SELF ASSESSMENT OF A TYPICAL TRAMP SHIPPING POOL
rationale, sample assessment and alternatives

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### Contents

1 Introduction .................................................................................................................. 4

2 Rationale for Self Assessments ..................................................................................... 7
   2.1 Public Enforcement.................................................................................................. 7
   2.2 Private Enforcement .............................................................................................. 10
   2.3 Conclusion ............................................................................................................. 11

3 Tramp Shipping Pools and Article 101 TFEU ............................................................. 12
   3.1 Pool Participants as Undertakings ....................................................................... 12
   3.2 The Object or Effect of Tramp Shipping Pools ....................................................... 13
       3.2.1 The Relevant Market ..................................................................................... 14
       3.2.2 The Object Assessment of Tramp Shipping Pools ....................................... 15
       3.2.3 Effect of Tramp Shipping Pools .................................................................. 16
           3.2.3.1 Effect on Competition ......................................................................... 16
           3.2.3.2 Pool Agreements and Effect on Trade ............................................... 17
           3.2.4 De Minimis Doctrine .................................................................................. 17
   3.3 The Exceptions of Article 101(3) ......................................................................... 18
   3.4 Conclusion ............................................................................................................. 20

4 Self Assessment of a Tramp Shipping Pool under the Maritime Guidelines ............. 21
   4.1 Self Assessments and Legal Status of Guidelines ............................................... 21
   4.2 Self Assessment of a Typical Tramp Shipping Pool: Article 101(1) TFEU and the Maritime Guidelines ........................................................................................................ 23
       4.2.1 Market Analysis .............................................................................................. 23
       4.2.2 Scope Clause .................................................................................................. 25
       4.2.3 Non Compete Clauses .................................................................................... 27
       4.2.4 Information Exchange ................................................................................... 28
       4.2.5 Withdrawal from the Pool ............................................................................. 30
       4.2.6 Joint Purchasing ............................................................................................ 32
       4.2.7 Joint Selling and Joint Production ................................................................. 33
   4.3 Self Assessment of a Typical Tramp Shipping Pool: Article 101(3) TFEU and the Maritime Guidelines ........................................................................................................ 34
   4.4 Conclusion ............................................................................................................. 37
1 Introduction

On 18 October 2006, tramp shipping pools became subject to the enforcement powers of the European Commission by the adoption of Council Regulation 1419/2006. At this stage and before going into further details, it is important that certain common terms be clarified. A shipping pool may be defined as “a collection of similar vessel types under various ownerships placed in the care of a central administration”, and tramp shipping is defined as “shipping by means of a vessel that does not operate on a published schedule but serves different ports in response to tenders of cargo.” Considering that tramping represents two thirds in volume and three quarters in tonnage miles of world maritime transport the changes brought about by Council Regulation 1419/2006 generated huge waves in the shipping industry. Council Regulation 1419/2006 repealed Council Regulation 4056/86 and amended Council Regulation 1/2003 by including in its scope international tramp services. Indeed Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 101 and Article 102 TFEU had already amended Council Regulation 4056/86 by bringing maritime transport under the common competition enforcement rules applicable to all sectors with the exception of cabotage and international tramp services. As such, international tramp services were, along with cabotage, the only remaining sector to be excluded from the investigative and enforcement powers of the European Commission and this was seen as an anomaly from a regulatory point of view. The main argument for excluding tramp vessel services from Regulation 1/2003 was that these operated on the basis of freely negotiated rates which depended on the interaction between supply and demand. This was no longer seen as a justification for the exclusion based on the argument that such market conditions also affect other services that were already subject to Article 101 TFEU and “no convincing reason was brought forward to maintain the current

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2 Clarkson Research Studies, April 2004, p. 28.
3 http://www.trt.trb.org/trt.org (transportation board website).
7 As stated in Regulation 1419/2006 paragraph 12.
exclusion of these services from the rules implementing Article 101 TFEU. As arguably the most common type of arrangement in the tramp sector, it is interesting to see which challenges tramp shipping pools now face. The Guidelines on the application of Article 101 TFEU (previously Article 81) to maritime transport services\(^8\) provide some assistance to tramp shipping pool participants needing to determine whether their arrangement is in compliance with competition law rules by conducting a self-assessment of their arrangement. Such self-assessment and its accompanying challenges are particularly relevant for several reasons. Firstly Regulation 1419/2006 is still relatively recent and an increasing number of lawyers are being instructed to “set the sail on a sea of doubt”\(^9\) and conduct self-assessments of tramp shipping pools. Secondly, the Guidelines on the application of Article 101 TFEU to maritime transport services will be applied for a period of five years only. Having only been published in September 2008, these are still at a trial phase. The challenges encountered by tramp shipping pools and their respective teams of legal advisers will be used as a basis for lobbying groups in Brussels to try and modify the existing guidelines when these call for a renewal. Hence it is not just the future of tramp shipping pools that is on the agenda but also potential changes to the existing EU legislation. In this context, self-assessments may turn out to be the deciding factor for both the existence of a tramp shipping pool and the sustainability of the EU legislation in force. Thirdly and as will be seen later in this study, these self-assessments are highly complex. Being of a near sisyphean nature, tramp shipping pool self-assessments will require lawyers and often economists to collaborate to provide pool participants with the answer of whether their arrangement infringes competition law. An arrangement infringing competition law will have far fetched consequences as will be presented below. As such, self-assessments are all the more crucial as pool participants will be expected to assess an arrangement which do not benefit from a preliminary “stamp of approval” from competition authorities.

This thesis will exclusively focus on self-assessments of tramp shipping pools without analysing the effects of Regulation 1419/2006 on liner shipping services and cabotage. Whilst the Guidelines on the application of Article 101 TFEU to maritime transport services will be to a certain extent assessed, this will only be done in the prevailing analysis of typical clauses of a tramp shipping agreement. These clauses will be the subject of an assessment under Article 101 TFEU and the step by step analysis required to determine whether they infringe Article 101 TFEU. The second chapter of this thesis will expand on the rationale behind self-assessments as evidenced by the enforcement and investigative powers of the European Commission along with possible enforcement actions by

\(^8\) Regulation 1419/2006 paragraph 14.
\(^{10}\) Widely used expression within the shipping legal community.
individuals. The third chapter of this thesis will analyse the legal framework necessary to conduct a self assessment as conducted in the fourth chapter which will examine typical clauses of a tramp shipping pool agreement. The fifth chapter will go into the structural alternatives to tramp shipping pools and best practice options that need to be considered during the course of a self assessment. This will be followed by a general conclusion in the sixth chapter of this thesis.
2 Rationale for Self Assessments

Council Regulation 1419/2006 amended Council Regulation 1/2003 by extending the latter’s scope to include cabotage and international tramp services. In effect, the Regulation amendment provided the Commission with a number of enforcement powers in relation to tramp shipping pools. Contained in Regulation 1/2003, these powers represent the public aspect of competition rules enforcement, in addition to possible private enforcement actions. Both should prompt tramp shipping pools to conduct thorough assessments of their respective arrangement.

2.1 Public Enforcement

To ensure that Article 101 TFEU is applied effectively within the EU, the Commission has been granted wide ranging powers to carry out investigations and to take binding decisions. Furthermore, where applicable, the Commission has the power to impose fines. The main powers of the Commission will be addressed in detail in this chapter.

Under Article 7(1) of Regulation 1/2003, the Commission may require that pool participants bring their pool arrangement to an end should the Commission deem the arrangement to be an infringement of Article 101 TFEU. The Commission is for this purpose granted the power to impose behavioural or structural remedies. Further to Article 7(1), “Structural remedies may only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy”. The Commission may even, at its discretion, impose some interim measures if a tramp pool agreement infringes Article 101 TFEU on the face of it. A condition for these interim measures to be imposed is that the pool agreement in question causes a risk of serious and irreparable damage to competition.\textsuperscript{11}

\textsuperscript{11} Article 8(1) Regulation 1/2003.
These powers to impose interim measures and/or behavioural or structural remedies are complemented by the Commission’s powers of inspection in respect of industry sectors or individual undertakings. Indeed, Article 17 of Regulation 1/2003 grants the Commission wide power of inquiries into a particular sector of the economy or into a particular type of agreements which is used across various industry sectors where circumstances indicate that competition may be negatively affected within the Internal Market. On a narrower basis, the Commission may require undertakings or associations of undertakings to provide it with the information necessary to determine whether Article 101 TFEU is infringed.\textsuperscript{12}

Pool participants, when facing a request for information from the Commission should be made aware by their legal advisers of the Commission’s extensive power of inspection. These powers include the power to enter the premises of the undertaking to conduct the inspection, the power to examine books and records and take copies and the power to seal the premises if this is necessary to conduct the inspection.\textsuperscript{13} Nevertheless, these powers of inspection are not limited to the business premises of the pool participants as even the private homes of directors, managers and other members of staff of the undertaking/association of undertakings may be inspected\textsuperscript{14}. It should be mentioned that these powers of inspection by the Commission come with powers of inspection vested in the competition authorities of Member States. Pursuant to Article 22 of Regulation 1/2003, a given competition authority of a Member State may conduct an investigation on its own territory both on behalf of another Member State and on behalf of the Commission.

The results of these investigations may prompt the Commission to make use of its powers to impose penalties under Articles 23 and Article 24 of Regulation 1/2003. The amount of the fine will depend on the gravity and duration of the infringement\textsuperscript{15}, and Article 23 distinguishes between fines relating to the supply of incorrect information and fines relating to the infringement of Article 101 TFEU. In this respect, Article 23(1)(a) of Regulation 1/2003 states that the Commission may impose fines amounting to up to 1% of the total turnover in the preceding business year of the undertaking supplying the incorrect or misleading information.

