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The New Era of EC Competition Law in the Shipping Industry

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[Keywords to Follow]

For many years, the shipping industry has been resting in the wide arms of Regulation 4056/86[1] and the block exemption[2] provided therein without being required to consider in much regard the EC rules on the protection of competition.

Regulation 4056/86 applied to international maritime services from or to one or more Community ports other than tramp vessel services; thus in effect arts 81 and 82 EC only applied to liner shipping, while the manner in which they were drafted has led to a considerable amount of litigation.

Since October 2006, however, there has been a dramatic change in the relevant legal framework by virtue of the entry into force of Regulation 1419/2006,[3] which repealed the aforementioned Regulation 4056/86 and made the shipping industry subject to arts 81 and 82 of the EC Treaty and Regulation 1/2003[4] as to the implementation of these articles.

A transitional period of two years from October 18, 2006 was provided, in which period shipping conferences satisfying the requirements of Regulation 4056/86 were able to continue to enjoy the benefits of the block exemption provided therein in order to enable a smooth transition to the new regime.

It should be noted that pursuant to Regulation 1419/2006, art.32 of Regulation 1/2003 has been expressly repealed. Article 32 of Regulation 1/2003 provided that the latter did not apply to: (1) international tramp vessel services as defined in art.1(3)(a) of Regulation 4056/86; (2) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in art.1(2) of Regulation 4056/86; and (3) air transport between Community airports and third countries.

At the same time, the EC Commission had entered into consultations as to the adoption of Guidelines with respect to the application of art.81 of the EC Treaty to maritime transport services.[5]

On the other hand, the block exemption on consortia seems to be working well and save for limited amendments that are applied from time to time, it continues to be in force.

Maritime transport services

Prior to the enactment of Regulation 1419/2006, only liner shipping services were caught within the ambit of EC antitrust rules, but both liner conferences and liner consortia benefited from favourable block exemptions.

Since the entry into force of Regulation 1419/2006 tramp shipping, cabotage services and liner shipping are now all affected by the EC competition rules:

- *Liner shipping* involves the transport of cargo, on a regular basis, to ports on a particular geographic route. Liner shipping is characterised by the timetables and scheduled sailing dates that are advertised in advance as are the services they offer. It therefore primarily involves scheduled liner services of containers.
- *Tramp shipping* services were generously defined in art.1(3)(a) of Regulation 4056/86 (a definition that has been adopted in the proposed Guidelines of the EC Commission) as the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand. Thus voyage and time charterparties as well as bareboat charterparties are considered as tramp shipping.
- *Maritime cabotage* is the provision of maritime transport services within the territory

1. Regulation 4056/86 laying down detailed rules for the application of Arts 85 and 86 of the Treaty to maritime transport [1986] OJ L378/4.
2. Regulation 4056/86 art.3 onwards.
3. Regulation 1419/2006 [2006] OJ L269/1.
4. Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L1/1.
5. For further information on the consultation procedure see *http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/* [Accessed October 13, 2008].

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of a single Member State as regulated by Regulation 3577/92[6]; for example, a Cypriot flag vessel providing maritime transport services by linking two or more ports in Spain.

The elements of articles 81 and 82 EC

Article 81 of the EC Treaty provides that:

> ''81.1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
> 81.2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
> 81.3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> – any agreement or category of agreements between undertakings,
> – any decision or category of decisions by associations of undertakings,
> – any concerted practice or category of concerted practices,
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.''

In order for a practice or an agreement to fall within art.81(1) of the EC Treaty, what must be shown is: (1) the existence of undertakings; (2) an agreement or practice between those undertakings that has as its object or effect ''the prevention, restriction or distortion of competition within the common market. . .''; and (3) an effect on trade between Member States. Article 81(1) further stipulates examples of what practice may be considered as distorting competition and pursuant to art.81(2) such agreements are void unless they may be exempted by virtue of art.81(3).

On the other hand, art.82 of the EC Treaty is much more vigorous and states that:

> ''82. Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.''

Article 82 of the EC Treaty does not provide a possibility of exemption as art.81(3) does. The elements that must be established in order for the prohibition of art.82 to be deemed to apply are: (1) the existence of one or more undertakings; (2) the existence of a dominant position within the Common Market or a substantial part of it; (3) an abuse of the dominant position; and (4) an effect on trade between Member States.

