Chartering Pools In Tramp Shipping
And EC Article 81

Proposed changes to the implementation of
EC competition rules and their implications
for tramp shipping

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1 Introduction

1.1 Background

The shipping market has from a legal standpoint long been divided into two, broad, market segments: liner shipping where vessels sail along regularly scheduled routes on a fixed timetable, and tramp shipping where vessels sail at the charterers’ discretion. Liner shipping has historically enjoyed exemptions from important segments of competition law allowing companies to establish “conferences” which set common prices for the shipment of goods on a particular route.\(^1\) The main reason for allowing this practice has been a general consensus that such agreements secure the stability of liner shipping companies which in turn secures the stability of international trade.

There are today no organizations which openly try to set freight rates for the various tramp shipping market segments, nor would such activity be legal since tramp shipping, unlike liner shipping, is not exempt from any of the EC competition rules. However, whilst EC competition rules have applied in substance, implementation of the EC rules has been less effective. In almost all sectors of the economy the European Commission is responsible for investigating and upholding EC competition law. In the tramp shipping sector however responsibility for implementation has been left to the individual member states. For various reasons this has meant that the EC competition rules have not been effectively applied, a fact long recognized even by the community courts.\(^2\)

The Commission is currently going through an in depth review of competition policy in the shipping sector and in the autumn of 2004 the Commission published the “White Paper on the review of Regulation 4056/86”. The White Paper focused mainly on the exemptions from the competition rules given liner shipping. The industry has undergone significant changes in recent years and the question arose whether an exemption is still justified. In their review the commission looked at the four cumulative criteria of Article 81(3) for exemption and found that there was no conclusive evidence

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\(^1\) Examples of this are contained in EC regulation 4056/86, the United States Shipping Act of 1984 and the UN Convention on a Code of Conduct for Liner Conferences.

\(^2\) Ministere Public v Lucas Asjes, Cases 209-213/84 [1986]
that the conditions were fulfilled in the present market circumstances. The Commission is therefore considering proposing a repeal of the current block exemption. The Commission does however appear to be open to consider a more limited block exemption or other legal instrument and has invited proposals from all parties. The White Paper also briefly discussed the current legal status of tramp shipping and proposed that the rules on implementation should be brought in line with all other sectors of the common market. The Commission pointed out that this would not mean any change in the substantive rules the tramp sector is already subject to, however since the reality of the EC’s current legislation has been a “legal limbo”, with an almost total lack of enforcement, this is dramatic change for the industry. From submissions it received in advance of publishing its white paper it must have been clear to the Commission that such a change would cause a lot of uncertainty in the industry, but the White Paper was still surprisingly brief on the subject. The commission has however stated that it would consider issuing guidance on the implementation of competition rules to the sector.

In this paper I will first look briefly at the way in which EC competition law has historically been implemented in the tramp shipping sector and then look at the proposed changes. I will then look at one important form of cooperation which is quite common in tramp shipping, namely the chartering pool, and try to do a similar review for tramp shipping chartering pools as the Commission did for liner shipping. The two main issues that arise are:

1) Do chartering pool agreements infringe EC Article 81(1)?
2) If chartering pools are in violation of Article 81(1), could they in some instances qualify for an exemption under Article 81(3)?

The European Community Shipowners’ Association which has been working to maintain tramp shipping’s exclusion from regular implementation rules has put a lot of emphasis on just trying to show that there is effective competition in the tramp shipping market. The existence of competition in various tramp shipping markets is of course an important point; however as the Commission White Paper on Regulation 4056/86 showed this has to be put in the context of a full review of the conditions in Article 81.

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1 Holman, Fenwick & Willan – Comments on White Paper on review of Regulation 4056/86, p.3
1.2 Limits to the scope of the paper

Article 81 prohibits agreements *between undertakings* that are restrictive of competition. However two or more shipping companies may decide to establish a joint venture company to carry out their objectives. If such a company can perform as an autonomous economic entity on a lasting basis (a “full function” joint venture) such cooperation does not fall under Article 81, but is instead considered a merger and will be considered under the EC Merger Regulation. This paper will not discuss the merits of chartering pools under the EC Merger Regulation.

1.3 Definitions

*Tramp Shipping* – Regulation 4056/86 defines 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”\(^4\) However one should note that this definition differs slightly from the traditional maritime definition which only distinguishes tramp shipping from liner shipping by organisational structure and does not emphasize the type of ship used, or how freight rates are negotiated. A “tramp” is a “ship which can be hired as a whole, by the voyage or the month, to load such cargo and to carry it between ports as the charterer may require”\(^5\)

*Liner Shipping* –refers to maritime transport services that are provided on a regularly scheduled basis to pre-determined ports, and in accordance with timetables and sailing dates advertised in advance and available, even on occasional basis, to any transport user against payment.\(^6\) Ships typically involved in these trades are typically general cargo carriers, specialised cargo carriers (e.g. car carriers or refrigerated goods carriers) and partially or fully dedicated container carriers.

*Liner Conferences*– Regulation 4056/86 defines liner conferences as two or more vessel operating carriers engaged in liner shipping operating under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.\(^7\)

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\(^4\) Regulation 4056/86, Section I, Article 1.3.a
\(^5\) Fayle, “A short history of the world’s shipping industry”
\(^6\) Regulation 4056/86, Section I, Article 1.3.b
\(^7\) Regulation 4056/86, Section I, Article 1.3.b
1.4 Sources of law and method

The primary source of law in EC law is the EC treaty\(^8\). EC competition law is contained in Chapter 1 of part III of the treaty which consists of Articles 81 to 89. The rules governing implementation of competition law were originally laid out by the Council in Regulation 17/62, which was recently replaced by Regulation 1/2003.

The Commission can on authority from the Council issue block exemptions. These exemptions cover a whole category of agreements such as technology transfer or franchise agreements. For the maritime transport sector Regulation 4056/86 provides a block exemption for certain liner conferences and Regulation 823/2000 which grants a block exemption to certain liner consortia.

The Commission previously had the sole power, subject to review by the community courts, to grant individual exemptions to undertakings\(^9\). Individual exemptions no longer exist and will gradually disappear as they expire. The Commission also has the power by decision to require an end to practices it finds infringe Article 81 or Article 82. These decisions however can be appealed to the community courts. These exemptions and decisions provide guidance when interpreting competition law although it is important to remember that competition law is a quickly developing field and it is therefore necessary to look at the development of practice over time.

Important guidance when interpreting EC law can be found in the Commission’s notices. These notices outline the Commission’s view on the current state of the law, and will also often explain the Commission’s views on issues that have not been dealt with, or are subject to interpretation. These are of course the Commission’s opinions and may differ from the opinion of the community courts. Of special relevance for chartering pools are the Commission’s “Guidelines on the applicability of Article 81 of the EC treaty to Horizontal cooperation agreements” and “Guidelines on the application of Article 81(3) of the Treaty”.

Information can also be found on the Commission’s web site which publishes documents on the ongoing review of EC regulation. The web site contains consultation papers, White Papers and responses to these from interested parties.

\(^8\) Based on the Rome Treaty 1957 and last renumbered by the Amsterdam treaty
\(^9\) Regulation 17/62, Article 9(1)
Finally there is abundant legal theory on EC competition law, however very little has been published relating to the tramp shipping sector since it has been in a legal limbo.

2 EC competition law in the tramp shipping sector

2.1 Historically and today

The substantive competition rules of the EC treaty are contained in Article 81 which prohibits agreements between undertakings that restrict competition and article 82 which prohibits abuse of a dominant position in the marketplace. According to Article 83 the European Council was given the responsibility to adopt “appropriate regulations or directives to give effect to the principles” set out in the competition rules. This resulted in regulation 17/62 which became the principal regulation dealing with the practical application and enforcement by the Commission of the competition rules. Regulation 17/62 did not however apply to the transport sector (rail, road, maritime) due to opposition from some member states. These sectors were only later regulated in individual regulations – in the case of maritime transport this was done in Regulation 4056/86.

Council Regulation 4056/86 established the rules of procedure for applying Article 81 and 82 to the maritime transport sector and also provided for exemptions from certain parts of the rules for liner shipping conferences. However the regulation could more correctly be described as regulating liner shipping, not maritime transport in general since it does not apply to tramp vessel services or transport within one member state (“cabotage”).

Regulation 17/62 was replaced in 2004 by Regulation 1/2003 which also repealed the rules of procedure found in Regulation 4056/86. This did not result in any material changes though since an exemption for tramp shipping was maintained.

Whilst tramp vessel services have been excluded from the various competition implementing rules this does not mean that the substantive competition rules found in

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10 Bull[1991] p 96
11 Regulation 141/62, Article 1
12 Regulation 1/2003, Article 32
Articles 81 and 82 do not apply. There was initially uncertainty as to whether or not the EC treaty applied to the transport sector in general since the treaty of Rome Article 84(2) had exempted air- and maritime transport from the treaty’s general provisions on transport. It was therefore claimed that maritime transport was exempt from all the provisions of the EC treaty. The courts rejected this view in *French Merchant Seamen Commission*.\(^{13}\)

Until such regulations on implementation called for in Article 83 were enacted Article 84 prescribes that “the authorities in member states” shall rule on “the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82”. Since implementing rules have never been enacted for tramp vessel services this rule still applies.

2.2 Enforcement

The main responsibility for enforcement of EC competition rules in the tramp shipping sector lies therefore with the “authorities” in each member state. Exactly who is encompassed by the term “authorities” was defined by the community courts in *BRT v. SABAM*\(^{14}\) as “either the administrative authorities entrusted, in most member states, with the task of applying domestic legislation on competition subject to the review of legality carried out by the competent courts, or else to the courts to which, in some member states, that task has been especially entrusted.” The problem that persisted for a long time however was that most member states lacked national provisions giving any such “administrative authority” – for example national competition authorities – power to directly enforce EC competition rules.\(^{15}\)

The Commission which is usually responsible for enforcement still has a certain role. According to Article 85 the commission has a duty to ensure the application of the principles laid down in Articles 81 and 82, and to do this the Commission may investigate the matter and propose appropriate measures. However the Commission has very limited powers as far as sanctions go, both when requesting information during an investigation and to enforce proposed measures. The commission may only publish

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\(^{13}\) Case 163/74 [1974]

\(^{14}\) Case case 127/73

\(^{15}\) Stemshaug – Maritime transport and antitrust in the EC and US – EC shipping policy p.103
their decisions and authorize the member state to take the measures needed to remedy the situation.\footnote{Article 85(3)}

Finally there is the question of to what extent private individuals may seek to enforce the competition rules in Articles 81 and 82. In general the ECJ stated in \textit{BRT v. SABAM} that Articles 81 and 82 “tend by their very nature to produce direct effects in relation between individuals concerned which the national courts must safeguard.” In other words individuals may use the courts to enforce the competition rules. However Article 84 gives the authorities (as defined above) and not the national courts the jurisdiction to rule on competition matters when no implementing regulations have been enacted according to Article 83. So can national courts rule that an agreement is contrary to Article 81 in such a case? This question was raised in \textit{Ministère public v. Lucas Asjes et al}\footnote{case 209-213/84 [1986]}, a case regarding air transport, an area where no implementing regulations had been adopted at the time. In its ruling the ECJ stated that in such cases national courts could not rule an agreement as automatically void (cf Article 81(2) cf Article 81(1)). The ECJ’s principal argument seems to be that Article 84 gives the public authorities, not the national courts of a member state the jurisdiction to rule on whether an agreement is exempted according to Article 81(3) from the rule in Article 81(1). Accordingly a national court cannot rule that a practice is contrary to article 81 as a whole if neither the competent national authorities, or the Commission pursuant to Article 85(3), have taken any decisions on exemption.