Further to Article 23(2), the Commission may impose fines on an undertaking or association of undertakings where they, inter alia, intentionally or negligently infringe Article 101 TFEU or contravene a decision ordering interim measures under Article 8 of Regulation 1/2003. If actual

\textsuperscript{12} Article 18(1) Regulation 1/2003.
\textsuperscript{13} Article 20(2) Regulation 1/2003.
\textsuperscript{14} Article 21(1) Regulation 1/2003.
\textsuperscript{15} Article 23(3) Regulation 1/2003.
knowledge of Article 101 TFEU is not necessary for the infringement to be intentional\(^\text{16}\), this has in practice little relevance as the amount of the fine that may be imposed on pool participants will not depend on whether an intention to infringe Article 101 TFEU was present\(^\text{17}\). If negligence needs to be established this criteria will be fulfilled by proving that the tramp shipping pool participants could foresee that their conduct would have anti-competitive effects.\(^\text{18}\) For each undertaking and association of undertakings participating in the infringement, the fine may reach up to 10 % of its total turnover in the preceding business year. An example of this is the fine of 896.000.000 Euros imposed on Saint Gobain in 2008.\(^\text{19}\) These heavy fines have the capacity to lead a pool participant to bankruptcy. In the case of an infringement of an association relating to the activities of its members, the fine shall be calculated in relation to the sum of the total turnover of each member active on the market affected by the infringement of the association.\(^\text{20}\) It should be noted that the Commission has the power to impose fines even if the infringement has already ceased, as held in the case of ACF Chemieforma v. Commission.\(^\text{21}\) Tramp shipping pools should also not place too much reliance on the Italian Flat Glass\(^\text{22}\) decision. In this decision, no fine was imposed for an alleged breach of competition law as the concept was a new one. There is to this day a lack of cases concerning fined tramp shipping pools but the novelty of the sector being subject to the enforcement powers of the Commission relates more to the facts in question than to the legal concepts being applied. Hence the Italian Flat Glass decision should not protect tramp shipping pools from being fined. The Commission may also want to set precedents by imposing fines on tramp shipping pools infringing Article 101 TFEU as it may feel this would prompt the entire tramp sector to comply with competition law rules.

Undertakings infringing competition law may also be subject to periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision. Penalty payments are used by the Commission to compel undertakings to put an end to an infringement of Article 101 TFEU.\(^\text{23}\)

In addition to fines and penalty payments, other actions of the Commission may be harmful to tramp shipping pools. As seen above, the Commission has the power to seal off the business premises for the time required to conduct the investigation under Article 20(2) of Regulation 1/2003 and one

\(^{17}\) On this see Bellamy & Child, European Community Law of Competition p. 1280.
\(^{19}\) Case M. 774 Saint Gobain/Wacker Chemie/Nom OJ 1997 L247/1.
\(^{20}\) Article 23(2) Regulation 1/2003.
\(^{22}\) Italian Flat Glass OJ 1989 L33/44.
\(^{23}\) Article 24 Regulation 1/2003.
should not underestimate the scale of financial loss which may be caused by an interruption of business activities. Pool participants should also be made aware of the negative impact that bad publicity may have on their business. According to Article 30 of Regulation 1/2003, the Commission “shall publish the decisions which it takes pursuant to Articles 7 to 10, 23 and 24.” Publications of decisions of the Commission relating to an infringement of competition law may cause pool participants to lose customers.

2.2 Private Enforcement

The threat of action by competition authorities is complemented by possible enforcement action for damages by private individuals for breaches of Article 101 TFEU. The case law of the European Union and of the Member States confirms the right of individuals to seek damages by invoking an infringement of competition law rules. In the case of Manfredi v. Lloyd Adriatico24, various individuals tried to recover some insurance premiums that they had paid further to contracts based on unlawful information exchange between insurance companies. The Court of Justice held that the individuals were entitled to damages invoking the direct effect of Article 101(1) TFEU and this case confirmed that the invalidity of an agreement infringing competition law can be relied on by anyone. There must nevertheless be a causal connection between the inflicted harm and the agreement or practice prohibited under Article 101 TFEU.25 As a result of this precedent, a tramp shipping pool agreement infringing Article 101 TFEU is exposed to claims and enforcement actions by individuals. The Court of Justice’s reasoning in Manfredi v. Lloyd Adriatico is not surprising as the obligation to make reparation constitutes a fundamental principle of European law.26 Whether a strict interpretation of the requirement for a causal connection should be made will presumably be confirmed by future case law. The danger for tramp shipping pools would be a lenient application of this requirement.27

On a national level, in Crehan v. Inntrepreneur Pub Company28, the English Court of Appeal overturned on 21 May 2004 a previous judgment of the High Court and made an award in damages to a former pub lessee who suffered damage as a consequence of a beer tie imposed on him by the Inntrepreneur Pub Company in breach of Article 101 TFEU. This was the first award of damages made by an English court for a breach of either the EC or the UK competition rules.

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27 See for example the White Paper on modernisation of the rules implementing Article 85 and Article 86 of the EC Treaty, OJ 1999 C-132/1, paragraphs 133-134 where the Commission advocates for a full compensation of all victims including indirectly injured parties in cases of breach of EU competition law.
One should however, distinguish between the right of individuals to claim damages and their likelihood to succeed in their claim under Article 101 TFEU. Tramp shipping pools will be to a certain extent protected from possible private claimants who must take into account the prohibitive procedural costs involved which are likely to prove an effective deterrent against taking action. The general rule is that a claimant whose claim is unsuccessful will have to bear the costs of an action and these can be very high given the nature of competition law as illustrated by the Arkin case.\textsuperscript{29} In the Arkin case\textsuperscript{31}, which concerned alleged breaches of competition rules, the claimant expert fees amounted to GBP1.3 million.

2.3 Conclusion

The heavy fines and structural remedies that may be imposed on tramp shipping pools not complying with EU competition law will be a major reason for pools to undertake a self assessment of their respective arrangements. As the Commission also has inspection powers, pool participants should also be made aware of the consequences of any document that may raise the suspicion of the competition authorities. Possible actions by private individuals invoking a breach of competition law to recover damages from pool participants will put additional pressure on pools to ensure that their arrangements do not breach Article 101 TFEU.

\textsuperscript{29} Marjorie Holmes, the relevance of competition law in shipping-related private actions, EMLO guide, p. 296.  
3 Tramp Shipping Pools and Article 101 TFEU

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States of the European Union and which “have as their object or effect the prevention, restriction or distortion of competition within the internal market”. An agreement between parties will therefore not be caught if the object or effect of the agreement is without consequences for the internal market. A list of clauses that are specifically prohibited is given under (a) – (e) Article 101(1) TFEU. It should be noted that Article 101(3) TFEU contains certain exceptions to the general prohibition of Article 101(1) which will be analysed in this chapter. Before considering these exceptions it should be ascertained whether tramp shipping pools qualify as undertakings under Article 101(1) which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

3.1 Pool Participants as Undertakings

An initial condition to the applicability of Article 101(1) is that the pool must qualify as an agreement between undertakings. It is a pre-requisite that any pool, the aim of which is to bring together a number of vessels under different ownership under the management of a single administration, will need to be contractually formalised by an agreement. The fact that no tramp shipping pool is similar means that there will invariably be a variety of tramp shipping pools agreements with some common features that will be addressed at a later stage in Chapter 3.

As such, it is important that the term “undertaking” under article 101(1) TFEU is clearly defined and understood. The landmark case of Klaus Höfner and Fritz Elser v Macrotron GmbH\(^{32}\) provides some clarity in this respect. In this case it was held that a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying EU competition rules since, in the context of competition law, that classification applies to

every entity engaged in an economic activity, independently of its legal status and the way in which it is financed. The entity in question may also be an undertaking in respect of one part of its activities only. Similarly, the Fenin\textsuperscript{33} case advocates that a purchasing activity is only subject to EU competition law if it is undertaken for an economic purpose (in this case the supply of goods or services on a market) instead of a "social purpose". The affiliation of the entity with an economic activity is thus a key condition for the entity to qualify as an undertaking for the purpose of EU competition law.

Tramp shipping pools constitute agreements between various shipowners/shipping companies offering transport services to customers. From an EU competition law perspective, tramp shipping pools are agreements between undertakings as their reason for existence is closely interconnected with the conducting of an economic activity and the maximisation of profits.

One should also note that for the purpose of Article 101, the term “agreement” should be construed widely. Oral and written agreements, whether binding or not, will be caught by Article 101 TFEU if the other conditions apply.\textsuperscript{34} The debate revolving around the term “agreement” loses its significance however when one notes that concerted practices which may affect trade between Member States of the EU and which have as their object or effect the prevention, restriction or distortion of competition within the internal market also fall under the prohibitions set out in Article 101. The use of the words “concerted practices” significantly extends the scope of application of Article 101 and has the effect of preventing undertakings from avoiding the application of Article 101 by colluding in a manner which falls short of an agreement. An example of a concerted practice is the exchange of information on prices.\textsuperscript{35} In any event, and as already mentioned for the purpose of this study, shipping pools will customarily originate from the signing of an agreement. The typical clauses of such an agreement will be discussed and analysed within the context of Chapter 4.

3.2 The Object or Effect of Tramp Shipping Pools

If tramp shipping pools are agreements between undertakings, these must have as their object or effect “the prevention, restriction or distortion of competition within the internal market” according to Article 101 TFEU. It should be noted in the first instance that, on a practical basis, the differences between prevention, restriction and distortion of competition between shipping pool participants

\textsuperscript{33} Case T-319/99 Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities [2003] ECR II-357.

\textsuperscript{34} Talk at BA-HR, Oslo – EU competition law and shipping, November 2009.

\textsuperscript{35} Linklaters, agreements restricting competition – introduction to article 81 EC treaty, Carsten Grave, Dusseldorf law school, 5 August 2009.
are purely rhetorical. An expansion on the difference between these terms is unnecessary as these are often interchangeable for the purposes of our analysis. A second comment is that the drafting of Article 101 TFEU specifically uses the word “or”. The result of such drafting is that the object and effect of tramp shipping pools are not cumulative requirements when it comes down to assessing whether such pools infringe Article 101 TFEU. Hence an analysis of tramp shipping pool agreements by assessing their effect on competition in respect of their corresponding markets and taking an economic approach is only necessary if the object of the agreement does not restrict competition. The term “object” should be understood as the objective meaning of the agreement in question and its purpose, the intention of the parties being irrelevant. 36 Article 101(1) (a,b and c) gives examples of prohibited objects applicable to pools such as price fixing, output limitation or sharing of markets or customers. These examples are known as “hardcore restrictions” and Article 101 will almost certainly catch these practices if the other conditions are satisfied.

3.2.1 The Relevant Market

The purpose of analysing the relevant market is to assess the competitive constraints the undertakings involved face in relation to their competitors and is necessary both for the object and effect assessment. The Commission Notice on the definition of the relevant market for the purposes of Community Competition law37 provides some guidance. The geographical market and the product market are the main aspects of the market to be determined.

The geographical market corresponds to “the space comprising the physical and geographical area in which the undertakings concerned are involved in the supply and demand of goods or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”38

With respect to the service or product market, it was stated in Hoffmann-La Roche & Co AG v. Commission39 that “the concept of the relevant market implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in

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36 Whish (p. 112).
38 Notice on the relevant market, paragraph 8.
so far as a specific use of such products is concerned\textsuperscript{40}. Hence the relevant product market comprises those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of their prices, intended use or characteristics. This requires some attention to be paid to demand substitutability\textsuperscript{41} and supply substitutability (relating to the supply side of the market in other words where it is possible to buy the relevant services).\textsuperscript{42}

3.2.2 Object Assessment of Tramp Shipping Pools

Tramp shipping pools will almost invariably have as a key feature the use of a pool manager in charge of the joint marketing and negotiation of freight and/or charter rates. A consequence of this joint marketing is that third parties view the various pool vessels and their respective owners as one entity.\textsuperscript{43} Instead of having a variety of players on a given market, tramp shipping pools by essence limit the number of participants competing against each other by combining their fleets. This leads to a sharing of both the market and customers if the vessels belong to different owners and not to shipping companies within the same group. Article 101(1)(c) TFEU expressly prohibits agreements which have as their main object the sharing of markets.