The European Court of Justice has held that ''an undertaking'' is ''any entity engaged in an economic activity. . .''.[7]

The test for deciding whether the European competition rules apply is whether the relevant practice affects intra-Community trade. As stated by the European Court of Justice (ECJ) in *Volk v Etablissements J Vervaecke SPRL*[8]:

> ''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.''

6. Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [1992] OJ L364/7.

7. *Hoefner v Macrotron GmbH* (C-41/90) [1991] E.C.R. I-1979.

8. *Volk v Etablissements J Vervaecke SPRL* (5/69) [1969] C.M.L.R. 273 at 282 ECJ.

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However, if the effect on trade is insignificant, then the agreement will not fall within art.81 EC.[9]

With respect to both arts 81 and 82 EC, it is always of critical importance to identify first the relevant market. In order to do so, both the geographical aspect as well as the product market aspect are taken into consideration.

In *F Hoffmann La Roche & Co AG v Commission of the European Communities*,[10] the ECJ held:

> ''The concept of the relevant market in fact implies the 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 insofar as a specific use of such product is concerned.''

Whether certain products are interchangeable and thus form part of the same product market is determined based on the SSNIP test, which asks whether a 5 to 10 per cent increase in the price of one product will cause purchasers to turn to another product.

In many instances, the ECJ has found with respect to the geographical context that although the infringement occurred in the territory of a single Member State, there was an effect on intra-Community trade. In the cases of *B&I Line Plc v Sealink Harbours Ltd*,[11] *Sea Containers Ltd v Stena Sealink Ports*,[12] *Irish Continental Group v CCI Morlaix*[13] and *Euro-Port A/S v Denmark*,[14] the particular seaports in question were held to constitute a substantial part of the Common Market and the relevant undertaking had breached their dominant position by refusing access to the port facilities to their competitors.

Likewise, there have been instances under the old regime whereby specific routes in the liner trade have been deemed to constitute the relevant market,[15] and this trend continues.

Once the relevant market is determined, the next step is to assess whether the relevant undertaking holds a dominant position. In *United Brands Co v Commission of the European Communities*,[16] the ECJ stated that:

> ''The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.''

In *Compagnie Maritime Belge Transports SA v Commission of the European Communities*[17] the ECJ upheld the Commission's finding of abuse of a collective dominant position and said:

> ''. . . [B]y its nature and in light of its objectives, a liner conference . . . can be characterized as a collective entity which presents itself as such on the market vis-à-vis both users and competitors.''[18]

Moreover, the case of *Compagnie Maritime Belge*[19] illustrated a number of other practices that may constitute an abuse of a dominant position:

- It was held that *super dominant* undertakings are under a special responsibility not to weaken competition (in this case the market share of the conference was about 90 per cent).
- Dominant undertakings may be required to make reasonable use of any veto powers within a conference.
- The Court condemned as a serious abuse of a dominant position the use of *fighting ships* whereby: (1) ports of call and sailing times are deliberately altered to coincide with those of competitors; (2) freight rates are reduced not by economic criteria but in order to be lower that those of competitors; and (3) losses suffered by the fighting ships are distributed between members of the conference or higher prices are imposed on other routes.
- Loyalty arrangements whereby 100 per cent loyalty contracts were imposed and disloyal shippers were blacklisted constituted an abuse of a dominant position.

The effects of articles 81 and 82 EC

The decision in *Guerin Automobiles v Commission of the European Communities*[20] has confirmed that both individuals and undertakings can