In conclusion one may note that even though individual member states have been under treaty obligations to ensure that Articles 81 and 82 are applied, and even though the Commission has had authority to investigate cases and make recommendations which a member state could not refuse to implement\footnote{Faull & Nikpay p.919} this has not proven to be an effective way of enforcing EC competition rules. This has probably been partly due to the lack of competent authorities in the member states, but overall there has also been a lack of political will in the individual member states. The member states responsible for implementation are also those states with the largest shipping communities and the most vocal industry interest groups. Finally one point of interest to note is that the exemption found in Regulation 1/2003 refers to “international tramp vessel services as defined in
Article 1(3)(a) of Regulation 4056/86\textsuperscript{19}. As was commented above this definition differs from the traditional maritime definition and makes the term tramp shipping dependent on “freight rates [being] freely negotiated case by case in accordance with the conditions of supply and demand.” It would therefore seem possible to argue that if this condition is not met in a market because of the activities of, for example, a pool then Regulation 1/2003 will apply.

2.3 Proposed Changes

A review of Regulation 4056/86 was initially begun in 2002 and in 2003 the Commission published a consultation paper inviting responses from maritime service providers, users and other interested parties regarding the need to modernise Regulation 4056/86\textsuperscript{20}. Based on this and other information the European Commission published in the autumn of 2004 a white paper reviewing the regulation. The main part of the review looked at whether there was still a justification under Article 81(3) for the block exemption for liner shipping conferences, but the review also looked at whether there were grounds for maintaining the exclusion of tramp services from the competition implementing rules in Regulation 1/2003.

The grounds originally given in Regulation 4056/86, in recital 4 of the preamble, for the exclusion of tramp services seem to be that rates for tramp services were “being freely negotiated on a case-by-case basis in accordance with supply and demand conditions”\textsuperscript{21}. In other words since there already was a competitive market for tramp shipping there was no need to include it in Regulation 4056/86. As the Commission stated in its initial consultation paper\textsuperscript{22} such a description would apply to most de-regulated services and is therefore not a compelling reason for excluding tramp shipping from the regular implementing rules regarding Articles 81 and 82. Besides political resistance from some member states another possible reason for this somewhat peculiar exclusion could be that because of the different nature of the tramp market it was not deemed necessary for tramp to enjoy the same exemptions from the application of Articles 81 and 82 as liner conferences. However this does not justify why the Commission did not include tramp shipping in Section II of Regulation 4056/86 which contained rules on implementation.

\textsuperscript{19} Regulation 1/2003, Article 32(a)
\textsuperscript{20} Commission Services document – Consultation paper on the review of Regulation 4056/86
\textsuperscript{21} Regulation 4056/86, Preamble, recital 4
\textsuperscript{22} Consultation paper p. 11
The consultation process did not provide any arguments which the Commission found convincing for continued exclusion of tramp shipping from the general enforcement rules and one of the conclusions of the White Paper was that Article 32 of Regulation 1/2003 exempting tramp shipping should be repealed. In all likelihood tramp shipping will therefore in the future be included in Regulation 1/2003 and subject to its rules on implementation. Interestingly the consequence of the new regulation is that national competition authorities and national courts will be given more responsibility in implementing EC competition policy in order to relieve the Commission of some of its work load. However the new regulation states that the Commission and the national competition authorities should form a network of public authorities applying the competition rules in close cooperation so that there will be a uniform application of the rules. The new regulation is also aimed at ensuring that Articles 81 and 82 are more frequently applied by the national courts. Article 3(1) of the regulation states that national courts must apply Articles 81 and 82 when applicable, and the recital to the regulation calls for cooperation between the commission and national courts to ensure consistency in application. Even though application will therefore still largely be the responsibility of national authorities there is little doubt that if the tramp exclusion is repealed there will be a much more consistent and uniform application of the rules in the sector.

Under the old Regulation 17/62 an agreement which was in breach of article 81(1) might still be valid if it was subject to either a block exemption such as Regulation 4056/86 or an individual exemption. Individual exemptions were essentially assessments by the Commission as to whether or not an agreement fell qualified for exemption under Article 81(3). Under the new regime however individual exemptions no longer exist. Agreements either infringe or do not infringe Article 81 as a whole. Businesses must themselves assess whether or not an agreement it is party to is in breach of Article 81(1), and if it is in breach, if it could be exempt according to Article 81(3). There is therefore an increased risk that companies will be in violation of competition laws because they incorrectly assess their agreements under Article 81. For the tramp shipping industry this poses some extra difficulties since it has up till now been excluded from Regulation 17/62. Accordingly there is no case law or

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23 Whish p 257  
24 Whish p 168  
25 except for a few given under Regulation 17/62 that still remain in force
administrative practice from the Commission specific to agreements found in tramp shipping, such as pooling agreements, which could provide guidance for the industry. The prospect of implementation of Regulation 1/2003 in the tramp shipping sector has therefore caused concern among some market participants because of the legal uncertainty that arises surrounding some of the activities in the sector such as the pool system. This uncertainty was raised as an argument against implementation of the regulation, however as the Commission pointed out this legal uncertainty has always existed and was created by the lacking application of the competition rules under the existing rules. The Commission did state in its white paper that it would provide guidance to shipowners. However recent indications are that guidance may not be forthcoming for a year or two and that a repeal of the tramp exemption may occur first. This is of concern for the shipping community which is therefore currently preparing its own proposal for a set of guidelines which is to be published in the late spring of 2005 in order to get things moving. Shipowners wish to avoid risking costly litigation to establish the extent of the competition rules which is what they feel happened in the case of the liner trade. Once the tramp exemption is repealed recital 38 of Regulation 1/2003 will allow companies to seek informal guidance from the Commission on their agreements. This guidance does not in any way prejudice assessments from the Community Courts and assessments will only be given to agreements that pose “novel” or “unresolved” questions. For the time being shipping companies can only await the Commission’s promised guidance on implementation in the sector and try to assess agreements based on current general guidance from the Commission and previous decisions as I will do in the next section.

3 Chartering pools and the Tramp Shipping Market

3.1 The Chartering Pool

Cooperation between shipping companies may take many forms. This paper focuses on of the most common – the chartering pool. A chartering pool is an arrangement under

26 From Conversations with Jan Fritz Hansen, director of The Danish Shipowners Association.
27 Guidelines 81(3)
which several shipowners establish a common vehicle to market and charter out their tonnage. The purpose of such a pool is to maximize the combined income from vessels committed to the pool. Increased profits may be a result of efficiency gains involved in operating a larger fleet of ships, but depending on the market as a whole it is also possible that the cooperation in itself may lead to improved freight rates. Another reason for participating in such a pool is that it is a way of sharing risk - each participant’s income will probably fluctuate less than if they had operated independently. It is possible to imagine a pool consisting of ships of all kinds, for example even a pool which consists of a mix of tankers, container ships and car carriers would lead to benefits for the owners from reduced fluctuations in income and possibly other benefits from joint purchasing depending on the extent of the pooling agreement. Chartering pools however are made up of similar types of ships since this will create the most synergies.

There are numerous possible variations in the way in which a chartering pool may be structured but the basic features are:

a) The participants independently control a number of vessels
b) The vessels are placed under the care of a joint administration. The vessels are usually deemed to be on time charter to the pool. This means that capital expenses and fixed voyage expenses (crew, supplies, insurance) are borne by the owner, and variable voyage expenses (bunkers, port charges, etc) are borne by the pool. However, unlike a standard time charter, hire is dependant on the pools overall performance over time.
c) The administration markets the vessels as a single commercial fleet under a common trade name and collects freight earnings.
d) The combined net earnings are then distributed to the individual owners in accordance with a distribution key.

From a competition law point of view several features of such an agreement are noteworthy. First of all there is the creation of a common vehicle for marketing and chartering out of all the ships of the participating undertakings. Secondly, pool agreements will usually contain a non-compete clause barring the participants from in any way operating in competition with the pool any vessels of substantially the same

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28 Falkanger et al, Scandinavian Maritime Law. The term “chartering pool” is used in a broader sense by Gombrii to also cover pools with individual marketing, however in a later article Gombrii [1993] uses the term in a similar sense as Falkanger et.al.
29 Bull [1991] p. 89
30 Bull [1991] p.185
type as those operated by the pool. Third, the agreements regulate the individual participant’s right to withdraw from the pool, usually requiring a notice period before a party is allowed to withdraw their ships from, and compete with the pool. Fourth, the pool will usually regulate or imply joint purchasing of variable voyage costs. Finally pools often involve exchange of information of both a technical and commercial nature between the participants.

3.2 The tramp shipping market

In this section I will briefly look at market power and market definition within the tramp shipping sector. A lot of the information in this section stems from a study commissioned by the European Community Shipowners Association (ECSA) for use in a workshop with the Commission where the ECSA made their case in favour of pools. Considering that the study contains numerous data on fleet size, company size, market share of top 20 companies etc. it is interesting to note one omission in the study - any data on pool market share.

The tramp shipping sector can be divided into two broad segments.

1) Bulk shipping – which transports large cargo parcels of goods such as grain and iron ore in “bulk carriers”, and oil in oil tankers.

2) Specialized shipping – which transports “specialized” trades such as chemicals, LNG, LPG and motor vehicles using ships that are often purpose built.

The industry has several characteristics which makes it conducive to competition. The commodity – ships – is relatively homogenous. This is especially true of bulk shipping where there is usually not much differentiation possible between vessels or between owners.

The industry is quite transparent - information on pricing is circulated quickly by the shipbroking business and so is information on operating costs.