Additionally, Article 101(1)(a) prohibits agreements that directly or indirectly fix selling prices or trading conditions. This constitutes another prohibition which is significant for shipping pools. Freight or charter rates are usually negotiated by the pool manager. This feature enhances the view of the pool as a single entity with the pool manager acting on behalf of the owners of the vessels in the pools.\textsuperscript{44} As a result, Article 101(1)(a) will apply if the other parameters such as the affecting of trade between Member States are present. A closer analysis of the recent Guidelines for the application of competition law to shipping will be the object of Chapter 4 of this study. At this stage it is important to state that pooling agreements which provide for price fixing will generally infringe Article 101 independently of their market share.

In light of the above, one may question the necessity of analysing the effect on competition that pool agreements may have given that by their very object they appear to represent an infringement of Article 101(1) TFEU. In addition to each pool agreements being different the effect analysis will often be needed as pool arrangements frequently do not consist of one but of several agreements that will

\textsuperscript{40} Case 85/76 [1979] ECR 461 p. 28.
\textsuperscript{41} Sometimes measured based on the Small but Significant Non-Transitory Increase in Price test.
\textsuperscript{42} Vincent Power, an overview of EC competition law as it relates to the shipping and port sectors, European Maritime Law Organisation, Spring Seminar, Gdansk Poland 8 May 2006, p.4.
\textsuperscript{43} Fearnleys report p 147.
\textsuperscript{44} Fearnleys report p 147.
each need to be analysed separately clause by clause for the purpose of competition law. For example, one agreement will appoint the pool manager whilst another agreement will deal with the commercial side of the pool arrangements.\footnote{Fearnleys report p 150.} This common cluster of agreements justifies the next subsection addressing the effect analysis of pool agreements.

3.2.3 Effect of Tramp Shipping Pools

3.2.3.1 Effect on Competition

The parties to the pool agreements will need to assess whether the clauses contained in their pool arrangements potentially have an adverse impact on the parameters of competition on the market such as price, costs, service quality and influence on existing competitors/potential competitors. Adverse impact is meant here as the negative effects caused by pool arrangements threatening the subsistence of a free internal market and consumer welfare. Whether pool arrangements cause negative market effects will vary depending on the agreement in question, whether the parties have a low market share and whether the market is highly concentrated or not.\footnote{Talk given at BA-HR, Oslo – EU competition law and shipping, November 2009.} The line of reasoning is that a highly concentrated market fosters collusion and anti-competitive practices. On the other hand, one could argue that a given shipping pool can behave competitively if it does not prevent the formation of other pools. It is the very possibility of other pools forming that will dictate the existing pools' price behaviour on the market. This view is compliant with the followers of the economist Will Baumol and of its contestability theory. According to the contestability theory monopoly providers such as shipping pools do not have to be exposed to actual competition to act competitively, but only to the threat of competition.\footnote{Contestability: developments since the book, Baumol, William J., International Library of critical writings in economics, 126 (vol.3), p. 493-520.} The case of Societe Technique Miniere v. Maschinenbau\footnote{Case 56/65 [1966] ECR 235, 249.} established that the analysis of the effect of an agreement will take into account the position and importance of the parties in relation to the market for the products concerned.

The extent to which the recent Commission Guidelines\footnote{Commission Guidelines on the application of article 81 EC (now article 101 TFEU) to maritime transport services (OJ C 245/2 2008).} on the Application of Article 101 to maritime transport services provide real guidance to the relevant parties will be the object of Chapter 4 of this study. Non compete clauses, clauses relating to information exchange and clauses regulating the withdrawal from the pool agreement constitute non exhaustive instances of potential
negative effect on the parameters of competition and are an important part of the self-assessment that pools are expected to conduct.

3.2.3.2 Pool Agreements and Effect on Trade

One of the criteria for Article 101 to apply to pool agreements is that these must affect intra-community trade. This principle was established in *Volk v Vervaeke* where the Court of Justice stated that "if an agreement is to be capable of affecting trade between Member States it must be possible to foresee with sufficient degree of probability on the basis of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States."  

In an age of globalisation and with shipping being the backbone of trade and markets, there is no need to look beyond the EU to realise the international nature of the shipping industry. To give an example, the European Community Shipowners' Association published a report in 2004 according to which up to 41% of intra-European movements are going by short sea services. It is therefore easy to see how the "pattern" of trade inter states and intra EU may be affected. The effect on trade will be interpreted broadly here which on the face of it poses a threat to pool agreements unless the agreement in question only has effects in one Member State (in which case national competition laws will be relevant) or unless the effect itself is negligible.

3.2.4 De Minimis Doctrined

Provided the initial "effect on trade" or "effect on competition" test is positive, the next step is to review whether the pool agreement may qualify as being of negligible effect on competition or on trade between Member States. The notice from 2001 "on agreements of minor importance which do not appreciably restrict competition" provides some guidance. This so-called "de minimis" notice quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 101(1) TFEU. An agreement does not prima facie appreciably restrict

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51 www.ecsa.be.
52 The de minimis principle was laid down by the Court of Justice in Case 5/69 *Volk v Vervaeke* [1969] ECR 295 and in case 19/77 *Miller v Commission* [1969] ECR 131.
competition within the meaning of Article 101(1) if the aggregate market share held by the parties to an agreement between competitors does not exceed 10% on any of the relevant markets. This is in line with the Horizontal Cooperation Guidelines in which the Commission states that a low combined market share of the parties to a cooperation agreement is unlikely to have a restrictive effect on competition.\footnote{See Horizontal Guidelines paragraph 10.}

Relevant in the context of pool agreements is the fact that pools containing hardcore restrictions such as price fixing and market sharing cannot benefit from the “de minimis” notice.

However, the market share threshold of under 10% is not necessarily a safe haven for shipping pools as this market share threshold is not strictly applied. A good illustration of the danger of relying on this threshold is the \textit{Pioneer} case\footnote{Case 100/80 \textit{Musique Diffusion francaise} [1983] ECR 1825.} where the defendants contended that their behaviour did not appreciably affect inter/state trade since their aggregate market share was just under 7%. The Court of Justice rejected their argument and held that the total market, despite its size, was very fragmented. The market shares of the applicants were held to be greater than most of their competitors and the Court held that there was an appreciable effect. As a result the market structure is a key factor for determining any appreciable effect and shipping companies should take this into account for their pool self assessment.

3.3 The Exceptions of Article 101(3)

Tramp shipping pools which infringe Article 101(1) face being automatically void under Article 101(2) and more importantly, are exposed to sanctions unless the pool can prove that the exceptions of Article 101(3) apply. The exceptions under Article 101(3) are cumulative and are as follows:

The pool agreement must contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefits, and not impose restrictions which are not indispensable to the achievements of the benefits. In addition the pool agreement in question must not afford the parties to it the possibility of eliminating competition. Before briefly going into each of these conditions, it is worth stressing
that Article 101(3) places the burden of proof on the parties to the pool agreement seeking to
benefit from it.\textsuperscript{56} One of the first obstacles that pools will encounter is that they must show that the
improvements relating to the distribution of goods (or of services),\textsuperscript{57} have appreciable objective
advantages of such character as to compensate for the disadvantages caused.\textsuperscript{58} This is quite a
burdensome requirement for which pools will be expected to balance the pro competitive effects of
their arrangement against the anti competitive ones. On a more positive note for pools, the
improvements do not need to have a link with the relevant market where the improvement occurs.\textsuperscript{59}

The second requirement of allowing the consumers a fair share of the resulting benefits may be
viewed as a continuation of the appreciable objective advantages requirement. Shipping companies
acting together in a pool will be in a position to argue that by acting in concert, this will lead to
efficiency gains translating in turn into lower prices for consumers. The above mentioned cost
sharing will provide an opportunity to pool members to offer cheaper services in addition to a
greater flexibility and a wider scope of services. By way of illustration, one of the advantages of the
Odfjell pool is the terminal and storage facilities available to customers.\textsuperscript{60}

But the picture is not that simple as the Guidelines on the application of Article 101(3) of the Treaty\textsuperscript{61}
deepth. Paragraphs 95-101 of the Guidelines illustrate the two opposing forces between an increased
market power of undertakings susceptible to raise prices and the efficiency of gains that may result
in lower prices. One of the factors that will determine whether the pool will result in consumer
friendly prices is the structure of the market and how competitive it is. In any case the third condition
relating to the indispensability of the restrictions will add to the evidentiary burden imposed on
pools. True, the Guidelines do state that the alternative must be economically viable in paragraph 75
which speaks in favour of pools. In the same paragraph, however, the Guidelines enthusiastically
state that "the parties must only explain and demonstrate why such seemingly and significantly less
restrictive alternatives to the agreement would be significantly less efficient". Given the plethora of
alternatives to pools ranging from simple bilateral agreements to full function joint ventures, the
question remains of how achievable this task is for the pool participants.

\textsuperscript{58} Case 56/64 and 58/64 \textit{Consten Grundig v. Commission} [1966] ECR 299, 350.
\textsuperscript{60} Fearnleys p. 346.
\textsuperscript{61} OJ No C 101 of 27 April 2004.
This uncertainty as to whether pool participants can benefit from the application of Article 101(3) is accentuated by the fourth condition under which there must be no possibility of eliminating competition in the market. This is a direct transposition of the principles of competition law which advocate that having numerous participants competing against each other result in economic efficiencies benefiting consumers. Various parameters will be relevant here to determine the effect on competition such as the behaviour of the parties after the creation of the pool and their market share\textsuperscript{62} and the list goes on. Whether tramp shipping pools will succeed in overcoming the requirements of Article 101(3) in their self assessment remains at a quasi-theoretical level given the recent application of the rules implementing Article 101 TFEU to the tramp sector. The applicability of Article 101(3) to tramp shipping pools, if not dubious, remains uncertain.