9. *Etablissements Consten Sarl v Commission of the European Economic Community* (56/64) [1966] E.C.R. 299.
10. *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) [1979] E.C.R. 461 at [28].
11. *B&I Line Plc v Sealink Harbours Ltd* (IV/34.174) [1992] 5 C.M.L.R. 255 CEC.
12. *Sea Containers Ltd v Stena Sealink Ports* (IV/34.689) [1995] 4 C.M.L.R. 84 CEC.
13. *Irish Continental Group v CCI Morlaix* (IV/35.388) [1995] 5 C.M.L.R. 177 CEC.
14. *Euro-Port A/S v Denmark* [1994] 5 C.M.L.R. 457 CEC.
15. See Decision 92/262 relating to a proceeding pursuant to Arts 85 and 86 of the EEC Treaty (IV/32.450-*French-West African shipowners' committees*) [1992] OJ L134/1; and Decision 94/980 relating to a proceeding pursuant to Art.85 of the EC Treaty (IV/34.446-*Transatlantic Agreement*) [1994] OJ L376/1.
16. *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207 at [65].
17. *Compagnie Maritime Belge Transports SA v Commission of the European Communities* (C-395/96 P) [2000] E.C.R. I-1365.
18. *Compagnie Maritime Belge* [2000] E.C.R. I-1365 at [48].
19. *Compagnie Maritime Belge* [2000] E.C.R. I-1365.
20. *Guerin Automobiles v Commission of the European Communities* (C-282/95 P) [1997] E.C.R. I-1503.

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be deemed to have rights afforded to them by arts 81 and 82 of the EC Treaty owing to their direct applicability.

In *Belgische Radio en Televisie v SABAM SV*,[21] the ECJ held that:

> ''As the prohibitions of Article 81(1) and 82 tend by their very nature to produce direct effects in relations between individuals these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.''

Since the enactment of Regulation 1/2003, art.81 is now directly applicable in its entirety. Moreover, art.6 of Regulation 1/2003 expressly provides that the national courts have the capacity to apply arts 81 and 82 EC.

In the case of *Manfredi v Lloyd Adriatico Assicurazioni SpA*,[22] it was finally clarified that victims of antitrust practices are eligible to claim damages. The ECJ, which was dealing with the effects of art.81 of the EC Treaty, arrived at this reasoning as follows:

> ''. . . Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard. It follows that any individual can rely on a breach of Article 81 EC before a national court (see Courage and Crehan, cited above, paragraph 24) and therefore rely on the invalidity of an agreement or practice prohibited under that article . . . as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (Courage and Crehan, cited above, paragraph 26). . . It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.''[23]

In addition to the possibility of private individuals enforcing arts 81 and 82 of the EC Treaty as demonstrated by the aforementioned ECJ judgments, pursuant to Regulation 1/2003, the EC Commission has been afforded an extensive arsenal to ensure compliance with the antitrust rules, ranging from wide investigative powers (including the ability to enter into premises, land and vehicles of undertakings or ask for oral examinations on the spot as well as examining books and records) to the imposition of hefty fines. When an infringement of arts 81 or 82 EC is found, the EC Commission can issue decisions requiring termination of the infringement, impose behavioural and structural remedies or accept commitments by undertakings for specific periods. Pursuant to art.8 of Regulation 1/2003, interim measures can also be granted.

The serious effects of arts 81 and 82 of the EC Treaty essentially oblige undertakings to ensure that their agreements or practices do not fall within arts 81 and 82 EC and if they do fall within art.81 EC, that they can be exempted by virtue of art.81(3) EC. It should be noted that following the abolition of individual exemptions with the entry into force of Regulation 1/2003, there is no possibility for undertakings to apply in advance to the EC Commission for a confirmation that their practices or agreements may be deemed to be covered by art.81(3) EC. The burden therefore falls on the undertakings and their legal advisers to ensure the greatest possible conformity with the EC competition provisions.

In order to assist undertakings in their compliance with the provisions of art.81 EC, the EC Commission has drafted guidelines on the application of the EC Treaty to the maritime transport services.

The Guidelines

The Guidelines prepared by the EC Commission on the Application of Article 81 of the EC Treaty to Maritime Transport Services[24] (the Guidelines) can be characterised as general and open to a wide degree of interpretation at least insofar as tramp shipping is concerned.

Ascertaining an effect on trade between Member States

As regards the element of arts 81 EC and 82 EC concerning the existence of ''an effect on trade between Member States'', the Commission views transport services offered by liner shipping and pool operators as most likely to affect trade between Member States, primarily ''on account of the impact they have on the markets for the provision of transport and intermediary services'' and the fact that it is frequent for vessels to link a port within the European Union with another port in the Common Market or with third countries (see para.4 of the Guidelines).[25]

Regardless of the aforementioned view of the EC Commission, each case must be examined on its facts.