Entry costs are low – Because of the degree of transparency potential entrants can easily calculate profit margins. A certain amount of equity is required for entry, but 60-80% of financing is usually available in the form of loans secured by a mortgage in the ship. It is also possible to enter the market with a relatively limited degree of shipping

31 Rosæg, Organisational Maritime Law, p. 99
32 The Tramp Shipping Market – Clarkson Research Studies
knowledge since most tasks can be outsourced quite easily. Ship management firms can take care of the actual running of the ship and ship brokers will find employment for the vessel. The exception is some specialist sectors where a certain degree of expertise may be needed which is difficult to acquire quickly.

Ships are by nature very mobile - This point is specifically made in the eighth recital to Regulation 4056/86 which states that “the mobility of ships, which is a feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate.” The quote refers to liner shipping, but is possibly even more relevant in international tramp shipping were ships are constantly being sent wherever the last charterer decides. Markets are in many cases, especially for larger vessels, global.

From a company perspective the market is quite fragmented. The Clarkson study further divides the tramp shipping market into 10 sub markets: Bulk carriers, Forest products carriers, Crude oil tankers, Oil products tankers, Chemical tankers, LPG carriers, LNG carriers, Reefers, RORO and Car carriers. The total fleet operating in each market varies between about 1000 and 5500 ships, with the exception of LNG carriers where there are only 158, yet the average company in each market only owns between 2 and 6 ships. The largest companies in each segment account for only around 4-5% of the market.

On the buy side shippers are often very large international companies or trading houses and will have a certain amount of buying power.

The markets identified by the study are of course not identical to the markets as they would be defined for the purposes of EC competition law. Judgements from the community courts have shown that the relevant definition of the market is essentially a matter of interchangeability,35 for example if two vessels can be interchanged they are in the same market. On the one hand a 300,000dwt bulk carrier does not compete in the same market as a 10,000dwt bulk carrier due to factors such as cargo size and port and canal limits. On the other hand large cargoes may be broken up and f.ex. motor vehicles can be transported by not just car carriers, but also container ships, bulk carriers, and even reefers (refrigerated ships). Regardless of the exact definition of the individual market the study does indicate that in most markets there will be numerous companies participating.

34 Parcel – the individual consignment of cargo
35 United Brands v Commission, Case 27/76 [1978], and Whish p. 28
The relative size of pools compared to the market they operate in is an elusive number to find, it was not presented to the Commission in their discussions with the ECSA, nor do the major shipbroking firms keep track of this statistic. However, it is probably in the niche markets were a pool is most likely to achieve a significant size compared to the total market. According to Tradewinds, an international shipping newspaper, “specialized pools such as Bergesen’s VLGC pool control 30% of the market, carry considerable clout” and the trend is that pools are increasing in size as they become more established.  

In the handysize Chemical/products tanker market the Handytanker pool quite quickly built up to a 20% market share which caused some concern that the pool could become large enough to manipulate the market, especially if there was a bull run in the market.

Low barriers to entry and numerous market participants are characteristics which reduce a pool’s ability to achieve and maintain any degree of market power. On the other hand judging from one ship brokerage report it appears that market participants do engage in pooling in the belief that this is can be “an effective means for reducing competition in markets with too much capacity” The general opinion of the shipbroking community seems to be that whilst it may be possible for a pool to achieve higher rates in a tight market it is very difficult to influence prices in a poor market unless the pool has an extremely large market share. In the 1970’s Maritime Fruit Carriers and Stolt Nielsen suffered financial difficulties despite at some points controlling around 80% of their respective markets.

### 4 Do Chartering Pools Infringe Article 81(1)?

For Article 81(1) to apply four requirements have to be fulfilled, there has to be

1) An agreement, decision, or concerted practice,
2) between “undertakings”,

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36 Tradewinds, 6/8/04, p.18  
37 Drewry chemical forecaster 1Q2005, p.43
3) that has at its “object or effect the prevention, restriction or distortion of competition, 4) and there has to be an effect on trade between member states.

Some pooling arrangements will not fall under Article 81(1) by their very nature. First of all this will be the case where the participants in the pool are not actual or potential competitors. This will of course depend on how you define the relevant market but will for example clearly be the case in a pool between two companies with very different types of ship. One might also question whether a single vessel company which is basically a financial investment vehicle for investors is truly an actual or potential competitor in the market. Such companies outsource all operations with commercial operations handled by a chartering pool. Without chartering pools it is doubtful that such investment vehicles would exist.

Secondly cooperation between competing companies can also occur without falling under Article 81(1) if the companies involved could not carry out the project or activity covered by the cooperation independently.39 This is in effect a related argument to the previous one excluding undertakings that are not competitors. If for example there are four companies in a market and two of them are too small to independently compete for a very large contract of affreightment a pooling of ships between them in order to be able to bid for the contract would not fall under Article 81(1). The two companies would not have been able to bid for the contract independently and so they are not competitors in this particular situation. The argument has been put forward that a critical mass in terms of a minimum number of ships is required in order to be able to operate in the market. In other words a company with only one or a few ships would always be too small to be able to compete. If this premise is accepted then a pooling of ships in order to reach such a critical mass would not fall under Article 81(1). However according to the numbers in the study commissioned by the ECSA there are numerous companies that exist today which own only one or two ships and which apparently are still able to operate in the market. This seems to suggest that any such critical number of ships is very low. Such a pool of two or three vessels would also probably escape article 81(1) because any possible effect on competition would likely be insignificant.

38 Poten & Partners on the Exmar and Golar LNG pool.
39 Guidelines, paragraph 24
4.1 Undertakings

First of all article 81(1) only applies to agreements between undertakings. The concept of an undertaking encompasses every entity engaged in an economic activity regardless of legal status of the entity and the way in which it is financed. Shipping pools are usually formed between ship-owning companies which may be organized in various fashions – public, private, state owned or otherwise. Any activity involving commercial shipping trade is clearly engaged in economic activity and covered by this broad definition.

4.2 Agreements, decisions and concerted practices

A broad interpretation has also been given to the terms “agreements”, “decisions” and “concerted practices” and the terms are not limited to legally enforceable agreements. Pools are often organised as a limited company or a partnership, a Pool Management Company (“PMC”), owned by the participants. In these instances the pool agreement may take the form of a shareholders agreement or form a part of the company agreement. As long as the company is not a full function joint venture the company agreement is regarded as an agreement between the participating undertakings. Pools may also be mere abstractions – there is no formal pool structure, simply payments directly between the participants. Since even so called “gentleman’s agreements” and simple understandings have been held to be agreements in the sense of Article 81 by the courts it seems clear that any cooperation in the form of a pool would qualify as an agreement.

4.3 Trade between member states

For an agreement to affect trade between member states it must “have influence, direct or indirect, actual or potential, on the pattern of trade between member states.” This effect on trade does not have to be harmful or negative, it is sufficient that there is an effect. The effect does however have to be appreciable. Since this criterion is considered easily fulfilled by goods and services traded between member states, and tramp

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40 Hofner and Elser v Macrotron GmbH, Case C-41/90 [1991]
41 Whish, p. 91
42 Røsæg, Organisational maritime law, p84
43 Chemifarma NV v Commission, Case 41/69[1970]
44 Consten and Grundig v Commission (Cases 56 and 58/64 [1996]
45 Faull & Nikpay, paragraph 2.104
shipping is by definition international,\textsuperscript{46} it seems likely that this criterion will in most cases be met by agreements concerning the shipping industry. Shipping carries out a large portion of the EC’s trade in goods, 33\% of intra-community trade and 90\% of the trade between the EC and third countries is seaborne.\textsuperscript{47} Even agreements involving liner shipping companies that only directly concerned trade outside the EC have been found to indirectly affect transport services inside the EC and therefore fall under article 81(1).\textsuperscript{48}

\section*{4.4 Competition Analysis - object or effect of preventing, restricting or distorting competition}

Competition law is an area of the law closely linked to economics and when determining whether or not an agreement has the “object or effect of preventing, restricting or distorting competition” some economic analysis is usually always required. In order to demonstrate that an agreement infringes Article 81(1) because it has or would have a restrictive effect on competition it is necessary to take into account the actual conditions of the market in which it functions. This requires determining amongst other things the product market, the geographic extent of the market, and the market’s competitive structure.\textsuperscript{49} This extensive analysis however is not necessary if the agreement contains “obvious restrictions of competition such as price-fixing, market sharing or the control of outlets”\textsuperscript{50}, in other words if the agreement can be said to have has as its object the restriction of competition. Object and effect are alternative requirements\textsuperscript{51} and so if an agreement restricts competition by object it is not necessary to show that there is a restrictive effect, and vice versa. Accordingly a natural starting point is to ask whether chartering pool agreements can be said to have as their object the prevention, restriction or distortion of competition. In this context “object” refers to the objective meaning or purpose of the agreement in the economic context in which it is to be applied, the subjective intention of the parties is not relevant.\textsuperscript{52} Thus even if the

\textsuperscript{46} as opposed to “cabotage”
\textsuperscript{47} Dinger p.8
\textsuperscript{48} Compagnie Maritime Belge Transports SA v Commission Case 395-396/96[2000]
\textsuperscript{49} The Commission has provided guidance on how to determine the market in its Notice on the Definition of the Relevant Market OJ[1997] C 372/5
\textsuperscript{50} European Night Services v Commission, Cases T-374/94 [1988]
\textsuperscript{51} Societe Minierer v Maschinenbau Ulm, Case 56/65 [1966], and Faull p.81
\textsuperscript{52} Whish p. 110
stated purpose of a chartering pool is a more effective utilization of the pools’ ships, which in itself would be beneficial to competition it, the agreement can still have as its object the restriction of competition.

4.4.1 Object Analysis

As mentioned above price fixing is one type of agreement that has been considered by the courts to have as its object the distortion of competition. This does not merely include blatant price fixing between competitors but any agreement that directly or indirectly suppresses price competition. One form of cooperation the Commission has been wary of, and considers a form of price fixing, is the joint selling agreement. In a joint sales agreement producers or suppliers of a good or service grant to a common agent or joint sales organization the right to sell their products or services. Such practice is regarded by the commission as a horizontal cartel since it entails joint determination of all commercial aspects including determination of price. As mentioned, in a chartering pool a joint entity markets the ships of several owners as a single commercial fleet. The ships are deemed to be on a modified form of time charter to the pool management company which handles all chartering of the vessels to third parties. Since the management company is trying to maximise the profits of the fleet as a whole the ships of the different owners are not bid against each other when competing for a contract. The result is that competition on price between the participants in the pool has been eliminated. This is a typical example of a joint selling agreement. Chartering pool agreements usually contain a non-compete clause forbidding the participants from operating in competition of the pool which entails that the participants vessels are exclusively marketed and chartered out by the joint entity. However even if there is no exclusivity a joint sales agreement will still exist if in practice the bulk of the sales of the participants is done through the joint sales agency. According to the Commission’s “Guidelines on Horizontal Cooperation Agreements” commercialisation agreements involving joint selling have as a rule the object and effect of coordinating the pricing policy of competitors, and will therefore restrict competition and fall under Article 81(1). Chartering pool agreements do not deviate from this rule in the sense that they do coordinate the pricing policy of the participants. Accordingly chartering pool

53 *Floral, Ansac* OJL152/54[1991], guidelines, paragraph 144
55 “Guidelines to Horizontal Cooperation Agreements” Paragraph 144-145
agreements are a form of price fixing which can be said to have as their object the restriction of competition.