3.4 Conclusion

Article 101 implies legal as well as economical considerations of a complex nature. Tramp shipping pools as undertakings are more than likely to have as their object or effect the restriction of competition. If this restriction of competition materialises in the internal market and substantially affects trade, the burden will be on shipping pools to demonstrate that the exceptions contained in Article 101(3) apply. As demonstrated above, there is no guarantee that shipping pools will be in a position to benefit from these exceptions. Shipping pools are horizontal agreements by nature and as such do not qualify under the newly adopted EU Regulation 330/2010 known as the Vertical Agreements Block Exemption Regulation.\textsuperscript{63} The reason why horizontal agreements are deprived of a similar block exemption is beyond the scope of this paper. This absence of block exemption, coupled with the complexity of Article 101, makes a comprehensive self assessment by every shipping pool all the more necessary. Whilst it is impossible to have a "pro forma self assessment" that could be applied to and by every shipping pool, the following chapter will use a typical pool agreement and assess common clauses in light of the Commission Guidelines on the application of Article 101 TFEU to maritime transport services\textsuperscript{64}.

\textsuperscript{62} Notes from talk at BA-HR, EU Competition Law and Shipping, Oslo, November 2009.
\textsuperscript{64} Commission Guidelines on the application of Article 81 EC to maritime transport services (OJ C 245/2 2008).
4 Self Assessment of a Tramp Shipping Pool under the Maritime Guidelines

4.1 Self Assessments and Legal Status of Guidelines

The adoption of Regulation 1419/2006 granting enforcement powers to the Commission with regard to tramp pools generated much talk within the shipping industry. The fines and consequences of non-compliance with EU competition rules, as presented in Chapter 2, lost their terra incognita status and many pool participants are now actively seeking an answer to the question of whether their pool is compatible with EU competition rules. If the question seems on the face of it to be a simple one, the process required to obtain an answer requires a legal and economic analysis that is highly complex, to say the least. It is this legal and economic analysis that pools will undertake as a self assessment to determine how their pools qualify under the relevant provisions of EU competition law. A legal analysis is necessary, because the issue pertains to the application of Article 101(1) TFEU and the possible exceptions under Article 101(3) TFEU. This legal analysis will often be conducted by an appointed external law firm. As seen in Chapter 3, the issues are numerous and the step by step analysis will have to be tailored so as to be applicable to the pool in question. The fact that these self assessments are relatively new makes the appointment of legal experts highly desirable in order to ensure a comprehensive analysis. An economic analysis is also necessary, because the definition of the relevant market and the very nature of competition law will often require pools to appoint economic experts. The burden of advising on whether economic experts are needed or not is placed on the law firm conducting the self assessment.65

In other words, these self assessments “have a pre-emptive function and are essentially broad brush risk assessments, leading to identification of possible danger areas, possibly leading to the agreement being amended or abandoned altogether”.66 The early stage of negotiation talks between potential pool participants is therefore preferable considering what is at stake but already existing pools are conducting these self assessments in the same rigorous manner for the purpose of making

65 Sometimes jointly with any in house legal counsel the entity may have.
66 P. Wareham, the Challenges of Self Assessment, EMLO Guide to EU competition law, p. 126.
their arrangement compliant with EU competition law. One should not however be misled by the term “broad brush” as used by P. Wareham to describe such self assessment, as every single clause of the agreement will need to be analysed.

The evidentiary burden imposed on the parties is substantial. If the objective is to determine whether the pool agreement is compliant with EU competition law, the analysis will also extend to any notes at meetings or written records that may help qualify the original intention of the parties.\textsuperscript{57} The logistics of such evidence gathering will require a coordinated exchange between the relevant pool, their appointed external legal advisers and potential economic experts.

The scope and complexity of these self assessments have been acknowledged by the Commission who responded by issuing the Maritime Guidelines on the application of Article 101 TFEU to maritime transport services. For the purposes of their self assessment, legal advisers to the pool participants will use the Maritime Guidelines\textsuperscript{68} to assess whether the pool agreement is compatible with Article 101 TFEU. These Guidelines “give guidance on aspects of EU law where the Commission identified a gap in existing case law in particular with respect to the information exchange and trade association activities”.\textsuperscript{69}

Referring to the Maritime Guidelines themselves, paragraph 1 of the Guidelines states that these “set out the principles that the Commission will follow when defining markets and assessing cooperation agreements in those maritime transport services directly affected by the changes brought about by Council Regulation No 1419/2006.” One should nevertheless add that paragraph 7 stipulates that the Maritime Guidelines “are without prejudice to the interpretation of Article 101 of the Treaty which may be given by the Court of Justice or the Court of First Instance of the European Communities”.\textsuperscript{70}

However, if the function of Guidelines is to predominantly be an interpretative aid\textsuperscript{71}, one should not jump to hasty conclusions and underestimate their legal status. The case of \textit{Dansk Rorindustri and others v. Commission}\textsuperscript{72} demonstrates that Guidelines may acquire the superior status of having in practice a binding effect. In this case the Court of Justice held that Guidelines may not be, strictly speaking, regarded as legal rules but could nevertheless form “rules of practice... from which the

\textsuperscript{57} P. Wareham, the Challenges of Self Assessment, EMLO Guide to EU Competition Law, p. 139.
\textsuperscript{68} The Maritime Guidelines refer to the Guidelines on horizontal cooperation and the Guidelines on the application of Article 101(3) of the Treaty in paragraph 5.
\textsuperscript{70} Now renamed under the TFEU, General Court.
\textsuperscript{71} See Fergus Randolph, Overview Jurisdiction and Legal Status of the Guidelines, EMLO guide, p. 24.
\textsuperscript{72} C-213/02 \textit{Dansk Rorindustri and others v. Commission} 2005 ECR I-5425.
administration may not depart”. The Maritime Guidelines and Guidelines in general therefore constitute more than an interpretative aid and pools will need to follow them when assessing whether their arrangement comply with Article 101 TFEU. Whether the Maritime Guidelines also cause potential problems for pools and their legal advisers will be clarified shortly. Along with reviewing typical clauses of a tramp pool arrangement, our next subsection will investigate whether the Maritime Guidelines are more a “trick” or a “treat”.

4.2 Self Assessment of a Typical Tramp Shipping Pool: Article 101(1) TFEU and the Maritime Guidelines

The following analysis shall represent a self assessment of the main parts and clauses of a typical pool agreement that may be problematic from a competition law perspective. In reviewing these clauses, the extent to which the Maritime Guidelines provide some guidance will be addressed. The following analysis will assume that pool participants are actual or potential competitors, which is a condition for the prohibition of Article 101(1) TFEU to apply according to the Maritime Guidelines. As seen in Chapter 3, the market analysis is a key component under Article 101 TFEU and this is what this self assessment shall begin with.

4.2.1 Market Analysis

The legal and economic experts conducting the self assessment will request some factual statements from the pool participants to define the relevant market and their market share. Their assessment will aim at a broader market definition to minimise or deny any impact on competition. As shown in Chapter 3, this analysis of the relevant market will imply a product (demand and supply side substitution) and a geographic dimension. In practice, for the demand substitution, the main terms of the individual transport request will be a starting point and it will be relevant to assess whether the customers consider the services to be provided under time, voyage charters and contracts of affreightments to be substitutable. On the supply substitution side, the conditions of the cargo and the vessel type will provide some indications. With respect to the geographical market in the context of tramp shipping, ports will be as a main rule substitutable from the supply side as services are not

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73 Paragraph 64.
74 Vincent Power, an overview of EC competition law as it relates to the shipping and port sectors, European Maritime Law Organisation, Spring Seminar, Gdansk Poland 8 May 2006, p.3.
scheduled but respond to specific demand. These various steps to be taken to define the relevant market call for some practical guidance and assessors will turn to Guidelines.

In addition to the Notice on Market Definition, the Maritime Guidelines also provide information on how to assess the relevant market. Paragraph 16 of the Maritime Guidelines simply reiterates that to assess the effects of the pool agreement on competition it is necessary to define the relevant product and geographic market and refers back to the Notice on market definition. The Maritime Guidelines then give a list of elements which may be taken into account when determining the relevant product market from the demand side. Paragraph 23 for example states that “it may be necessary to ascertain whether the demand side considers the services provided under time charter contracts, voyage charter contracts and contracts of affreightment to be substitutable. Should this be the case they may belong to the same relevant market”. The Commission adopts the same approach when attempting to provide some practical guidance to the supply side of the relevant market before giving some additional considerations to take into account when determining the relevant product market.

A first comment is that these only constitute a non exhaustive list of elements to take into account. Tramp shipping pools and their advisers will find that this part of the Maritime Guidelines would have benefited from more guidance. Secondly, rather than just listing elements that “may” be taken into account, the Commission could have been more assertive as defining the relevant market is fundamental to the analysis under Article 101 TFEU. Even if the Commission apologetically states in paragraph 21 that it “has not yet applied Article 101 TFEU of the Treaty to tramp shipping”, one may legitimately wonder why the Commission did not grab the opportunity to give some much needed adapted and concrete advice to tramp services. On the positive side the Maritime Guidelines have a concise and more practical approach in paragraph 31 in relation to the definition of the relevant geographic market. Loading and discharging ports are to be the “first orientation” for the definition of the relevant geographic market from the demand side. The Maritime Guidelines even go as far in paragraph 32 as considering geographic markets that may occur only temporarily due to climatic conditions. The Maritime Guidelines are however silent in respect of the supply analysis of the relevant geographic market. The reason for it may be that usually supply-side substitutability is taken into account in situations in which its effects are equivalent to those of demand substitution in terms.

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75 Notes from talk at BA-HR, EU Competition Law and Shipping, Oslo, November 2009.
76 Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372/5 1997).
77 See for example paragraph 28 of the Maritime Guidelines stating that the existence of chains of substitution between vessel sizes in tramp shipping should be considered.
of effectiveness and immediacy. \(^{78}\) Pools in their self-assessment will here need to revert back to paragraph 20 of the Commission Notice on the definition of relevant market for the purposes of Community competition law.

With respect to market shares, the Maritime Guidelines remind us that these provide “useful first indications of the market structure and of the competitive importance of the parties and their competitors.”\(^{79}\) Paragraph 34 then specifies that various data such as the number of voyages or the parties’s share in the market for time charter contracts are relevant. This part of the self assessment often sees the legal experts of pools team up with economic experts in return for their special advice as the analysis is beyond legal territory. What would have been useful from the Maritime Guidelines for the purposes of self assessments is a clearer guidance on whether an emphasis should be placed on competition “for the market rather than competition in the market.”\(^{80}\) This was advocated by the European Community Shipowners’ Associations (ECSA) already at a draft stage of the Maritime Guidelines. The ECSA rightfully pointed out that customers have the upper hand since they tender their cargo for transportation with shipowners making their bids through brokers resulting in customers selecting the preferred offer. Hence, as the ECSA explains, market shares calculated by way of historic share of sales “provide little information on competitive strength...as competitors bidding may be equally credible irrespective of their share of sales by value or volume.”\(^{81}\) The examples listed in paragraph 34 of the Maritime Guidelines will nevertheless be a solid starting point for self assessments by pool participants and their advisers.