21. *Belgische Radio en Televisie v SABAM SV* [1974] E.C.R. 51 at [10].
22. *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] 5 C.M.L.R. 17 ECJ.
23. *Manfredi* [2006] 5 C.M.L.R. 17 ECJ at [58]–[61].
24. SEC(208) 2151 final, Brussels, July 1, 2008.
25. See Guidelines, para.4.

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Ascertaining the relevant market

In conformity with court decisions such as *Atlantic Container Line AB v Commission of the European Communities*[26] the Guidelines provide in paras 18 and 19 that with respect to liner shipping, containerised liner services can be deemed to be the relevant product market, without excluding the possibility that narrower product markets may be identifiable such as the transport of perishable goods by reefer containers.

As regards tramp shipping, the main variables that should be taken into consideration (both from the supply side and the demand side) should include parameters such as: (1) the exact nature of the transport request such as whether it concerns a time charter or voyage charter or contracts of affreightment and their essential elements (including reference to terms that are negotiable or non-negotiable); (2) the type and volume of cargo and its physical and technical characteristics; (3) loading and discharge ports; (4) lay-times; (5) technical details of the vessel (including vessel type—bulk carriers, LNG carriers, tankers, etc. as well as sub-classifications such as Panamax, Suezmax, Capesize, etc.) and the ability of the vessels to be adjusted to the transport of different cargos; and (6) interchangeability in general (including the factor that substitutability of vessel sizes may be limited owing to draught restrictions in ports and canals).

The Guidelines make reference to additional factors that may be applicable such as the reliability of the service provider, security and safety and regulatory requirements (such as double-hull requirements for tankers).

The relevant geographical market will consist of the area that the services are marketed with reference to the range of ports at each end of the service.

Insofar as liner shipping is concerned, at the European end this has been identified as a range of ports in Northern Europe and/or in the Mediterranean Sea.[27]

With respect to tramp shipping, the ports of loading and unloading will constitute the starting point of the assessment. As already indicated, substitutability of ports may be limited by restrictions on vessel mobility such as terminal and draught restrictions or environmental standards in certain areas. The EC Commission further considers pursuant to para.32 of the Guidelines that climatic changes, harvest periods, the repositioning of vessels, ballast voyages and trade imbalances should be taken into account for the delineation of relevant geographic markets.

Calculation of market share

The calculation of market share in liner shipping on the basis of volume and/or capacity has been upheld by the ECJ in *Atlantic Container Line*.[28]

Insofar as tramp shipping is concerned, the EC Commission's view pursuant to the Guidelines (para.2.4) is that shipowners compete for the award of transport contracts; in the words of the EC Commission, they ''sell voyages or transport capacity'' and thus, depending on the relevant services, the parameters that should be taken into consideration as to the assessment of the ship operators' annual market share, may include:

- the number of voyages;
- the parties' volume or value share in the overall transport of a specific cargo;
- the parties' share in the market for time charter contracts; and
- the parties' capacity shares in the relevant fleet, by vessel type and size.

Horizontal technical agreements

Technical agreements that do not restrict competition do not fall within art.81 EC. For example, undertakings may enter into co-operation agreements whose sole object and effect is to implement technical improvements, technical co-operation and implementation of environmental standards.

However, if technical agreements extend to or concern matters beyond the above (especially prices, capacity or other parameters of competition) then there is a high risk that they are caught by art.81 EC, subject to review of the particular provisions of each relevant agreement. More caution is required when the parties to the technical agreement are competitors.

Pursuant to para.35 of the Guidelines, the following are particularly important in the assessment of the effects that an agreement (not restricted to technical agreements) may have in the relevant market: (1) prices; (2) costs; (3) quality; (4) frequency; (5) innovation; (6) differentiation of the service provided; (7) marketing; and (8) commercialisation of the service.

26. *Atlantic Container Line AB v Commission of the European Communities* (T-191/98) [2003] E.C.R. II-3275; see further Decision 1999/485 relating to a proceeding pursuant to Art.85 of the Treaty (IV/34.250-*Europe Asia Trades Agreement*) [1999] OJ L193/23.