There have been some examples of the courts finding that joint sales agreements have not fallen under Article 81(1) where the agreement is between SME’s (Small Medium sized Enterprise). There is in other words still a requirement that the agreement has a minimum effect on the market even though it has been found to have as its object the restriction of competition. This will be discussed in further detail in section 4.5 on the “de minimis” doctrine.

Since chartering pool agreements constitute a form of price fixing which the Commission regards as having as their object the restriction of competition it is not strictly necessary to analyse if such agreements also have a restrictive effect to establish that chartering pool agreements infringe Article 81(1) as long as there is also an appreciable effect on competition. The effect of such an infringement is that the restrictive elements of the agreement in question are void and unenforceable unless the contract is inseverable. A full analysis of an agreement will therefore usually entail that each possibly restrictive element will be examined to see if it has the object or effect of restricting competition. However this will only be the case were the agreement contains restrictive elements that are distinct from each other in their purpose. Where an element of the agreement can be said to be the adjunct of an anti-competitive practice it will be assessed in combination with that practice. In the case of chartering pools this implies that if the sole or principal object of the agreement can be said to be the creation of a joint sales agency it will not be necessary to examine the other elements of the agreement since these will be examined in conjunction with the joint sales function and we have already established that this portion of the agreement has as its object the restriction of competition.

Certainly the main purpose of a chartering pool, as defined by Falkanger and in this paper, is to establish a common vehicle to market and charter out their tonnage, in other words a joint sales agency. The other restrictive practices which are to be found in chartering pool agreements regarding for example revenue pooling, restrictions on withdrawal from the pool and information exchange are all necessary clauses in order to

56 The text of article 81(2) seems to indicate that the entire agreement is void, however the courts have found (Societe de Vente de Ciments et Betons de l’Est SA v Kerpen & Kerpen, Case 319/82 [1983]) that the automatic nullity only applies to those contractual provisions which are incompatible with Article 81(1)
57 Falkanger et.al., “Scandinavian Maritime Law” p. 151
secure a proper functioning joint sales agreement. It would of course be possible to imagine a stand alone agreement involving for example information exchange, however in the context of a chartering pool agreement such a restriction is adjunct to the main competitive restriction and will therefore be examined in conjunction with it.

A further effects analysis of the other competitive restraints found in chartering pools is therefore not strictly necessary and a study purely focused on chartering pools could therefore proceed to an evaluation of the question of appreciability and, if an appreciable effect were to be found, examine if chartering pool agreements could fulfil the requirements for an exemption according to Article 81(3).

4.4.2 Effects Analysis

Before proceeding with a further analysis of chartering pools I will however devote some time to an effects analysis of some of the other clauses in chartering pool agreements that potentially contain competitive restraints. This will provide at least some guidance as to what forms of cooperation might or might not infringe Article 81(1) for pooling agreements that stop short of having joint sales as their main purpose.

As mentioned chartering pool agreements contain several clauses which entail cooperation in a manner potentially restrictive to competition. These other forms of cooperation may have as their object the restriction of competition themselves or they may have to be individually assessed to determine if they have the effect of distorting competition to an appreciable extent. Briefly there are three important factors when undertaking an effects analysis under Article 81(1). First of all there is the nature of the agreement. Some forms of cooperation are more likely than others to have a restrictive effect. Secondly there is the market share of the parties. A low market share makes a restrictive effect unlikely. Finally there is the market structure. Agreements between parties in a highly concentrated market make a restrictive effect more likely. An in depth assessment is beyond the scope of this paper however I will discuss in general terms to what extent such cooperation may be considered to restrict competition.

4.4.2.1 Joint purchasing

In a chartering pool the pool management company is usually responsible for payment of all voyage related costs such as bunkering, port charges, canal dues and agency fees. The owner on the other hand is responsible for all capital and running costs such as loan repayments, interest, insurance, maintenance, and manning. The centralization of
purchasing is beneficial to pool members for two reasons. First of all overall administrative costs are reduced, and secondly the pool will have a stronger negotiating position due to its increased size which may lead to lower prices. Despite the benefit to competition of being able to negotiate lower prices joint buying is not considered entirely unproblematic from a competition law perspective.\(^{58}\) Joint buying is not considered to have as its object the restriction of competition unless the cooperation does not truly concern joint buying but serves as a tool to engage in a practice such as price fixing. However purchasing agreements may end up having a restrictive effect on competition and so have to be analysed in their specific context looking at both the purchasing and selling markets.

The main competition concern is that a cooperative group with sufficient buying power will be able to force suppliers to accept prices below a competitive level without passing along these price reductions downstream. This may lead to increased costs for competitors as the supplier is forced to raise prices for other customers, i.e. the groups rivals’, to try to make up for the large price reductions.\(^{59}\) There are also other possible negative effects which may arise. If the supplier is forced to accept sufficiently large reductions in price this could lead in the long run to inefficiencies such as reduced quality or less innovation from the supplier. Sufficient buying power in the upstream – procurement – market may therefore lead to inefficiencies in the marketplace.

Joint buying may also lead to competition problems in the downstream –selling- market. First of all by potentially raising prices for competitors, as described above, or even by limiting competing buyers’ access to efficient suppliers. Secondly the savings provided by the joint buying agreement can act as an incentive for the participants to the agreement to coordinate their behaviour on the selling market as well so that less of the benefit is passed on to the consumers. Such coordination will be facilitated by the commonality in costs that result from joint purchasing.

It is clear that in order for the competition concerns described above to arise the participants to the joint purchasing agreement must have more than an insignificant market share in both the upstream and the downstream markets. There is no absolute threshold above which one can state that competition issues arise but in its guidelines to

\(^{58}\) Guidelines, paragraph 124

\(^{59}\) Guidelines, paragraph 126
horizontal agreements⁶⁰ the Commission indicates that below a market share of 15% in either market it is unlikely that a joint purchasing agreement will infringe Article 81(1). As mentioned a pool management company is usually responsible for the voyage related costs such as bunkering and port charges. Such goods and services are required by more or less the entire shipping industry and the market for such goods will therefore in most cases consist of not just the market the pool operates in but most tramp shipping markets and to a certain extent liner shipping as well. It is therefore unlikely that any pool will have a market share of over 15% for such goods or services and consequently unlikely that any joint buying agreement will infringe Article 81(1).

4.4.2.2 Restrictions on withdrawal from the pool

Chartering pool agreements also regulate the participants’ right to withdraw one or more of their vessels from the pool. The agreement itself will usually stipulate a relatively long period of validity, however changing circumstances may lead to a participant wishing to withdraw from the agreement early. The conditions for withdrawal from the pool will of course vary but withdrawal usually requires the participants to give notice anything from 6 to 12 months in advance and in some cases even longer. In some pools withdrawal also results in an economic penalty such as the charter of any substitute vessels being for the account of the party withdrawing or even an obligation to sell any pooled vessels to the pool at a reduced price.⁶¹ This will naturally discourage any participant from leaving the pool. This is a problem since it means that potential competition is being restricted. A potential competitor is usually defined as any firm which would enter the market in response to a small but significant increase in price. If an undertaking leaves the pool it would operate in competition with it and a common problem for pools is that in very good markets participants will be tempted to try to operate on their own.⁶² Potential competition is an important factor when assessing market power since the prospect of new entrants to a market will discipline price setting. However to be a potential competitor a firm has to be able to enter the market relatively quickly to act as a constraint on prices. Relatively quickly has been considered to be less than a year,⁶³ although it could be longer if firms already present in the market would require even longer to adjust their own capacity. An agreement which

⁶⁰ Guidelines, paragraph 130
⁶¹ Bull[1991], p. 96
⁶² Tradewinds
restricts potential competition by preventing a company from leaving the pool may therefore have a negative effect on prices and therefore be considered to restrict competition.

4.4.2.3 Non compete clauses

As mentioned chartering pool agreements usually contain a non-compete clause barring the participants from in any way operating in competition with the pool any vessels of substantially the same type as those operated by the pool.\(^{64}\) Despite the name non-compete clauses do not automatically come within the prohibition in Article 81(1). In order to determine whether or not such clauses do infringe Article 81(1) it is necessary to examine what the state of competition would be if the clause did not exist.\(^{65}\) In Remia the vendor of a company could have set up a new business and potentially driven the old company out of business without a non compete clause. According to the courts the non compete clause therefore had “the merit of ensuring that the transfer has the effect intended” and contributed to the promotion of competition by increasing the number of undertakings in the market.\(^{66}\)

There also some block exemptions that exempt non-compete clauses in such cases as exclusive distribution agreements\(^{67}\) and franchising.\(^{68}\) These block exemptions clarify the limits of allowable non compete clauses for certain categories of agreements but follow from the principles of Remia and Pronuptia exempting only that which is necessary in order to ensure the main, beneficial, purpose of the agreement.

4.4.2.4 Information exchange

Transparency in the marketplace is essential for competition, however one can distinguish between public and private market transparency.\(^{69}\) Public market transparency, for example through advertising, allows the consumer to compare products and services, and their prices, and thereby increases competition. Private market transparency on the other hand only increases market transparency for the undertakings involved and may lead to restrictions of competition if it leads to

\(^{63}\) Guidelines on Vertical Restraints, paragraph 26
\(^{64}\) Røsæg, Organisational Maritime Law, p. 99
\(^{65}\) Remia BV v Commission, Case 42/84 [1985]
\(^{66}\) Presumably by ensuring that there is a market for the sale of companies.
\(^{67}\) Regulation 1983/83
\(^{68}\) Regulation 4087/88
coordination of policies between undertakings. Competition is believed to work best when the participants take independent decisions, not when there is peaceful coexistence.

When assessing an information exchange agreement there are three key factors – market structure, the type of information exchanged and how frequently it is exchanged.

The market structure is a relevant factor since the greater the number of market participants the more difficult it will be for a market participant to predict or anticipate the conduct of all its competitors.