4.2.2 Scope Clause

A standard scope clause of a tramp pool agreement will read as follows:

“The purpose of this pool is to establish the common marketing and commercial operation and employment of the pool vessels through the optimal use of the pool vessels by improved scheduling to reduce ballast legs and bulk buying of goods and services related to voyage expense, maximising flexibility, reliability and competitiveness so as to provide the best possible services to the market and obtain the highest possible earnings on the pool vessel”.\(^{82}\)

\(^{78}\) As stated in the Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372, 09/12/1997.
\(^{79}\) Paragraph 33 of the Maritime Guidelines.
\(^{82}\) Extracted from a typical pool agreement seen at Nordisk.
As previously stated, every clause of the pool agreement will need to be “self assessed” or reviewed for competition law purposes. Pools should be advised that the scope clause (or, as also often called objective clause) has the strong potential of raising the alarm bells of competition authorities. The main legal question that arises in connection with the scope clause is whether the pool has as an object the restriction of competition within the common market. The wording of the clause will be key here as terms such as “highest possible earnings” will be read critically and with suspicion by the competition authorities for instance in a dawn raid scenario. Indeed it is difficult to see how a pool agreement that lists as one of its objective the obtaining of “the highest possible earnings” on the pool vessel can be seen as pro-competitive. On the other hand, the objective as stated in the above clause to “provide the best possible services to the market” will be viewed positively by competition authorities and potentially counterbalance or mitigate any anti-competitive wording in the above clause.

In terms of guidance and with respect to the scope clause of pool agreements, one should applaud the initiative of the Commission to try and define categories of pools that do not, may, or generally fall under Article 101 TFEU. As will be further assessed later, pool agreements limited to joint selling generally fall under Article 101 (1) TFEU. One should, on the other hand, comment that section 3.3.1 of the Maritime Guidelines (pools that do not fall under Article 101(1)) add little to the general competition law regime studied under Chapter 3 and is not pool specific.

According to paragraph 64 of the Maritime Guidelines, participants to the pool are not competitors “if they set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which they could not bid successfully or which they could not carry out on their own”. Based on the assumption that members of a pool are rarely unable to provide transport services at large, the ECSA points out that another example of an agreement falling outside the prohibition of Article 101 TFEU would have been useful to avoid the implication that pool agreements only fall outside the prohibition of Article 101 TFEU in the “narrow description of paragraph 64”.

83 Talk at Nordisk, June 2010.
84 Guidelines paragraph 66.
85 With the result that the pool agreement does not fall under the prohibition of Article 101 TFEU.
4.2.3 Non Compete Clauses

"Any participant shall be entitled to operate in the same trades as the pool with vessels other than those listed in annex A. Each participant shall not, and shall procure that its affiliates do not, operate in the same trades as the pool with vessels listed in annex A other than in accordance with this agreement".\(^{87}\)

Parties to pool agreements will almost invariably agree to the inclusion in their arrangement of a non compete clause similar to the above preventing them to compete using vessels similar to those belonging to the pool.\(^{88}\) One should therefore question the compatibility of such clauses with Article 101(1) TFEU. The landmark case of Remia BV v. Commission\(^{89}\) is a good illustration of the issue. In this case it was held that the fact that non-competition clauses are included in an agreement for the transfer of an undertaking is not in itself sufficient for these clauses to come within the prohibition of Article 101(1) of the Treaty. As held in the Remia case, a “close examination of what would be the state of competition if these clauses did not exist is required to determine whether Article 101(1) TFEU applies”. Should the vendor and the purchaser remain competitors after the transfer without competition clause, the agreement shall not be given effect. This reasoning is in line with paragraph 64 of the Maritime Guidelines under which participants to the pool must be either potential or actual competitors for the pool to come within the scope of Article 101 TFEU. In this case, the vendor, with his detailed knowledge of the transferred undertaking, will still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of the business. The Court even considered that non compete clauses may contribute to the promotion of competition by leading to an increase in the number of undertakings in the market in question. More importantly in this case the Court specified that the beneficial effect on competition which such an interpretation may afford is subject to the duration and scope of such clauses being strictly limited for that purpose failing which Article 101(1) TFEU may apply.

The facts of Remia nevertheless remain very different from the circumstances in which tramp shipping pools operate. The undertakings at stake were part of the food industry and the non compete terms were limited to a period of 10 years. As shipping pools rarely contain a short period of duration, if any at all, shipping pools should be careful in conducting their self assessment to not rely too blindly on the Remia precedent.

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\(^{87}\) Extracted from a typical pool agreement seen at Nordisk.

\(^{88}\) Røsaeg, Organisational Maritime Law page 99.

\(^{89}\) Case 42/84, Remia BV v Commission [1985] ECR 2545.
Paragraph 71 of the Maritime Guidelines explicitly refers to non-compete clauses and to use the Guidelines’ own words “consideration should be given to clauses affecting the pool or its members competitive behaviour in the market place such as clauses prohibiting members from being active in the same market outside the pool (non-compete clauses).” If one looks at the wording of the typical non-compete clause above, pool participants will be prohibited from participating in the same trade as that of the pool and from using vessels similar to those brought together by the pool. A more specific statement of the Maritime Guidelines as to which degree of consideration shall be given to non-compete clauses would have nevertheless been welcome. As a last comment one shall note that the *Remia* case, dating from 1985, and the Maritime Guidelines are separated by more than 20 years of competition law practice by the Commission.

4.2.4 Information Exchange

“Each of the participants and the pool managers agree to keep confidential and not to disclose to any third party or exploit any secret or confidential information concerning any other participant or the pool managers business or affairs. This obligation shall continue during this pool agreement and after its termination howsoever occurring, but shall cease to apply to any information which may come into the public domain (otherwise than through the default of any of the parties hereto), or to any information which participant becomes compelled to disclose”.90

Pool agreements will often involve clauses such as the above pulled out from a standard pool agreement relating to the sharing of information between pool members. The question arises of whether such information sharing can be seen as a problematic under Article 101 TFEU. In the case of *Huls AG v. Commission*91 it was held that participation in meetings concerning the fixing of price and sales volume targets during which information is exchanged between competitors about the prices which they intend to charge, their profitability thresholds, the sales volume restrictions they judge to be necessary or their sales figures constitutes a concerted practice in the meaning of Article 101 TFEU. The reason for it is that the information disclosed at such meetings may serve as a basis for the competitors to determine their conduct on the market. On the other hand, some information exchange can be seen as pro-competitive and may lead to an intensification of competition.92

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90 Extracted from a typical pool agreement seen at Nordisk.
92 As stated in the Horizontal Guidelines, paragraph 58.
such, the interpretation of any information sharing amongst pool participants should be addressed on a case by case basis.

This decision forces one to differentiate between the different types of information shared when it comes down to analysing whether Article 101 TFEU applies or not. A first type of information as described in the above clause is information of a confidential nature as opposed to information in the public domain. The Fearnley's report contained a number of reviewed pool agreements and revealed the variety of the information which may be disclosed. Some of the agreements contained clauses requiring their parties to restrict the information exchanged to a bare minimum and forbidding information sharing relating to commercial operations outside the pool.\textsuperscript{93} If the information shared is purely restricted to the operation of the pool, it is difficult to see how Article 101 TFEU would apply.

The very purpose of Article 101, as stated by the Commission in one of its communication notices is "to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"\textsuperscript{94} and information restricted to the operation of the pool should not constitute a threat to consumer welfare. Information strictly relating to the logistics of the pool should therefore fall short of Article 101. Similarly, shared information relating to technical matters such as ISPS and ISM Code compliance, environmental law, technology and crew vessel safety should not be a ground for the application of Article 101.\textsuperscript{95} The same applies to information of a statistical nature where Article 101 was held not to apply,\textsuperscript{96} or information of a public nature which customers have access to.\textsuperscript{97}

The smaller the number of undertakings operating on the market, the more frequent the exchange and the more sensitive detailed and confidential the nature of the information which is exchanged, the more likely the exchange of information is to have an appreciable effect on competition.\textsuperscript{98} This statement should be illustrated with the so-called "fatty acid decision"\textsuperscript{99}. In this case the addressees

\begin{itemize}
\item \textsuperscript{92} Fearnleys report p. 251.
\item \textsuperscript{94} Communication – notice on the application of Article 81(3) of the Treaty, Official Journal C 101, 27.04.2004, p. 98.
\item \textsuperscript{95} Fearnleys report p. 251.
\item \textsuperscript{96} See Case c-238/05, Asnef-Equifax and Administracion del Estado v. Asociacion de Usuarios de Servicios Bancarios (2006) ECR I-1125.
\item \textsuperscript{98} Office of fair trading publication – trade associations, professions and self regulatory bodies, competition law Guidelines 2004 p. 9.
\end{itemize}
shared information by agreeing on price targets, allocated volume quotas and monitored their anti-competitive arrangements. The Commission found the addressees to be in direct infringement of Article 101(1) of the Treaty. The case does not relate to shipping pools but as the application of Competition law to tramp shipping pools is relatively new future case law will clarify and take a stance on the application of Article 101 TFEU and its impact on the tramp sector.

If the Maritime Guidelines contain a section on information exchanges for liner services, this is not the case in respect of tramp services. A self assessment of the standard clause quoted above will prove necessary as the terms contained therein refer to information that is not in the public domain. A confidentiality clause within the context of a pool agreement is understandable and will, in fact, be found in other forms of cooperation agreements between entities doing business together. To what extent a pool can function and appeal to participants without such a confidentiality clause is beyond the scope of this thesis.

Whether this clause will infringe Article 101(1) TFEU is a question for the pool’s legal advisers and will require them to ask their client to state precisely and list all kinds of information exchanged as confidential information is not anti-competitive per se. For example information exchanged relating to crew safety could well be confidential. At the time of writing of this thesis, new Guidelines on horizontal cooperation were being drafted containing a section on information exchange. These draft Guidelines, albeit subject to change, provide some much needed guidance on what constitutes public information and state that, “for information to be genuinely public, obtaining it should not be more costly for buyers and companies unaffiliated to the exchange system than for companies exchanging the information.” The draft Guidelines should be borne in mind within the context of a pool self assessment as one should avoid premature conclusions as to the public nature of the information at stake.

