonstrate that the pool improves the transport services or promotes technical or economic progress in the form of efficiency gains. The efficiencies generated cannot be cost savings that are an inherent part of the reduction of competition but must result from the integration of economic activities.

74. Efficiency gains of pools may for instance result from obtaining better utilisation rates and economies of scale. Tramp shipping pools typically jointly plan vessel movements in order to spread their fleets geographically. Spreading vessels may

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67 Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 149.

68 Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraph 142.

69 Guidelines on the application of Article 81(3), cited above in footnote 7.

reduce the number of ballast voyages which may increase the overall capacity utilisation of the pool and eventually lead to economies of scale.

75. Consumers must receive a fair share of the efficiencies generated. Under Article 81(3) of the Treaty, it is the beneficial effects on all consumers in the relevant market that must be taken into consideration, not the effect on each individual consumer ([70]). The pass-on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition under Article 81(1) ([71]). To assess the likelihood of a pass-on the structure of tramp shipping markets and the elasticity of demand should also be considered in this context.

76. A pool must not impose restrictions that are not indispensable to the attainment of the efficiencies. In this respect it is necessary to examine whether the parties could have achieved the efficiencies on their own. In making this assessment it is relevant to consider, *inter alia*, what is the minimum efficient scale to provide various types of services in tramp shipping. In addition, each restrictive clause contained in a pool agreement must be reasonably necessary to attain the claimed efficiencies. Restrictive clauses may be justified for a longer period or the whole life of the pool or for a transitional period only.

77. Lastly, the pool must not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question.

[70] Judgment in *Asnef-Equifax* v *Ausbanc*, cited above in footnote 38, paragraph 70.

[71] Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 24.