The type of information exchanged is of course the most important factor. The courts stated in the *Sugar* case\(^70\) that statistical information may be exchanged directly between undertakings or via trade associations as long as the information does not enable the identification of individual undertakings. Aggregate data exchanged therefore has to consist of information from at least three companies. Organized exchange of individual data on the other hand, would likely be regarded as a practice with the object or effect of restricting competition. This is the case not just for price information but also sales volumes\(^71\) and general terms of sale. The age of the information exchanged is also an important factor. If information on future conduct of the undertaking is exchanged the courts will presume that the agreement has both the object and effect of restricting competition.\(^72\) Historical data more than one year old on the other hand will as a rule not be caught by Article 81(1).\(^73\) Finally the more frequently information is exchanged the greater the potential restrictive effect is.

In a chartering pool agreement detailed information on all present and future commercial aspects will be available to the participants and the joint entity in part in order for the pool to function and be marketed as a single fleet. The information exchange in this case is accordingly adjunct to the joint sales function and is therefore assessed in conjunction with that function. An agreement to exchange of a similar level of information but without joint sales would most likely be found to infringe Article 81(1). The European Liners Affairs Association, an industry interest group for liner shipping companies, has forwarded a proposal to the commission which suggests that a

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\(^{70}\) Suiker Unie and others v Commission Cases 40-48/73 [1975]  
\(^{71}\) UK Agricultural Tractor Registration Exchange OJ L68/19 [1992]  
\(^{72}\) Huls v Commission, Case C-199/92[1999]  
\(^{73}\) Faull & Nikpay, p. 429
possible replacement for the block exemption in regulation 4056/86 could include an information exchange program which involves the exchange of market data between one and three months old aggregated by an independent body which would be made publicly available. Even this level of exchange has met with some scepticism if it could lead to price forecasting.

4.4.2.5 Cooperation on technical matters

A pool might also include agreement on a uniform standard for technical equipment or procedures. Agreements which have as their sole object and effect technical improvement or cooperation are not caught by Article 81(1). Regulation 4056/86 specifically states in article 2 that such agreements do not fall under Article 81(1) for the sectors covered by the regulation. However this article is merely of a declaratory nature. The regulation does not state that article 2 is to be an exemption and the case law of the commission and the courts has made it clear that such agreements in general are not caught by Article 81(1). It should be noted however that the reason technical agreements do not fall under Article 81(1) is that they as a general rule do not restrict competition, not because they qualify for any type of block exemption. If an agreement on technical matters were to have a restrictive effect on competition it would fall under article 81(1) since its sole object and effect would no longer be the achievement of technical improvements or technical cooperation.

4.4.3 Ancillarity

It has been suggested that pool arrangements may be considered acceptable because of the ancillary restraints doctrine. In the article in question this doctrine is briefly presented as stating that for an agreement “if the overall result is good, relatively minor anti-competitive flaws will be accepted.” I am somewhat sceptical to this possibility. First of all since the description of the doctrine seems to be derived from the judgment in Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten where the courts stated that in certain cases it is possible to balance non-competition objectives against a restriction of competition and find that the former outweighs the latter.

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74 Annex to the white paper on the review of Regulation 4056/86, p.40-41
75 FETTCSA, OJ L 268 [2000], paragraph 147
However the breadth of the rule in *Wouters* is limited to regulatory rules adopted for the protection of consumers – “regulatory ancillarity”\(^77\) which clearly does not cover chartering pool agreements.

Another incarnation of the ancillary restraints doctrine developed from judicial practice is the notion of commercial ancillarity. The unifying idea behind these judgments can be said to be that restrictions to competition in an agreement may fall outside of article 81(1) if they are necessary to achieve a legitimate commercial purpose such as the sale of a business or the penetration of a new market\(^78\). This definition illustrates the problem I see with trying to argue commercial ancillarity when it comes to chartering pools:

- Chartering pools function as joint selling agreements.
- The joint sales function is not an ancillary clause in a chartering pool agreement; it is the principal purpose of the agreement. The ancillary restraints doctrine cannot therefore apply.

Another problem as I understand it is the fact that the doctrine applies to restrictions which are necessary to achieve a legitimate commercial purpose. The Commission’s view is that joint selling agreements are by object restrictive to competition regardless of the subjective intentions of the parties. The restriction of competition can hardly be deemed a legitimate commercial purpose. This would at least require that one finds that the agreement qualifies for exemption under Article 81(3). This would also be a problem if one were to argue that the other restrictions found in chartering pool agreements which are ancillary to the joint sales function might benefit from the doctrine.

In *Gøttrup-Klim Grovvareforeninger v Dansk LandbrugsGrovvareselskab AmbA*, a central case in commercial ancillarity the community courts did find acceptable non-compete clauses necessary to maintain the bargaining power of a joint buying cooperative. However joint buying agreements are not considered as restrictive to competition as joint selling agreements since they tend to give smaller buyers greater bargaining power which may even be beneficial to the market as a whole especially if the market is dominated by large suppliers which was the case in *Gøttrup Klim*. However the non-compete clauses were restricted to what was necessary to ensure the

\(^{76}\) Gombrii in Bull[1991], p.200
\(^{77}\) Whish p 122
\(^{78}\) Whish p.119
legitimate purpose – a functioning cooperative which could maintain contractual power in relation to its suppliers.

As the courts clearly stated in *Metropole television v commission* there is no “rule of reason” under article 81(1). In EC competition law the weighing of pro- and anti-competitive aspects of the chartering pool occurs when determining whether pools qualify for an exemption under article 81(3).

4.5 The De Minimis Doctrine

The de minimis doctrine states that “an agreement falls outside of the prohibition in Article 81(1) where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question”79 The doctrine applies to all agreements whether they are restrictive to competition by object or effect and so even agreements involving hardcore restrictions will not infringe Article 81(1) if the agreement does not in fact have an appreciable effect on the market. The requirement of an appreciable effect on trade between member states mentioned in 4.3 also follows from the de minimis doctrine. The Commission has provided some guidance as to when an agreement is considered not to have an appreciable effect on competition through the publication of a series of “de minimis” Notices80. The most recent Notice states that for horizontal agreements (i.e. agreements between actual or potential competitors) if the aggregate market share of the participants does not exceed 10% of the relevant market then the agreement does not appreciably affect competition. This negative definition cannot be interpreted antithetically and so an aggregate market share which exceeds 10% does not automatically entail an appreciable effect. In such cases it is necessary to individually determine the actual effects on the market.

The Notice does not however apply to horizontal agreements containing certain hard core restrictions, namely – a) the fixing of prices when selling to third parties, b) limitation of output or sales, and c) allocation of markets or customers.81 These three examples of restrictions are the same three as the courts used in *European Night

79 *Volk v Vervaecke*, case 5/69 [1969]
80 The Commission’s notices are not legally binding
81 De Minimis Notice, Article 11
Services as examples of agreements that have as their object the restriction of competition. Indeed earlier versions of the Notice used the term “have as their object” when defining the agreements which do not fall under the de minimis notice, however this was left out in the current notice. One possible reason for this could be to indicate that that the de minimis notice may apply to some agreements that have as their object the restriction of competition just not the three types of restriction specifically stated in the Notice.

Joint sales agreements are regarded by the Commission as a form of price fixing and are therefore outside the scope of the de minimis notice. As explained earlier chartering pools are a form of joint sales agreement and accordingly there is no assurance that the commission would not proceed against a pooling arrangement even though it has a market share of less than 10%. The Notice was last updated in 2001 and previous to this the de minimis limit for horizontal agreements was 5% market share. There were few examples of the Commission challenging agreements below this level even when restrictions outside the scope of the de minimis notice were involved and with the new notice the commission will presumably rarely challenge agreements involving market share less than 10%. The de minimis doctrine does after all apply to hard core restrictions as well. As the courts stated in Javico even absolute territorial restrictions may escape prohibition “if it affects the market only insignificantly.” In the SAFCO ruling the courts found that a joint sales agreement between several small undertakings producing vegetable preserves with a market share of 6 to 7% was not in violation of Article 81(1). On the other hand in Miller a similar market share did not prevent the agreement from being found to infringe Article 81(1).

There is in other words no “safe harbour” level for price fixing agreements and it has been suggested that the commission would pursue such agreements to “ensure that a competition culture was developed and maintained in a particular sector of the economy.” It is of interest to note that the Guidelines to Horizontal cooperation agreements, the Commission uses an example of five small food producers who combine their distribution and sell their products at a common price with a combined market share of 10%. According to the notice this is an example of price fixing which

82 See for example Notice on horizontal cooperation agreements paragraph 138
83 Faull&Nikpay p.85
84 Javico, Case 5/69 [1969]
85 Miller v Commission, Case 19/77[1978]
86 Faull&Nikpay p.85
therefore falls under Article 81(1) even though the participants could not be considered to have market power.\textsuperscript{87} (The example does however find that the agreement is exempt under Article 81(3) since it leads to lower costs and better service for the consumers).

5 Could Chartering Pools qualify for Exemption under Article 81(3)?

It seems likely therefore that the basic features of a chartering pool agreement infringe Article 81(1). If Regulation 1/2003 comes to encompass tramp shipping in the future the Commission, national competition authorities and the courts will have the power to apply all the provisions of article 81. Unless an agreement is found to fulfil the conditions for exemption in article 81(3) the agreement may be found null and void for those portions that are incompatible with Article 81.

The basic requirement in article 81(3) is that if the net effect of the agreement is beneficial, and this benefit is to general welfare, not just to the parties involved then the provisions of Article 81(1) may be declared inapplicable. Article 81(3) does not distinguish between restrictions by object or effect and so any agreement may qualify for exemption, even agreements on hardcore restrictions, if the agreement leads to sufficiently beneficial results.\textsuperscript{88} There are four cumulative and exhaustive conditions which have to be fulfilled for an agreement to be exempted under article 81(3):

\begin{enumerate}
  \item The agreement must produce an improvement in the production or distribution of goods or in technical or economic progress.
  \item A fair share of this benefit must go to consumers.
  \item Any restrictions of competition must be indispensable to the beneficial effects of the agreement.
  \item The agreement must not substantially eliminate competition in the market.
\end{enumerate}

An assessment of an agreement under Article 81(3) will be made on the basis of the facts as they exist at any one time. Accordingly an exemption will only apply as long as all four conditions are fulfilled.