4.2.5 Withdrawal from the Pool

The following subsection is based on a number of tramp pool agreements reviewed whilst working at Den Norske Skibsrederforeningen. Whilst it is fair to say that the agreements reviewed varied more or less in terms of drafting, they all contained some common features. This subsection deals both

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100 Paragraph 82, draft communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the functioning of the EU to horizontal cooperation agreements.
with the withdrawal of a participant from a pool and the case where a participant only withdraws a vessel. Typical clauses were as the following:

"A participant may withdraw from the pool upon written notice to the pool manager with copy to the other participants. This shall have the effect to withdraw all the pool vessels for which it is the responsible participant, the date of withdrawal to be as follows: six months after delivery of the notice or on expiry of the vessel’s current commitments, whichever is later".\textsuperscript{101}

Therefore pool participants are customarily granted the right to withdraw from the pool but only upon a conditional notice being given to the pool manager. Nevertheless, the required notice for withdrawal from the pool is that of a lengthy period of several months before the intended withdrawal date. One may therefore legitimately question whether this requirement does not amount to a “lock-in” effect on pool members wishing to withdraw. After all, lock-in periods and notice period clauses should be given special consideration according to the Maritime Guidelines.\textsuperscript{102} Indeed, given the commercial nature of tramp shipping and the flexibility needed to adapt to the market demands, this lengthy notice period may well indirectly restrict the ability of pool members to effectively compete outside of the pool.

A more direct potential restriction of competition and infringement of Article 101 TFEU is constituted by the fact that pool agreements often stipulate the obligation to provide for substitute vessels and/or payment of a compensation as illustrated by the following clause:

"If pool managers determine that one or more pool vessels due to be withdrawn are required to enable the pool to perform its contractual obligations under the contracts of affreightment, then, and in that event, the participant must from the time of its/their withdrawal either supply one or more substitute vessels or if it does not provide a substitute vessel or vessels, pay compensation to enable pool managers to charter suitable vessels".\textsuperscript{103}

As a result, pool managers seeing that one or more pool vessels due to be withdrawn is/are required to perform existing obligations of the pool may enforce a clause under which pool participants must supply substitute vessels or pay compensation to enable pool managers to charter suitable vessels (in either case for such period as may reasonably be required for the pool to perform its obligations under the relevant transportation contracts). The compensation will crystallise into a settlement reflecting the accumulated value of contracts entered into with third parties and the economic loss

\textsuperscript{101} Extracted from typical tramp shipping pool agreement at Nordisk.
\textsuperscript{102} Paragraph 71 of the Maritime Guidelines.
\textsuperscript{103} Extracted from typical tramp shipping pool agreement at Nordisk.
and other detrimental effects which are likely to result from the withdrawal. This will take into account the result of voyages commenced but not yet completed. Sometimes the pool manager can go as far as refusing to redeliver a vessel to the extent she has been committed or nominated under a contract entered into before the notice of redelivery was given and the redelivery would be incompatible with such commitment.

4.2.6 Joint Purchasing

A standard pool agreement reviewed whilst at Nordisk typically referred to the pool managers being in charge of the payment and collection of expenses and revenues relating to the commercial operation of the pool vessels. This followed from the purpose of the pool agreement in question which was stated to be the establishment of the common operation of the pool vessels through the optimal use of these by improved scheduling to reduce ballast legs and bulk buying of goods and services related to voyage expenses\(^{104}\). This illustrates the purpose of most tramp shipping pools which aim at maximising the buying power of their participants through joint purchasing.

This buying power may give rise to some competition concerns as stated in the Guidelines on horizontal cooperation (otherwise known as the Horizontal Guidelines).\(^{105}\) The competition concerns that may arise are numerous and the Horizontal Guidelines give us a few examples by stating that “joint purchasing may lead to restrictive effects on competition such as increased prices, reduced output, product quality, market allocation or anticompetitive foreclosure of other possible purchasers.”\(^{106}\) In the case of shipping pools the potential anti-competitive effects of increased prices, market allocation and foreclosures of other possible shipping players will be mostly relevant to the purpose of self assessments.

Whether the joint purchasing power of shipping pools has an anti-competitive effect will require in each separate case a more holistic analysis by the advisers to the pool conducting the self assessment taking into account several factors such as the market power of the parties. According to paragraph 69 of the Maritime Guidelines, “the pool’s ability to cause appreciable negative market effects depends on the economic context, taking into account the parties’ combined market power and the nature of the agreement together with other structural factors in the relevant market”. The

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\(^{104}\) See scope clause in 4.2.2 above.


\(^{106}\) Horizontal Guidelines paragraph 199.
Horizontal Guidelines also illustrate this by stipulating that general joint purchasing arrangements are less likely to give rise to competition concerns when parties do not have market power on the selling markets.\footnote{107} Equally, the restrictive effects on competition are more likely if the parties to the purchasing agreement have a significant proportion of their variable costs in the relevant downstream market in common.\footnote{108} It remains unclear why the Commission has not elevated joint purchasing to the status of a key feature as it has done for joint selling in paragraph 62 of the Maritime Guidelines.

4.2.7 Joint Selling and Joint Production

Some typical tramp shipping pool agreements reviewed at Nordisk contained the following clauses:

"The pool manager shall enter into various transportation agreements such as contracts of affreightment and time and voyage charters, as deemed fit by the pool manager";

"the pool board shall have authority to decide all matters relating to this pool agreement....including but not limited to entering into contracts with third parties committing a pool vessel for more than thirteen (13) months"; and

"the services to be provided by the pool manager include the payment and collection of the expenses and revenues relating to the commercial operation of the pool vessels".

These clauses raise the question of the joint selling aspect of pool agreements as the pool manager/pool board in the above clauses have the authority to commit the vessels brought together to contracts with third parties. The fact that the pool manager centralises the revenues generated by the joint commercial operation of the pool vessels reinforces the joint sale nature of the standard pool. This will constitute an important element of the self assessment for various reasons. Firstly, the Maritime Guidelines in paragraph 66 equate pool agreements between competitors whose scope is limited to joint selling to agreements which generally fall under Article 101(1) TFEU. In fact, it is the only example given by the Maritime Guidelines of pools generally exposed to the prohibition of Article 101(1) TFEU. Secondly, the joint selling aspect of the assessed pool will be relevant for the purpose of paragraph 62 of the same Guidelines, stating that "each pool must be analysed on a case-
by-case basis to determine by reference to its centre of gravity, whether it is caught by Article 101(1) TFEU.” Regrettably for advisers to the pool, this analysis is not made easier by the fact that the Maritime Guidelines do not contain a definition of what is meant by “centre of gravity.”\(^{109}\) The Maritime Guidelines leave the definition of such terms to the existing Guidelines on horizontal cooperation agreements. The starting point of the cooperation between the parties and the degree of integration of the different functions combined are the factors determining the centre of gravity.\(^{110}\) As it is hard to think of a pool which does not have joint selling as both a starting point and main function, the assessment of a pool based on its centre of gravity may be misleading and may lead to a number of pools being unduly labelled as infringing Article 101 TFEU (should the cumulative conditions of Article 101(3) TFEU not apply). The Maritime Guidelines view standard shipping pools as having the “key feature of joint selling, coupled with feature of joint productions.”\(^{111}\) The Fearnleys consultants, on the other hand, advocate that shipping pools should be seen as joint production agreements as the selecting of vessels and the fixing of freight rates are nothing more than intrinsic parts of the functions of a pool manager.\(^{112}\) Given this dichotomy of analysis and the lack of clarity as to what is meant by “limited” to joint selling in paragraph 66 of the Maritime Guidelines, legal advisers to the pools (along with economic experts) will need to be extremely diligent in tackling the issue and deciding on the extent to which the shipping pool may be characterised as a joint selling agreement.

4.3 Self Assessment of a Typical Tramp Shipping Pool Agreement: Article 101(3) TFEU and the Maritime Guidelines

Because of the inclination of the Commission to view tramp shipping pools as commercial joint selling agreements, a self assessment under Article 101(3) TFEU will be all the more crucial - assuming the pool agreement may appreciably affect trade between Member States. We have already seen under Chapter 3 the cumulative requirements of economic benefits, fair share to customers, indispensability and of no elimination of competition that the pool agreement must satisfy to avoid being caught under Article 101(1) TFEU. How the Maritime Guidelines provide some practical guidance for each of these requirements will now be addressed.

\(^{109}\) Thommessen, Shipping briefing: Tramp Pools and Liner Consortia, page 1, November 2008.

\(^{110}\) See Horizontal Guidelines paragraph 12.

\(^{111}\) Maritime Guidelines, paragraph 62.

\(^{112}\) Fearnleys report paragraph 1526 and 1528.
In the scope clause reproduced under 4.2.2 above, the objective of the pool is said to aim for “the optimal use of the vessel by improved scheduling to reduce ballast legs and bulk buying of goods and services related to voyage expenses and to maximise competitiveness so as to provide the best services to the market”. This wording should in principle provide the legal teams conducting the self assessment with some margin to argue that the first two requirements of improving the distribution of services and allowing customers a fair share of the benefits are satisfied. There are indeed a number of benefits resulting from pools. Pool participants will be able to share the costs related to the training of the crew, along with sharing the expenses relating to marketing and IT, to name a few. The technical improvements and improvement of services resulting from these arrangements are per se objective advantages. Lower prices and an increased flexibility as to the provision of services are materialisation of the first two requirements.

The challenging part of the assessment will be for legal advisers to conclude whether the test of the Maritime Guidelines under which the “greater the restriction of competition found under Article 101(1), the greater the efficiencies and the pass-on to consumers must be.” Even if the Maritime Guidelines state that “all restrictive agreements that fulfil the four conditions of Article 101(3) TFEU are covered by the exception rule”, it may have been useful to have subjective examples stated in the Maritime Guidelines of pools satisfying this test or not. If the Maritime Guidelines contain examples of pools generally falling under Article 101(1) TFEU, one may question why these do not contain examples of pools where the efficiencies generated outweigh the restriction of competition. The Maritime Guidelines only give one such example in the whole section relating to Article 101(3) TFEU when they state that better utilisation rates and economies of scale may lead to efficiency gains. Unfortunately for assessors, it may be challenging to measure efficiency gains in the context of tramp shipping and to this add the extra burden of identifying the group of consumers that “must receive a fair share of the efficiencies generated”, as dictated by the Maritime Guidelines. The evidentiary burden, imposed by the Maritime Guidelines on assessors and their respective tramp shipping pool, of proving the beneficial effects on all consumers in the relevant market, is accentuated by the statement that the pass-on benefits must compensate consumers not just in cases of actual negative impact, but also in cases of potential one.