27. See further para.20 of the Guidelines; Decision 2003/68 relating to a proceeding pursuant to Art.81 of the EC Treaty and Art.53 of the EEA Agreement (COMP/37.396/D2-*Revised TACA*) [2003] OJ L26/53 at [39].

28. *Atlantic Container Line* [2003] E.C.R. II-3275 at [924]–[927].

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Horizontal information exchanges in the liner shipping sector

As the EC Commission acknowledges in para.39 of the Guidelines, the common practice for aggregate statistics and general market information exchanged and published is a good means of increasing market transparency and customer knowledge, and thus may produce efficiencies especially when the market is truly competitive. However, the exchange of commercially sensitive and individualised market data can, under certain circumstances, breach art.81 of the Treaty.

At present, Regulation 823/2000,[29] containing the block exception for liner consortia, permits information exchanges between shipping lines that form liner consortia to the extent that such information are ancillary or necessary for the joint operation of the relevant transport services. Alternatively, they may be permissible if justified on the basis of art.81(3) EC.

If the exchange of information is intended to assist in the implementation of anti-competitive or cartel practices then certainly they will not be deemed acceptable by the courts.

Additionally, the exchange of information may infringe art.81 of the EC Treaty if such exchange reduces the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[30]

However, art.81 EC does not prohibit undertakings intelligently adapting to existing or anticipated conduct of competitors,[31] but each operator must autonomously determine the policy it will follow in the market.

In *John Deere Ltd v Commission of the European Communities*[32] the Court of First Instance held that in a highly concentrated oligopolistic market, exchanges of precise information on individual sales at short intervals between the main competitors but to the exclusion of other suppliers and of consumers are likely to impair competition substantially since they have the effect of disclosing to all competitors the strategies of various individual competitors.[33]

29. Regulation 463/2004 amending Regulation 823/2000 on the application of Art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2004] OJ L77/23, as amended.
30. *Thyssen Stahl AG v Commission of the European Communities* (C-194/99 P) [2003] E.C.R. I-10821 at [81].
31. See *Cooperatieve Vereniging Suiker Unie UA v Commission of the European Communities* (40/73) [1975] E.C.R. 1663 at [173]–[174].
32. *John Deere Ltd v Commission of the European Communities* (T-35/92) [1994] E.C.R. II-957 at [51].
33. The decision was upheld by the ECJ; see further para.44 of the Guidelines and *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios* [2006] E.C.R. I-11125.

Even when the market is not highly concentrated, the Court of First Instance in *Thyssen Stahl AG v Commission of the European Communities*[34] held that an information exchange system may constitute a breach of the competition rules if a reduction of an undertaking's decision-making autonomy exists that results from pressure during discussions with competitors.

Nevertheless, the ECJ decided in *A Ahlstrom Osakeyhtio v Commission of the European Communities*[35] that a system of quarterly price announcements that did not lessen each undertaking's uncertainty as to the future attitude of its competitors did not infringe art.81 EC.

In assessing conformity of information exchange systems with EC competition law, essentially, the facts of each particular case including the following parameters must be examined:

- the market structure;
- the characteristics of the information exchanged;
- the age of the data and the period to which they relate;
- the frequency of the exchange;
- the level of disclosure of the information (if the information is shared with customers the less problematic it is likely to be);
- the effects of the information exchange on the market; and
- the efficiency created and passed on to the customers.

The Guidelines are silent with respect to the possibility of information exchanges in tramp shipping. On the other hand, the Guidelines make clear that legitimately conducted discussions within trade associations, for example on environmental and technical standards, can take place but such trade associations should not be used as a forum for cartel meetings, anti-competitive decisions or means of exchanging information that reduces the degree of uncertainty as to the operation of the market with the result that competition is restricted.

Pools in tramp shipping

Even though there is no uniform standard of pool agreements, and ultimately the exact form is a matter of negotiation and contractual agreement, usually a shipping pool consists of a number of vessels of similar type and owned by different shipowners, under the commercial management of a single management.

34. *Thyssen Stahl* [1999] E.C.R. II-347 at [402]–[403].
35. *A Ahlstrom Osakeyhtio v Commission of the European Communities* (C-89/85) [1993] E.C.R. I-1307.