\textsuperscript{87} Guidelines, paragraph 156.
\textsuperscript{88} MatraHachette v Commission case T-17/93, [1994], paragraph 85
5.1.1 Contribution to economic progress

The first condition for exemption is that the chartering pool agreement must in some way contribute to improving production or distribution of goods or promoting economic progress. One can distinguish between two types of improvements or efficiencies. First, cost efficiencies which provide an indirect benefit to the consumer for example from savings which can be shown with reasonable probability will at least partly be passed on to the consumers. Secondly, qualitative efficiencies which more directly benefit the community in the form of improved goods or services. When assessing whether an agreement results in any benefits or efficiencies relevant issues are: \(^89\) i) The nature of the claim. ii) The link between the agreement and the benefit – indirect effects may be too uncertain to be taken into account. iii) The likelihood and magnitude of the benefit – cost efficiencies should be as accurately and reasonably as possible be estimated, qualitative efficiencies should be explained how and why they are an economic benefit. iv) How and when each benefit is achieved.

A chartering pool agreement provides several benefits to its participants. A pool spreads out risk by having more vessels in the market and can also further reduce risk for the individual participant by diversifying its contracts of affreightment. A pool may operate vessels in the spot market and charter vessels out on medium and long term charters which will lead to a greater stability of income in the long run. The notion of “stability”, both in income for the liner companies and in freight rates for shippers, was an important justification for Regulation 4056/86, however in the White Paper review of 4056/86 the commission seems to abandon the idea that stability can be achieved by allowing anti-competitive practices citing an OECD report which concluded that the most competitive markets seem to provide the greatest stability, and that there is no evidence that the shipping industry is unique in its cost structure and therefore in any need of protection. \(^90\) Lower risk and stability are therefore probably less relevant as benefits today.

There are however other benefits from chartering pools which may potentially produce more substantial cost and qualitative efficiencies. \(^91\) First of all the chartering pool system can lead to a rationalisation of the pools resources:

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89 Guidelines 81(3), paragraph 51, OJ C 101/97 [2004]
90 Annex to the White paper on 4056/86, p.6
91 The economics of bulk shipping pools, Haralambides pages 2-6
A combined fleet leads to *economies of scale*. A pool will have a stronger negotiating position since it will be purchasing goods that represent variable voyage costs such as bunkers and stores in larger quantities and making use of shipping agents more frequently. This strengthened position can in turn potentially lead to lower prices. The likelihood and magnitude of such savings are probably limited as even large pools will not constitute a large share of the consumption of such goods. Pools may be able to enter larger volume contracts and receive credit but this does not appear to be a significant factor for the operation of the pool.\(^\text{92}\) Greater savings for the shipping companies are probably achieved by management contracts which outsource technical management of the ships such as manning and supervising technical standards, however such management contracts do not form a part of charter pool agreements. Economies of scale are also achieved from reduced administration costs through the centralization of commercial activities such as purchasing. In a closely integrated pool the participants may also benefit from improved credit worthiness due to increased capital resources and the firm may thereby be able to reduce its capital costs.

Pooling may also lead to *economies of scope* which entail a more effective usage of the ships. A larger fleet of pooled vessels allows increased flexibility by enabling the pool to engage in cross trading which may lead to higher load factors, and minimize ballast legs and idle time. Cross trading occurs if for example a shipper has a set amount of cargo he wishes to have transported at regular intervals for a certain time from point A to point B. From point B there may not be much suitable trade going back in the other direction to point A and the shipowner would have to return the ship in ballast (i.e. empty). Alternatively the shipowner could look for suitable cargoes which need to be shipped from point B to point C where there are cargoes available that need to be shipped back to point A. In such a scenario the vessel is used more efficiently, the owner has a more continuous and higher stream of income which in a competitive market could lead to lower rates to the benefit of the consumer. However such a system of cross trading requires a larger fleet of ships in order to function. As mentioned earlier the average shipping company only owns a couple of ships and so for these companies to be able to engage in cross trading a pool system is required. The extent to which it will be possible to achieve savings from such operations will depend on the market the ship operates in. Bulk transport is probably the area where it is most likely that such

\(^{92}\) Conversations with Claus Nyborg, CFO of Torm Shipping
efficiencies can be achieved since ships trading in this market can carry a wide variety of goods. For crude oil and gas transport however pool participants have expressed that there is little or no such activity.

A sufficiently large pool will also be able to operate in a wider market or even globally and therefore benefit from increased visibility and marketing. It will also have a larger network of information channels through brokers and agents. This could lead to increased efficiency for the pool both in terms of load factor and by allowing it to react faster to changes in the market.

Cost reductions and productivity increases such as these have been held by the community courts to improve the production of services. One exception according to the notice on horizontal cooperation is saving which result only from the elimination of costs that are inherently part of competition. For example savings made because a pool can choose to send the closest vessel is not an improvement in efficiency when assessing an agreement under Article 81(3), nor are lower marketing expenditures. Savings must result from the integration of the logistical systems of the participants. Hence savings that arise because a combined fleet allows for a greater degree of cross trading will be regarded as an increase in efficiency.

Pooling can also lead to qualitative improvements which are more directly beneficial to the consumer. In the past decades there has been an increased requirement for a global presence and service from the shipping industry as ever larger industrial conglomerates and trading houses have emerged. These companies have required transport of large volumes of cargo, at regular intervals, over longer periods of time. Given the fragmented state of shipping markets few companies have been able or willing to bid for such contracts on their own. Companies may be physically unable to compete for such contracts or unwilling to take the risk of devoting all their vessels to one long term contract. Larger companies also demand greater flexibility. For example the option of not nominating a destination until the voyage is underway. Such flexibility is easier to accommodate for a larger fleet. Pools therefore provide improved services which at present cannot be provided individually except by a relatively small number of companies. Pooling might therefore also lead to greater competition for large scale contracts of affreightment. Improved logistics and efficiency can also provide vessels with fewer delays and less waiting time for the shipper which can translate into reduced

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costs for the shipper. Finally pools may also increase the supply of vessels in the market by lowering barriers to entry. Pools allow players without any first-hand knowledge to enter the market, allowing groups of financial investors to take advantage of a high market and order a new ship to be operated under a management contract and commercially run by a pool. Increased supply should lead to lower prices which will benefit consumers.

An important source for guidance as to how Article 81 might be applied in the future can be found in the Commission’s previously granted individual and block exemptions. Especially relevant is Regulation 832/2000 which provides a block exemption for liner shipping consortia. Consortia in terms of Regulation 823/2000 are defined as agreements between two or more liner shipping companies with the object of cooperating “in the joint operation of a maritime transport service and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations.”

In the preamble the main reasons for providing the block exemption are given as “Consortia...generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies through the economies of scale they allow in the operation of vessels….and economic progress by facilitating and encouraging greater utilisation…and more efficient use of vessels.”

Improvements in scheduling and better quality, personalized services are also mentioned. These are more or less exactly the same benefits that chartering pools provide which might indicate that chartering pools at least generate relevant benefits. Whether or not this will be sufficient to fulfil the conditions in Article 81(3) will depend on the individual pool and market.

There are some examples in the industry where pooled capacity has been deliberately withdrawn from the market because of oversupply. In Synthetic Fibres (1984-1207/17) producers collectively reduced capacity because of oversupply in the market and this was held to improve production by bringing production capacity more in line with demand. However it is uncertain to what extent this case can be held as a precedent for such “crisis cartels”. It is unclear exactly what the benefit to the consumer would be in such a case, and this was exactly the reason the courts gave in their decision in SPO and

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94 Regulation 823/2000, Preamble paragraph 4
others v Commission\textsuperscript{95} which found the relevant agreement ineligible for exemption. Regulation 4056/86 permits capacity regulation for liner shipping but only where it consists of “temporary or short term adjustments… [it] does not exempt capacity non-utilisation agreements because their only effect is to raise the level of prices and they do not involve any improvement of services”\textsuperscript{96}

5.1.2 Benefit to consumers

The second condition contained in Article 81(3) states that a fair share of the benefit that results from the agreement must go to the consumer. The term consumer is widely defined and includes not only private individuals as end users, but also any undertaking purchasing a good or service in the course of business. In the case of chartering pools the consumer would normally be any entity which charters a vessel from the pool.

There was previously no definition of “fair share” and this was a point where the commission had a certain margin of appreciation\textsuperscript{97}. More recently however the commission has stated that “the concept of fair share implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction”\textsuperscript{98}. The net effect of the agreement on the consumers must therefore be at least neutral. It is not however necessary for the consumer to receive a share of every one of the different benefits generated by the agreement.

This new guidance has some precedence in earlier decisions by the Commission to the effect that the benefits claimed of the agreement must be of value to the community as a whole and the advantages must outweigh any detriments.\textsuperscript{99} In this regard the Commission has declined to accept that an agreement leads to an improvement if the distortion of competition is disproportionate.\textsuperscript{100}

Four factors in particular are taken into account when assessing whether or not cost efficiencies are being passed on to the consumer\textsuperscript{101}: i) The characteristics and structure of the market – the greater the degree of competition the more likely it is that undertakings will try to increase sales by passing on savings in the form of lower prices.

\textsuperscript{95} Case T-29/92 [1995]
\textsuperscript{96} Trans-Atlantic Agreement, OJ L-376 [1994], paragraphs 365-366
\textsuperscript{97} Whish p 156
\textsuperscript{98} Guidelines to 81(3), paragraph 85
\textsuperscript{99} Whish p.151 and Consten v Grundig
\textsuperscript{100} Whish p151 from Screensport/EBU
\textsuperscript{101} Guidelines 81(3), paragraphs 96-101
ii) The nature and magnitude of efficiency gains - according to economic theory, consumers are more likely to receive a fair share of cost efficiencies in the case of reductions in variable costs than in reductions of fixed costs. iii) The elasticity of demand – the portion of cost savings passed on also tends to depend on the extent to which consumers respond to changes in price. The greater the increase in demand from a reduction in price the greater the pass on rate. iv) The magnitude of the restriction of competition – if substantial restrictions of competition are created by an agreement large cost efficiencies are required for a sufficient share to be passed on to the consumer.

There is of course also the matter of the qualitative benefits created by the agreement where one will have to resort to a certain amount of value judgment to be able to assess the overall benefit to the consumer.

The characteristics of the relevant market will necessarily vary a great deal, however as was noted earlier there are some general characteristics such as low barriers to entry and numerous market participants which make it likely that there will still be competition in the market. This increases the likelihood of cost efficiencies benefiting the consumer.