113 Fearneleys p. 345.
114 Paragraph 72 Maritime Guidelines.
115 Paragraph 72 Maritime Guidelines.
116 Paragraph 74 Maritime Guidelines.
117 Paragraph 75 Maritime Guidelines.
Nevertheless, the biggest hurdle that assessors will face is that of the third requirement of the pool: not imposing restrictions that are not indispensable to the achievement of efficiencies. The challenge here is twofold: assessors will need to examine whether the participants to the pool could have achieved the efficiencies on their own and each restrictive clause of the pool agreement must be reasonably necessary to attain the claimed efficiencies.\textsuperscript{118} If the first limb of the test is within reach by arguing that the pool allows for some otherwise non attainable flexibility, the justification of each restrictive clause proves more problematic. This goes beyond the wording of Article 101(3) which only requires that the agreement as a whole must not "impose on the undertakings concerned restrictions which are not indispensable...to the attainment of these objectives".\textsuperscript{119} The clauses reproduced and analysed in this chapter, ranging from the non compete clause to the joint selling clause may all be seen as prima facie restrictive. Considering the tendency of the Commission to associate joint selling clauses with the hardcore restriction of price fixing under Article 101(1) TFEU, it is easy to see how pool agreements may fail this test.

Assessors will have the choice between two different approaches when evaluating the indispensability in question. A first approach consists in going through each of the efficiencies associated with each clause and checking whether an alternative to the clause in question could create the same efficiencies. Alternatively, the assessor may want to go through each of the anti-competitive effects associated with each clause and check whether these effects are indispensable.\textsuperscript{120} In any case given the importance and the difficulty of the indispensability assessment, one may question why it represents such a minor consideration by the Maritime Guidelines.

"The pool must not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question."\textsuperscript{121} The wording of the fourth condition of the Maritime Guidelines does not add much to the wording of Article 101(3) TFEU. In fact the Maritime Guidelines have merely replaced the original words of "undertakings" by "pools" and "products" by "services". Assessors will be left with the uneasy task of ascertaining the meaning of "substantial"\textsuperscript{122} once they have managed to determine whether the pool eliminates competition. To achieve the latter, the assessors will need to show that the barriers and drivers of competition are not significantly affected

\textsuperscript{118} Paragraph 76 Maritime Guidelines.
\textsuperscript{119} See chapter 3 above.
\textsuperscript{120} On this issue, but applied to the whole agreement, see "practical methods to assess efficiency gains", 2208 DG Enterprise & Industry in the context of Article 101(3) of the EC treaty final report, 05 May 2006.
\textsuperscript{121} Paragraph 77 Maritime Guidelines.
\textsuperscript{122} The existing case law may be of some assistance but one should mention that it is not specific to the services offered by tramp shipping pools. See Case C-359/01, British Sugar Plc -v- European Commission [2004] 5 CMLR.
by referring to indicators of effective and actual competition such as the response to the creation of the pool\textsuperscript{123} (for example by comparing the level of competition prior to the pool arrangement to the one existing after the creation of the pool). In our standard pool, the non compete clause will need to be reviewed in light of the scope clause but other clauses such as the rights and termination on withdrawal of participants will need to be read together.

Notwithstanding the Guidelines on the application of Article 101(3) of the Treaty to which the Maritime Guidelines refer, one feels that the Commission overall failed to provide some guidance tailored to tramp shipping pools that could have been achieved by further clarification and adapted examples.

4.4 Conclusion

The adoption of Regulation 1419/2006 granting enforcement powers to the Commission with regard to tramp shipping pools have led to self assessments becoming \textit{de rigueur}. As such, the Maritime Guidelines are rules of practice that must be followed, even if they are not \textit{stricto sensu} legally binding. Tramp shipping pools and their legal/economic advisers conducting a self assessment will use these as a basis for their analysis. The self assessment of standard tramp shipping pool agreement clauses reproduced in this chapter demonstrates the complexity of the analysis required. The initiative of the Commission to provide tramp shipping pools with Guidelines must be applauded. If these Maritime Guidelines are helpful in numerous instances, one nevertheless feels that these could have been less general and more tailored to the tramp shipping industry. The grey areas of uncertainty as depicted in this sample self assessment may have been avoided by the presence of more concrete examples in the Maritime Guidelines. It is the very same grey areas that will prompt legal advisers to the pool to include options and alternatives considerations in their self assessment.

\textsuperscript{123} 2208 DG Enterprise and Industry, "practical methods to assess efficiency gains in the context of Article 81(3) of the EC Treaty", Final Report, 05 May 2006, p.91.
5 Structural Alternatives and Best Practice

Self assessments focus on analysing clauses of tramp shipping pool agreements to determine their compliance with EU competition law. Legal advisors to pools will also often pre-emptively take the opportunity to present their clients with options to be considered should the pool arrangement for example be found to be likely to infringe Article 101 TFEU. These options may be divided into two separate kinds: structural alternatives to tramp shipping pools sometimes necessitating a reorganisation of the already existing or planned arrangement between pool participants and options relating to best practice aiming for stricter compliance with EU competition law.

5.1 Structural Alternatives

5.1.1 Full Function Joint Ventures

As they are not subject to the rules on restrictive practices of Article 101 TFEU, but are governed by the European Community Merger Regulation (ECMR)\(^{124}\), full function joint ventures will frequently be considered as an alternative to tramp shipping pools. A joint venture will be subject to the rules of the ECMR (provided it meets a turnover threshold\(^{125}\)) if it satisfies the following requirements\(^{126}\):

- be jointly controlled\(^{127}\),
- have a management dedicated to its day-to-day operation,
- not be of limited duration (in practice this means to be for a period of at least 7 years or more),
- not be limited to taking over one specific function within the parent companies' business activities without access to the market (such as production only joint ventures), and
- not depend on the parent companies in the medium or long term.

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\(^{125}\) ECMR Article 1. The aggregate worldwide turnover of all the parties must exceed 5 billion Euros, the Community-wide turnover of each of at least two parties must exceed 2,50 million Euros unless each of the parties achieves more than two thirds of its aggregate Community-wide turnover in one and the same Member State. There are other thresholds for smaller concentrations.

\(^{126}\) See ECMR Article 3(4). Also, talk at BA-HR, EU competition law and shipping, p. 66, November 2009, Oslo.

\(^{127}\) For example the parent companies have veto rights on strategic matters such as the budget or the business plan of the joint venture company.
Hence, these requirements, if satisfied, will separate full function joint ventures from mere strategic alliances or other forms of joint ventures that may be subject to the rules of Article 101 TFEU.

The autonomy of management is a characteristic feature of full function joint ventures and is fundamental in differentiating them from tramp shipping pools. Whilst in tramp shipping pools (and, in pools generally) the pool manager typically limits its functions to the servicing of the pool vessels with the pool members being independent, full function joint ventures are autonomous and self standing businesses. It is precisely this independence from parent companies (in other words the companies that would be pool participants in a tramp shipping pool) and the application of the EMCR rules that generate advantages and disadvantages in comparison with pools. Legal advisers when presenting the alternative structure of a full function joint venture shall expand on the factors as set out below.

One of the many advantages of full function joint ventures is that the ECMR rules constitute less of a threat to their legitimacy than Article 101 TFEU does to tramp shipping pools or other agreements that may be deemed anti-competitive. The more stringent tests of Articles 2(2) and 3 of the ECMR are less easily satisfied than the broader wording of Article 101 TFEU.\textsuperscript{128} As seen in Chapter 3, Article 101 TFEU catches “all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market” (provided the exceptions of Article 101(3) do not apply). The ECMR rules are only triggered if the concentration “significantly impedes effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”.\textsuperscript{129}

Secondly, the notification process to the competition authorities that full function joint ventures are subject to is relatively straightforward. This notification is done through a standard form (Form CO) and the Merger Regulation lays down the rules, establishes the timetable for process, provides for the Commission investigative powers and sets outs the rights of the parties in connection with the notification.\textsuperscript{130} Attention should be drawn to the Commission’s powers to impose fines of up to 10 per cent of the aggregate worldwide turnover on the parties should they fail to notify a transaction

\textsuperscript{128} Notes from talk at BA-HR.
\textsuperscript{129} Notes from talk at BA-HR.
\textsuperscript{130} Getting the deal through, merger control 2007, John Davies and Stephanie Cameron, Freshfields Bruckhaus Deringer p. 97.
prior to implementation and independently of whether this failure to notify was intentional or negligent.\textsuperscript{131}

Thirdly, the regulatory stamp of approval by the competition authorities, if obtained after filing of the notification of the concentration, provides the approved joint venture with some degree of legal certainty.\textsuperscript{132} This clearance through notification has no equivalent for tramp shipping pool agreements. These are subject to the conclusions of pools’ self assessments which pools must review should, for example, the market share of the parties change. With the “one stop” clearance provided in the context of the ECMR rules, a later increase in market shares following an internal growth of the joint venture will not affect the granted approval.\textsuperscript{133}

Last but not least, a full function joint venture, being an independent legal entity, may allow its parent companies to avoid liabilities they would have otherwise faced through tramp shipping pools or other forms of arrangements.

However, full function joint ventures have some disadvantages when compared with tramp shipping pools. As mentioned above, full function joint ventures must have a management of their own and not depend on their parent companies in the medium or long term to be subject to the rules of the ECMR. This requires a structural organisation which is more complicated and time consuming than a more simple pool agreement and will result, for example, in higher legal fees relating to the set up of the full function joint venture. The self standing aspect of full function joint ventures will necessitate financial resources and assets that may be hard to obtain\textsuperscript{134}. Advocates of tramp shipping pools refer to the past years of economic difficulties to justify the combining of their fleets and realise costs efficiencies and economies of scale. In times of economic crisis the benefits of a full function joint ventures may seem less apparent in light of the costs involved to set it up.