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While technical and crew management may remain the responsibility of the shipowner of each vessel and services are performed individually, normally the pool manager will undertake marketing and commercial operations such as:

- negotiation of freight rates;
- calculation of income and costs;
- voyage planning;
- nominating port agents in ports;
- handling bunker supplies;
- customer updating, issuance of freight invoices;
- collecting vessels' earnings and distributing them to the members of the pool as may be agreed; and
- representation of shipowners as may be agreed.

Owing to the lack of uniformity in pooling arrangements, each pool will need to be examined on its own facts as to its compliance with EC competition rules, while there may be instances where the EC Commission Guidelines on the applicability of art.81 EC to horizontal co-operation agreements[36] may also be relevant.

Joint venture pooling arrangements whereby a joint venture is created performing on a lasting basis all the functions of an autonomous economic entity are not directly affected by Regulation 1419/2006 but they are affected by Regulation 139/2004[37] on the control of concentrations between undertakings.

Paragraphs 64 and 65 of the Guidelines very generally describe pooling arrangements that the EC Commission views as not caught by art.81(1) EC:

> ''64. Pool agreements do not fall under the prohibition of Article 81(1) of the Treaty if the participants to the pool are not actual or potential competitors. This would be the case, for instance, when two or more shipowners set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry out on their own. This conclusion is not invalidated in cases where such pools occasionally carry other cargo representing a small part of the overall volume.
>
> 65. Pools whose activity does not influence the relevant parameters of competition because they are of minor importance and/or do not appreciably affect trade between Member States, are not caught by Article 81(1) of the Treaty.''

36. Guidelines on the applicability of Art.81 EC to horizontal co-operation agreements [2001] OJ C3/2.
37. Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

The Guidelines further provide that pool agreements between competitors limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of these competitors and are generally deemed by the EC Commission as falling within art.81(1).

In the event that the pooling arrangement does not have as its objective the restriction of competition, then an assessment of the effects of the arrangements need to be undertaken in order to determine whether the pool may fall within art.81(1). As per para.67 of the Guidelines:

> ''An agreement is caught by Article 81 (1) of the Treaty when it is likely to have an appreciable adverse impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.''

In assessing the pool's ability to cause an appreciable negative effect, pursuant to para.69 of the Guidelines, the following general parameters should be examined:

- the economic context;
- the relevant market structure;
- the parties' combined market power;
- the nature and terms of the pooling arrangement; and
- possible effects of the pooling arrangement on neighbouring and/or closely related markets.

As regards the nature of the pooling agreement, the Guidelines provide in para.71 that:

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

With respect to the relevant market structure, the view of the EC Commission as expressed in para.70 of the Guidelines is that:

> ''. . . [I]f the pool has a low market share, it is unlikely to produce restrictive effects. Market concentration, the position and number of competitors the stability of market shares over time, multi-membership in pools, market entry barriers and the likelihood of entry, market transparency, countervailing buying power of transport users and the nature of the services (for example, homogenous versus differentiated services) should be taken into account as additional factors in assessing the impact of a given pool on the relevant market.''

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As already stated, even if an agreement falls within art.81 EC, it may be exempted and thus be held to be in conformity with EC competition law if the relevant entity can demonstrate that art.81(3) EC, the text of which is reproduced above, is applicable. The greater the restriction of competition under art.81(1) EC, the greater the efficiencies and the benefits passed on to consumers must be.

The burden of proof is on the relevant undertaking to demonstrate that the pool arrangement improves the transport services or promotes technical or economic progress in the form of efficiency gains. The EC Commission elaborates further on its meaning of efficiency in paras 73 to 77 of the Guidelines by stipulating the following directions and guidelines:

- ''The efficiencies generated cannot be cost savings that are an inherent part of the reduction of competition but must result from the integration of economic activities.
- Efficiency gains of pools may for instance result from obtaining better utilization rates and economies of scale. Tramp shipping pools typically jointly plan vessel movements in order to spread their fleets geographically. Spreading vessels may reduce the number of ballast voyages which may increase the overall capacity utilisation of the pool and eventually lead to economies of scale.
- Consumers must receive a fair share of the efficiencies generated. Under Article 81(3) EC, it is the beneficial effects on all consumers in the relevant market that must be taken into consideration, not the effect on each individual consumer. The pass-on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition under Article 81(1) (71). To assess the likelihood of a pass-on the structure of tramp shipping markets and the elasticity of demand should also be considered in this context.
- A pool must not impose restrictions that are not indispensable to the attainment of the efficiencies. In this respect it is necessary to examine whether the parties could have achieved the efficiencies on their own. In making this assessment it is relevant to consider, inter alia, what is the minimum efficient scale to provide various types of services in tramp shipping. In addition, each restrictive clause contained in a pool agreement must be reasonably necessary to attain the claimed efficiencies. Restrictive clauses may be justified for a longer period or the whole life of the pool or for a transitional period only.
- The pool must not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question.''