When it comes to the nature of the efficiency gains the costs involved in operating a shipping company include a very high proportion of fixed costs. Maintaining an operative fleet costs a high fixed amount even when the ships are unemployed. Variable costs where reductions are most likely to be passed on to the consumer constitute a significantly smaller proportion of total costs. In a chartering pool operation the pool is responsible for the variable voyage costs and there could be some economies of scale which reduce costs. Unfortunately though as mentioned earlier these cost efficiencies are probably limited. Other savings from pooling involve fixed costs which the Commission assumes that the participants have no direct incentive to pass on.102

Tramp shipping is also a relatively inelastic market. Whilst the percentage share of shipping costs will vary from product to product overall they are quite low. Even in today’s record high shipping market the transport cost of a barrel of oil from the Persian gulf to the US east coast is only a couple of percent of the value of the oil. In the opinion of one shipbroker the transportation cost for oil is more or less irrelevant for the total volume transported by the oil companies. Shipping costs are relatively higher for bulk transport and one can distinguish between high and low value cargoes. Some cargoes such as coal and iron ore may end up having shipping costs close to value and

102 Guidelines 81(3), paragraph 98
will have a greater degree of price elasticity but overall transportation costs are still quite low and the markets not very price sensitive. Accordingly pools usually have no incentive to lower prices in the belief that a lower price will be offset by a higher volume of goods transported.

Finally the magnitude of the restriction of competition that results from a chartering pool agreement is important since an increase in market power gives the participants the ability and incentive to raise market prices. This has to be balanced against any cost efficiencies which might provide an incentive for lower prices. There does seem to be reason to question whether chartering pool agreements result in significant cost efficiencies that are passed on to the consumer. The level to which competition is restricted by an agreement will vary case by case, but for a balancing of these two opposing forces any restriction would probably have to be limited.

Possibly equally as important to an assessment of the overall benefit to consumers as the cost efficiencies generated by the chartering pool system are the qualitative benefits to consumers from improved service and greater flexibility. This can lead to savings for the consumer from fewer waiting days and being able to guarantee a ship within a smaller window of time. For example a trading company buying a cargo will usually cover the purchase by a letter of credit until the cargo is received by the end buyer who pays for the goods. If the shipper can be sure of a shorter time window for shipment the letter of credit can be issued for a shorter time for a lower cost. Whilst such benefits can be quantified evaluating most other qualitative benefits is largely a value judgment.

According to the industry the problem is getting shippers to actually admit to the fact that they do see benefits. However such improvements are clearly a benefit to the consumer and were recognized as such by the Commission in Regulation 823/2000. It is at least of interest to note that The European Shippers Council which has been very critical to the block exemption in regulation 4056/86 in a response to the latest review of Regulation 823/2000 stated that they had no major problems with liner consortia. Of course Regulation 823/2000 does not allow for any coordination of prices between the participants of a consortium.

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103 Guidelines 81(3), paragraph 101
104 This is in line with the opinion of one shipping market researcher who stated that although he knew of no studies specifically looking at pass on of cost efficiencies he doubted that the consumer would see any reductions in price for example from an increase in cross trading.
As mentioned earlier the Community courts have interpreted Article 81(3) such that the advantages claimed from the agreement must outweigh any detriments. Regulation 823/2000 might again be used for guidance on this issue. In the liner consortia exemption the commission clearly found that the benefits provided exceeded the negative effects from restriction of competition. For chartering pools the benefits achieved are very similar, however the restrictive practices are different. Whilst Regulation 823/2000 does exempt several activities such as coordination of sailing timetables, joint operations of terminals and port installations and pooling of vessels and revenue it did does not allow any form of price fixing. Price fixing between undertakings is of course considered very detrimental to competition and must have an effect on any evaluation of net benefit. According to the Guidelines on Horizontal Cooperation price fixing, since it is a hardcore restriction, “can generally not be justified, unless it is indispensable for the integration of other marketing functions and this integration will generate substantial efficiencies.”\textsuperscript{105} This does not mean that price fixing precludes exemption however the assessment will be closely related to the market power of the pool and the level of competition present in the market. In \textit{Austrian Airlines/Lufthansa} the Commission approved an agreement for individual exemption which covered joint pricing and market sharing between two airlines. The benefits in that case were quite similar to the potential benefits from pooling. The Commission foresaw cost savings, better planning of frequencies, higher utilization and improved services for the consumer. The deciding factor will therefore probably be the magnitude of the different effects. As the market power of the pool increases the negative effect from the participants’ joint pricing will increase, and presumably the amount of savings passed on from rationalisation will decrease. One practical consequence of this is that there will be a limit to how large a market share a pool may have before it becomes ineligible for exemption.

5.1.3 Indispensability

Article 81(3) is only applicable to a chartering pool agreement to the extent that the restrictions to competition contained in the agreement are necessary to achieve the benefits identified in the first condition. Hard core restrictions usually fail to fulfil this

\textsuperscript{105} Guidelines 81(3), paragraph 151
condition since the more restrictive the restraint the stricter this condition is. However in the right circumstances any restriction could be held to be indispensable. In order to satisfy this condition the question of indispensability has to be assessed in a two-fold test. First of all the agreement as such must be necessary in order to achieve the relevant efficiencies. In this case the question will be whether there is any other economically practicable and less restrictive means of achieving the benefits identified other than through a joint sales agreement. Secondly the individual restrictions of competition that are adjunct to the main agreement must also be necessary. In other words each restriction such as the non-compete clause and joint purchasing agreement must be assessed to decide whether they are reasonably necessary in order to achieve the benefits.

As mentioned earlier the Commission exempted liner consortia in Regulation 823/2000 from the provisions of Article 81(1) for activities such as pooling of vessels, port installations, cargo, revenue, and net revenue. However the commission specifically excluded any form of joint fixing of freight rates between consortium members, presumably in part because the commission did not consider such a clause indispensable. Since the benefits achieved by liner consortia are more or less similar to those that arise from chartering pools it could therefore seem like Regulation 823/2000 might signal that the Commission does not consider the main purpose of a chartering pool, the joint sales agreement, as indispensable and that similar benefits can be generated in shipping without such restrictions. However there are some fundamental differences in the ways in which liner and tramp shipping operate which might lead to a different conclusion. The companies in a liner consortium operate a shipping service on a particular trade between certain pre-determined ports. There are therefore substantial benefits to be gained from pooling port installations and coordinating sailing timetables. Yet once there is agreement on a beneficial trading pattern and schedule it is still possible for the companies to compete on price for individual shipment along a portion of the route. In tramp shipping however cooperation will necessarily take a different form. There is not a set route or a set timetable which the members of a pool can divide between them. A cross trading system requires a central commercial marketing agency which coordinates where the ships sail and this agency would not function if each owner individually competed for various cargoes between various ports. Since tramp

106 Guidelines 81(3), paragraph 73
shipping is such a generic product it is also difficult to imagine a way of separating the marketing function from the sales function.

Even though Regulation 823/2000 did not exempt joint sales or joint price determination, there are examples of the commission accepting such practices in block exemptions such as Regulation 4056/86 and in individual exemptions. In Austrian Airlines/ Lufthansa\textsuperscript{107} for example the airlines involved received an exemption for a joint venture for traffic between Germany and Austria. The companies not only established an integrated transport system with joint network planning and pooled revenues and costs, but also operated a joint pricing policy. The Commission found that both the object and effect of the joint venture was to coordinate competitive conduct, yet still found Article 81(3) applicable. This type of service seems in some respects to be comparable to liner shipping – set routes and timetables to transport goods/passengers - but in this case the commission found that “the extent of integration envisaged in the cooperation agreement [was] necessary to achieve the objectives set” and accepted the joint pricing policy.\textsuperscript{108} The Commission did set some conditions regarding pricing, the parties had to apply any price cuts they introduced on other routes to three other routes on which they faced no competition. According to the Commission this would provide new entrants with “some protection” from predatory pricing, a wording which seems to indicate that the Commission was willing to accept quite an extensive restriction of competition as indispensable.

A chartering pool system which includes joint sales may therefore be considered indispensable for the attainment of the main benefits of the agreement. The Commission has stated that it will not second guess the business judgment of the parties but will only intervene where it is reasonably clear that there are realistic and attainable alternatives.\textsuperscript{109} In my opinion it is not clear that there are other forms of cooperation that could achieve the same benefits.

The benefits are however more or less solely a result of economies of scale and of scope and in such instances the Commission has stated that the undertakings concerned are required to explain why the same efficiencies could not be attained through internal growth. Why does the average company only own two vessels? Could the same not have been achieved through consolidation in the industry? A lack of financial capacity

\textsuperscript{107} OJ L 2422/25 [2002]
\textsuperscript{108} OJ L 2422/25 [2002], paragraph 94
\textsuperscript{109} Guidelines 81(3), paragraph 75
is probably part of the answer. At the moment shipping companies are very profitable, but the industry is volatile and historical returns up until 2003 were only around a 7% return on equity. Access to capital markets has also been limited since there have been few public companies. This may be changing and industry insiders predict more M&A activity in the future.\(^\text{110}\) On the other hand the good times in shipping have seldom lasted more than two years and a downturn might halt consolidation.

The second part of the indispensability assessment is to look at the individual restrictions of competition.

As mentioned earlier chartering pools often contain non-compete clauses which bar the participants from operating in competition with the pool any vessels of substantially the same type as those operated by the pool.\(^\text{111}\) When assessing a non-compete clause one has to look at the state of competition if the clause had not existed. One can distinguish between clauses encompassing all vessels owned by the participants and those just covering vessels committed to the pool. For pooled vessels the argument might be made that for the pool to operate vessels have to be committed to the pool exclusively. Joint chartering is the central purpose of the agreement and would not function if the owner tried to compete with the central chartering agent. It is more doubtful whether a similar argument can be made for a non-compete clause preventing participants from trading vessels outside the pool.

According to Røsæg in “Organisational Maritime Law” “pool contracts usually restrict the participant’s right to compete with the pool…” because a participant who offers vessels in competition with the pool “would increase the total offer in the market, and could thereby affect the pool’s profits adversely.” As the ECSA has pointed out however pools are not designed to create and take advantage of market power. Increased competition in the market cannot in itself be used as an argument for non-compete clauses. The main benefits from a chartering pool come from the pool acquiring a critical mass which allows it to attain economies of scale and of scope. Once this critical mass has been achieved it does not seem necessary for the functioning of the pool that the owners have all their vessels committed to the pool. On the contrary one more competitor will just help to ensure that benefits are passed on to the consumer through competition and thereby ensure that the pool will qualify for exemption under Article 81(3). The main argument for why a non compete clause needs to cover all vessels is

\(^\text{110}\) Claus Nyborg, CFO Torm shipping
that the participants in a pool will receive inside information on the activities, contracts, customers and strategic planning of the pool which could be used to the pools detriment. This information exchange could of course also be used to coordinate activities of the pool and ships nominally operating outside the pool to the consumers detriment.