In addition to these financial considerations, it may prove hard to demonstrate that the joint venture operates autonomously on the market. Various questions will arise such as the following to which the answer is uncertain: can a joint venture be seen as carrying an independent economic activity if it serves the function of an operator and not of a commercial operator? Also, to what extent does the

\textsuperscript{131} Getting the deal through, merger control 2007, John Davies and Stephanie Cameron, Freshfields Bruckhaus Deringer p. 97.
\textsuperscript{133} Talk at BA-HR, EU Competition Law and Shipping, Oslo, November 2009, p. 65.
\textsuperscript{134} Thommessen, Shipping briefing: Tramp Pools and Liner Consortia, page 2, November 2008.
sub-contracting of its commercial management to a third party prevent a joint venture from qualifying as a full function one? \(^{135}\)

If a tramp shipping pool has already been created, the difficulty of converting the existing arrangement into a full function joint venture should not be underestimated. There have been many instances in the past years where the Commission, after due pre-notification by the parties, dismissed the proposed structures as these were seen as insufficient to constitute full function joint ventures. \(^{136}\) The conversion (or creation) of a full function joint venture will also require a substantial amount of information gathering to assess whether a notification to the Commission is required. This information gathering is both a costly and lengthy process. \(^{137}\)

Pool agreements also provide their participants with a relative flexibility that full function joint ventures are not afforded \(^{138}\). An example of this is the exit clause of typical tramp shipping pool agreements. \(^{139}\) In a full function joint venture, the duration is, as described above, for a minimum of 7 years, unless certain events occur such as a change in control or ownership of one of the parties to the joint venture or the company becoming bankrupt. Furthermore, the lack of control of the parent companies on the created joint venture may result in the joint venture becoming a competitor. The following needs to be taken into account here: the joint venture can neither act principally as sales agent for its parent companies nor can it be forced to purchase what it needs from these. As a result, the joint venture may charter vessels from third parties. \(^{140}\)

5.1.2 From Capacity Sharing Agreements to Joint Purchasing of Ship Management Services

An assessment of possible alternatives would not be complete without briefly considering the following arrangements, which may constitute alternatives to tramp shipping pools by allowing some of the benefits usually gained from pool agreements, and may be compatible with the intention of the parties. Without analysing in depth whether they infringe Article 101 TFEU or not, these alternatives can be categorised as agreements allowing the procurement of ship management

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\(^{135}\) Talk at Nordisk, June 2010.
\(^{136}\) The future of shipping pools – full function joint ventures or horizontal cooperation, Martin Andre Dittmer in EMLO guide, p. 115.
\(^{137}\) The future of shipping pools – full function joint ventures or horizontal cooperation, Martin Andre Dittmer in EMLO guide, p. 116.
\(^{138}\) Fearnley’s report paragraph 962.
\(^{139}\) See 4.2.5 above.
\(^{140}\) Talk at BA-HR p. 66.
services from a third party services provider and agreements increasing the fleet capacity of a shipowner.

In the first category of agreement, several owners will group together to appoint the same company which in return will provide the management services needed. These services may include, for example, the appointment of stevedores and the provision of chartering services such as the seeking and negotiating employment for the vessels.

In addition to being less complex than tramp shipping pool agreements, the joint purchasing of ship management services from a third party may result in cost efficiencies. Crucial to an assessment under Article 101 TFEU will be the likely kind of information exchanged between the parties to the management agreement. The self assessors will need to be cautious with what or how much of information is obtainable. If the information exchanged is purely relating to the provision of management services, the agreement will be unlikely to infringe Article 101 TFEU and have an effect on trade.

Agreements relating to an increase of the fleet capacity of a shipowner may vary in duration and in type. These may take the form of simple bilateral agreements between vessel owners outside the context of a pool agreement, multiple time charters, or co-servicing agreements. Multiple time charters are arrangements where a single owner or operator enters into a variety of time charters with other vessel owners but without a transfer of the commercial management and operation of the vessels. These may infringe Article 101 TFEU depending of course on the market concentration and market shares of the parties.

Multiple time charter agreements are in a way the opposite of pool agreements in terms of the opportunities they provide. Unlike pool agreements, the charterer will not bear the burden of the legal responsibility for the maintenance of the vessels although the commercial management will remain with the charterer.

Co-service agreements are agreements between several owners to provide each other with vessel capacity on preferential terms and to provide some services on a joint basis. Unlike shipping pools, the owners retain their commercial independence and market their respective services on their

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141 Fearnley’s report paragraph 1474.  
142 Fearnley’s report paragraphs 1747 and 1748.
own.\textsuperscript{143} Some of the advantages of co-service agreements are that they may result in economies of scale or scope and in a shortening of delays and voyage lengths.\textsuperscript{144}

5.2 Best Practice

If the alternatives presented above do not prove to be compatible with the parties' intention, compliance of the pool arrangement with EU competition rules may be the only option. By best practice, it is customarily assumed to mean the recommended behaviour that will minimise the infringement risk of EU competition rules and the consequences such an infringement may have. This best practice may be characterised by do's (describing conduct encouraged under competition law), don't's (conduct that will lead to an infringement of competition law) and ask's (conduct that may infringe competition law and should not be entered into without legal advice).

In light of the plethora of legal issues associated with tramp shipping pools and their self assessment under Article 101(1) TFEU, it is advisable that legal advisers be contacted at an early stage and preferably before any substantial communication between pool participants. Even if the tramp shipping pool has already been created, a full disclosure of all of the information exchanged is recommended even if strictly speaking such disclosure is necessary. This implies that communication exchanges related to meetings are kept and filed. It should be noted that this includes drafts, minutes, notes, marginal annotations, diary entries and electronic documents in addition to final documents.\textsuperscript{145}

The tramp shipping pool agreement should be drafted in strict adherence to the substance of the Maritime Guidelines and, if possible, should make use of the same terminology. As seen above in the scope clause analysis\textsuperscript{146}, certain words such as "highest possible earnings" should be avoided. Conversely, some additional language may be included to make tramp shipping pool agreements more competition friendly. An example would be express references to economies of scale and benefits of consumers in the scope clause. A provision in the pool agreement where new entrants into the market would be assisted into the tramp shipping pool could also be highly favourable.

\textsuperscript{143} Fearnley’s report paragraph 1736.
\textsuperscript{144} Fearnley’s report paragraph 1741.
\textsuperscript{145} European Competition Law Compliance, Intertanko Tanker Events 2008, Matthew Levitt, 21 April 2008, Lovells presentation, p. 15.
\textsuperscript{146} See 4.2.2.
Equally, direct references to non compete clauses and clauses where pool participants directly fix the rate to be paid to them by customers should be avoided if possible.\textsuperscript{147}

Prevention is key and pool participants should not attend meetings where the exchange of information might lead to an infringement of Article 101 TFEU.\textsuperscript{148} In this respect, agenda items should be checked and if illegal matters are raised, pool participants should be advised to leave the meeting and end problematic telephone calls (if applicable) as well as reporting the issues raised to their respective compliance team.\textsuperscript{149} Similarly, competitive sensitive information should not be discussed with other pool participants without prior clearance from legal advisers.

This need for caution necessitates the appointment and maintenance of compliance teams for each of the pool participants. Internal legal staff should be appropriately trained as they have a direct overview of the internal affairs of pool participants. These in house compliance teams should be encouraged to liaise between each other in addition to the appointed legal advisers and economic experts. This interaction between internal and external advisers to the tramp shipping pools should be complemented with the establishment of a dialogue between the respective advisers and the competition authorities especially in respect of issues for which further information is needed.

5.3 Conclusion

Full function joint ventures may be a good alternative to tramp shipping pools especially in instances of agreements that may otherwise infringe Article 101(1) TFEU. In light of the uncertainties faced by self assessments, the clearance afforded to market participants through approval of full function joint ventures will be appealing. However, whether the setbacks of full function joint ventures are compatible with the parties' commercial intentions will need to be evaluated on a case by case basis. The structural independence of the full function joint venture may not, for example, be an option for the parties to the arrangement. The same is true with respect to capacity sharing agreements and joint purchasing of ship management services. If these arrangements are less complex than a traditional tramp shipping pool, whether the opportunities provided will be seen as sufficient will depend on what the parties are willing to achieve. Best practice and compliance may therefore be the only alternative for the parties for whom sound legal advice at an early stage is recommendable. If the Maritime Guidelines are a starting point, these should nevertheless be complied with at all

\textsuperscript{147} Talk at Nordisk June 2010.
\textsuperscript{148} Nordisk Skibsrederforening, compliance manual, p. 5.
times. Coordination between qualified internal (if any) and external legal advisers in conjunction with economic advisers will help achieve a best practice of compliance by tramp shipping pools.
6 Conclusion

The heavy fines and structural remedies that may be imposed on tramp shipping pools which do not comply with EU competition law will be a key reason for pool participants to undertake a self assessment of their respective arrangements. The earlier the self assessment, the better as it may provide pools with immunity from reorganisation requirements or fines. Possible actions by private individuals invoking a breach of competition law in order to recover damages from pool participants is another factor that should be considered at an early stage. The years to come will confirm the extent to which the Commission will make use of its enforcement powers in relation to the tramp shipping sector. As Article 101 requires legal and economical considerations of a complex nature, Tramp shipping pools and more specifically their legal advisers are at this point in time awaiting case law from the European Court of Justice to help them assess their arrangements. Tramp shipping pools as undertakings are more than likely to have as their object or effect the restriction of competition and it will be interesting to witness the volume of pending case law relating to the tramp sector.

In any case the detrimental effect that European Court of Justice rulings may have on the reputation of tramp shipping pools should encourage private arbitration proceedings. If the absence of block exemption, coupled with the complexities of Article 101, makes a comprehensive self assessment by every tramp shipping pool all the more necessary, one should question whether it would be more appropriate for the emphasis to be placed instead on encouraging a greater cooperation between the competition authorities and the legal advisers in charge of those self assessments. Should self assessments become, through a cooperation with the European Commission, joint assessments? Rather than being of a confrontational nature, an increased dialogue between the European Commission and tramp shipping pools would benefit both sides. By obtaining advice from the European Commission, tramp shipping pools would gain increased certainty as to whether their arrangement is likely to be deemed to be an infringement of Article 101. In return, the Commission may be spared the need to conduct investigations that may prove to be costly and time consuming. Whether the groups which are based in Brussels lobbying in favour of the tramp sector will succeed in promoting a system of “stamp of approval” by the Commission authorities similar to the one granted under the Merger Regulation is beyond the scope of this study.

True, tramp shipping pools can turn to the Maritime Guidelines as a basis for their analysis and the initiative of the Commission in providing tramp shipping pools with the Maritime Guidelines must be
applauded. However, if these Maritime Guidelines are helpful in numerous instances, it is worth considering whether these could have been less general and more tailored to the tramp shipping industry in order to give a more valuable assistance. The grey areas of uncertainty as depicted in the sample self assessment conducted in this study may have been avoided by the inclusion of more concrete examples in the Maritime Guidelines. In the light of this degree of uncertainty, legal advisers to the pool will include options and alternatives in their self assessment. Full function joint ventures may be a good alternative to tramp shipping pools in instances of agreements that may otherwise infringe Article 101(1) TFEU and by virtue of the clearance and stamp of approval they afford to market participants. However, whether the requirements of full function joint ventures are compatible with the parties’ commercial intentions will need to be evaluated on a case by case basis. This also applies to other alternatives such as capacity sharing agreements and joint purchasing of ship management services. On the one hand, these arrangements are less complex than a traditional tramp shipping pool but on the other hand, whether the opportunities provided will be seen as sufficient will depend on what the parties are willing to achieve. Best practice and compliance may therefore be the only alternative for pool participants for whom sound legal advice at an early stage is crucial. Although the Commission will only apply the Maritime Guidelines for a period of five years\(^{150}\), the tramp sector has already highlighted the need for new Guidelines from the Commission adapted to self assessments.

\(^{150}\) Article 8 Maritime Guidelines.
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