It should be noted that all that is described above concerning the Guidelines is not exhaustive and furthermore these Guidelines will always be subject to the ECJ's judgment. Therefore other factors that shipowners might consider relevant when assessing the existence of the elements of art.81 EC may be taken into consideration by the ECJ, if pleaded.

Consortia

Regulation 823/2000,[38] as amended by Regulations 463/2004 and 611/2005,[39] contains the block exemption for consortia under which, a number of activities are deemed as falling within art.81(3) EC and thus in conformity with art.81 of the EC Treaty

For the purposes of the block exemption, a consortium is defined as:

> ''. . . an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to one or more trades, and the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing.''

The activities that may be exempted are:

- the joint operation of liner shipping transport services which comprise solely the following activities: (1) the co-ordination and/or joint fixing of sailing timetables and determination of ports of call; (2) the exchange, sale or cross-chartering of space or slots on vessels; (3) the pooling of vessels and/or port installations; (4) the use of joint operations offices; (5) the provision of containers, chassis and other equipment and/or the contracts for such equipment; and (6) the use of a computerised data exchange system and/or joint documentation system;
- temporary capacity adjustments;
- the joint operation or use of port terminals and related services (i.e lighterage or stevedoring services);
- the participation in one or more of the following pools: cargo, revenue or net revenue;
- the joint exercise of voting rights held by the consortium in the conference within which its members operate, insofar as the vote being jointly exercised concerns the consortium's activities as such;

38. Regulation 823/2000 o on the application of Art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2000] OJ L100/24.
39. [2004] OJ L77/23 and [2005] OJ L101/10 respectively.

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- a joint marketing structure and/or the issue of a joint bill of lading;
- any other activity ancillary to the above which is necessary for their implementation.

The block exemption is granted only upon the existence of a number of preconditions and a number of obligations are attached to it as stipulated therein.

Even though the block exemption is valid until April 2010, the EC Commission has expressed in the preamble to the aforementioned Guidelines its intention to review it in light of the recent changes. Indeed, the introduction of a new unified regulation with an expanded scope of application to include tramp shipping or maritime services at large with some more detailed guidance of the pooling arrangements that the EC Commission deems permissible can constitute one of the options for review.

State aid

Pursuant to art.87 (1) of the EC Treaty, any aid granted by states or through state resources in whatever form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the Common Market.

The EC Commission has issued Guidelines on state aid to maritime transport[40] in order to assist the EU Member States to ensure that they do not breach the EC Treaty with their policies and legislation.

The aforementioned Guidelines however, do not cover the shipbuilding industry, with respect to which the Framework on State aid to shipbuilding[41] was applicable until December 31, 2008.

Conclusions

The antitrust regime in the shipping sector has changed dramatically not just for European shipowners but for all that trade in EU ports. While with respect to liner shipping the EC Commission has been able by virtue of the existing case law to draft useful guidelines, this is not the case insofar as tramp shipping and maritime cabotage services are concerned. As to the latter, the Guidelines are virtually silent while, with respect to tramp shipping, all that the EC Commission does is list all the parameters that it could think of without providing useful guidance to shipowners; nor has it taken into consideration the practical realities of the sector such as its global and non-concentrated character as well as the high degree of substitutability between vessel sizes and types from the demand side of the equation.

Essentially, all agreements and practices will be examined on their particular facts while even if such agreements are found to fall within art.81(1) EC, they can be exempted provided that they demonstrate that art.81(3) is applicable.

40. Guidelines on state aid to maritime transport [2004] OJ C13/3.

41. Framework on State aid to shipbuilding [2003] OJ C317/11.