This touches upon another form of restriction of competition which was discussed under article 81(1) namely information exchange. Whilst literature on chartering pools stresses the importance of information for the longevity of the pool\textsuperscript{112} this seems to in part be founded in a need to ensure “mutual trust and confidence”. It might therefore be possible to operate the chartering of the vessels behind a “Chinese wall” so that information exchange is minimized and participants can operate vessels outside, and in competition with pooled vessels. A general non-compete clause such as those commonly found at present in chartering pool agreements may therefore not be indispensable in their entirety.

Restrictions may also be indispensable for a limited time only. Examples of this are clauses regulating withdrawal from the pool. Such clauses are usually in the interest of the parties involved to avoid future conflict, but are also required according to the condition of indispensability. In Regulation 823/2000 it is stated that in order to prevent consortia from imposing restrictions of competition which are not indispensable….agreements should contain a provision enabling each shipping line party to the agreement to withdraw from the consortium provided it gives reasonable notice.”\textsuperscript{113} Reasonable notice according to the block exemption depends on the level of integration of the consortium. The notice period is usually 6 months and notice may first be given after a period 18 months after the agreement was entered. However for highly integrated consortia which have either net revenue pools or purchased/chartered vessels specifically for the consortium the notice period is 6 months which may be given after a period of 30 months after the agreement was entered. In tramp pool agreements notice periods of 6 or 12 months are not uncommon but may be may in some cases be even longer\textsuperscript{114}. Chartering pools do not have an initial lock in period but this may still appear excessive when compared to Regulation 823/2000. Notice periods of 6-12+ months may

\textsuperscript{111} Røsæg, p. 99
\textsuperscript{112} Economics of bulk shipping pools, p. 9
\textsuperscript{113} Regulation 823/2000, Preamble article 14
\textsuperscript{114} Røsæg p.97
therefore be questionable in terms of indispensability unless it can be explained by
differences in the tramp- and liner- shipping markets.
Both liner shipping conferences and tramp shipping pools sail their fleets in trading
patterns that may require a certain number of vessels in order to function and as such
may encounter difficulties if a participant wishes to withdraw suddenly. Chartering
pools however could in addition face another problem if a party withdraws since tramp
vessels may be chartered out to third parties for periods beyond 6 months and
charterparties do not always give the owner the right to substitute the vessel(s) under
contract. Withdrawing the vessel before the charterparty is over could be quite
problematic and this is one reason why the decision to enter charterparties that extend
for more than 12 months usually requires a unanimous vote of the board. Accordingly it
could be considered indispensable in some cases to allow longer notice periods.
Vessels in a pool are usually deemed to be on a “modified time charter” so that the pool
is responsible for variable voyage costs. This entails a joint buying agreement for these
costs such as bunkers. In order to achieve reduced variable costs from large volume
purchasing some form of joint buying is probably indispensable. However such a clause
is not necessarily indispensable for a joint sales agreement. A pool collects freight
revenue and then distributes profits after having deducted voyage, administration, and
possibly some other costs. It would be possible to adjust the calculation of pool points
to reach the same payout for each participant even if they covered the variable voyage
costs themselves. In a computerized age such calculations would not involve too much
extra work. On the other hand the Commission does consider it likely that reduced
variable costs will benefit the consumer, whilst joint buying in this case is probably less
likely to significantly restrict competition.

5.1.4 Elimination of competition

Finally an agreement will not satisfy article 81(3) if it substantially eliminates
competition. Some of this analysis is similar to the assessments under the previous three
conditions. For example in order to determine if there is a net benefit one has to look at
the level of competition in the market. Exactly what this condition entails was
discussed to some extent by the court of first instance in *Atlantic Container Line v
Commission:*

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“...the possibility of eliminating competition......must be assessed as a
whole, taking into account in particular the specific characteristics of
the relevant market, the restrictions of competition brought about by
the agreement, the market shares of the parties to that agreement and
the extent and intensity of external competition, both actual and
potential.
Thus, the greater the restrictions of internal competition between the
parties, the more necessary it is for external competition to be keen
and substantial if the agreement is to qualify for exemption. Similarly,
the larger the market shares of the parties to the agreement, the
stronger the potential competition must be.”

In the case of chartering pools internal competition between the parties to the agreement
is eliminated. This is not enough to conclude that this condition is not satisfied. It does,
however, mean that it is important that there is “keen and substantial” competition in the
rest of the market. To do this assessment it is necessary to examine actual competitors’
ability to compete, and also potential competition. As previously mentioned it is likely
that there will be potential competitors in most markets due to low barriers to entry.
Examining actual competitors’ ability to compete would have to be done on an
individual basis, although as mentioned earlier historical data seems to suggest that
competition will not have been eliminated even when the market is dominated by a few
large players.
Some block exemptions set as a condition that they only apply to undertakings with less
than a specified market share. This is an expression of the requirement that agreements
must not eliminate substantial competition. The limit for consortia operating under
regulation 823/2000 was set to 30% market share when operating within a conference
and 35% when operating outside a conference. However a consortium could have a
market share as high as 50% and still be exempt as long as the Commission was notified
and did not have any objections. In general market shares of less than one third have
been accepted in block exemptions and appear not to be considered by the commission
to substantially eliminate competition. For higher market shares an individual
assessment is necessary. In the *Atlantic liner* case the courts stated that in the case of an

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individual exemption even 50% market share could not automatically lead to the conclusion that the fourth condition of Article 81(3) was not satisfied.\textsuperscript{117} An undertaking with a market share of 50% or greater is presumed to be in a dominant position which can “clearly be said to afford them the possibility to eliminate competition”\textsuperscript{118}, but “eliminating competition” is a narrower concept than “dominant position” and an agreement could be regarded as not eliminating competition even though it establishes a dominant position for the participants.\textsuperscript{119} Bearing in mind that neither regulation 823/2000 nor the Atlantic Liner case covered any form of price fixing a chartering pool with a market level approaching 50% may well be considered to eliminate competition.

6 Conclusions

EC competition law in the maritime sector is currently going through a major overhaul with the Commission looking for a new “way forward”. For tramp shipping the European Commission’s recommendation in its white paper is quite clear: “To propose a change to Regulation 1/2003, as to remove the current exclusion of tramp and cabotage services from its scope.”\textsuperscript{120} This definite recommendation resulted in quite a strong response from the industry and some governments such as Denmark. This may result in a more detailed response from the Commission but is unlikely to alter the outcome.

Removing tramp shipping’s exclusion from the scope of regulation 1/2003 will mean that tramp shipping in the future will probably be subject to a far stricter control of its compliance with Article 81. This in turn may have an effect on the way in which shipping companies organize their cooperative joint ventures.

It is likely that a chartering pool agreement could be found to have as its object the restriction of competition. One consequence of this is that the de minimis notice will not apply and so no “safe harbour” level of market share exists for chartering pools. It is unlikely however that the Commission would instigate proceedings against pools with

\textsuperscript{116} Regulation 823/2000 Articles 6 and 7
\textsuperscript{117} Atlantic Container Lines, paragraph 324
\textsuperscript{118} Faull & Nikpay, paragraph 2.172
\textsuperscript{119} Atlantic Container Lines, paragraph 330
less than 10% market share. This would probably only occur if the Commission were concerned over the level of competition in the market. Considering the nature of tramp shipping it is unlikely that concerns would be raised at such low market levels.

Whether chartering pools qualify for exemption under Article 81(3) therefore becomes an important question.

Looking at the individual restrictions in Article 81(3) it is first of all possible to identify several benefits that result from chartering pools. There are cost efficiencies that clearly benefit the undertakings participating in the pool and qualitative efficiencies from improved and more flexible service that benefit and may lead to cost savings for the consumer.

Indispensability raises two issues – Is a joint sales agreement as such necessary to achieve the benefits identified? The answer to this is probably yes if one limits oneself to looking at JV cooperation between companies however consolidation would produce similar benefits for the consumer. Consolidation may increase in the future but is probably in part reliant on a continued buoyant market. The other aspect of indispensability which looks at restrictions adjunct to the main agreement raises questions about the need for non-compete clauses prohibiting the operation of similar ships outside the pool. Withdrawal clauses may also be unduly restrictive if they require notice periods beyond 6 months. Joint buying may not be indispensable but is unlikely to be restrictive to competition in most cases.

The question of whether the consumer is receiving a fair share involves a difficult, and to a certain extent subjective, balancing of benefits and detriments. A fair share requires that benefits at least compensate the consumer for any negative impact. Cost efficiencies probably mainly benefit the pool whilst some qualitative efficiencies on the other hand are of benefit to the consumer. Considering that the benefits from pooling for the consumer are also achieved from consolidation detriments probably do not have to be too great to outweigh benefits for the consumer. Weighing these benefits against the detrimental effects of a pool will depend greatly on the market power of the pool. The extent of a pool’s market power is likely to vary significantly over time. The consensus of the shipbroking community seems to be that pools have little or no effect on prices when the market is poor or average but do lead to higher prices in a tight market. Considering the highly cyclical nature of the shipping market one likely scenario is that

120 White Paper, p.10
the benefits of a pool may outweigh detriments for some years followed by a year or two when the detriments from higher prices may dominate. Since assessments under article 81(3) are made on the basis of the facts as they are at any one time this scenario would imply that pools qualify for exemption “seven years out of nine”. Unless this issue is addressed by the Commission in its promised guidance on implementation of competition rules there will still be uncertainty surrounding the legality of chartering pools. This may therefore lead to a restructuring of the joint venture format of chartering pools. As mentioned at the very start of the paper full function joint ventures will be assessed under merger regulations not Article 81. Future chartering pools may therefore be more independent entities than they are today set up as full function joint ventures, even though the vessels may still be owned by third parties. Another possibility is that the new rules will act as an incentive to consolidate as companies merge in order to avoid Article 81 conflicts.


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UK Agricultural Tractor Registration Exchange OJ L68/19 [1992]
United Brands v Commission, Case 27/76 [1978]
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7.4 Commission Publications

Published responses to the White Paper (Europa web site)
Guidelines on the application of Article 81(3) of the Treaty (OJ C101/97 [2004])
Guidelines on the applicability of Article 81 of the EC treaty to horizontal cooperation agreements (OJ C3/2 [2001])
Commission notice on agreements of minor importance (OJ C368/13 [2001])

7.5 Articles

Dinger, What shall we do with the drunken Sailor- EC competition law and maritime transport (Baslerschriften zur europaishen integration, 2001)
Haralambides The Economics of bulk shipping pools (Erasmus University, 2004)
The Tramp Shipping Market (Clarkson Research Studies, 2004)
The Drewry Chemical Forecaster(1Q 2005)
Tradewinds Pool players set to battle EU menace (06/08/05)
Lloyds List Tramp Operators need to prepare fro change in EU law (01/12/04)