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

Draft

(Text with EEA relevance)

(2007/C 215/03)

1. Introduction

1. These Guidelines set out the principles that the Commission of the European Communities will follow when defining markets and assessing cooperation agreements in the maritime transport services sectors directly affected by the changes brought about by Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (1).

2. They are intended to help undertakings and associations of undertakings operating those services to and/or from a port or ports in the European Union to assess whether their agreements (2) are compatible with Article 81 of the Treaty establishing the European Communities. The Guidelines do not apply to other sectors.

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

4. Regulation (EC) No 1419/2006 also repealed Council Regulation (EEC) No 4056/1986 of 22 December 1986 on the application of Articles 85 and 86 (now 81 and 82) of the EC Treaty (5) containing the liner conference block exemption which allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage, as the conference system no longer fulfilled the criteria of Article 81(3) of the Treaty. The repeal of the block exemption takes effect as of 18 October 2008. Thereafter, liner carriers operating services to and/or from a port(s) in the European Union must cease all liner conference activity contrary to Article 81 of the Treaty. This is the case regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conferences or discussion agreements.

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

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

(2) The term ‘agreement’ is used for agreements, decisions by associations of undertakings and concerted practices.
7. These Guidelines are without prejudice to the interpretation of Article 81 of the Treaty which may be given by the Court of Justice or the Court of First Instance of the European Communities. The principles in the Guidelines are to be applied in the light of the circumstances specific to each case.

8. The Commission will apply these guidelines for an initial period of five years.

2. Maritime transport services

2.1. Scope

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

10. Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user. Article 1(3)(a) of Regulation (EEC) No 4056/86 defined tramp vessel services as the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand. It is mostly the unscheduled transport of one single commodity which fills a vessel (10). Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State (11). Although these Guidelines do not specifically address cabotage services they nevertheless apply to these services insofar as they are provided either as liner or tramp shipping services.

2.2. Effect on trade between Member States

11. Article 81 of the Treaty applies to all agreements which may affect trade between Member States. In order for there to be an effect on trade it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market (12). The Commission has issued guidance on how it will apply the concept of affectation of trade in its Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty (13).

12. Transport services offered by liner shipping and pool operators are often international in nature linking Community ports with third countries and/or involving exports and imports between two or more Member States (i.e. intra Community trade) (14). In most cases they are likely to affect trade...
between Member States inter alia on account of the impact they have on the markets for the provision of transport and intermediary services (16).

13. Effect on trade between Member States is of particular relevance to maritime cabotage services insofar as it also determines the scope of application of Article 3 of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 of the Treaty. The extent to which such services may affect trade between Member States must be evaluated on a case by case basis (17).

2.3. The relevant market

14. In order to assess the effects on competition of an agreement for the purposes of Article 81 of the Treaty, it is necessary to define the relevant product and geographic market(s). The main purpose of market definition is to identify in a systematic way the competitive constraints faced by an undertaking. Guidance on this issue can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (18). This guidance is also relevant to market definition as regards maritime transport services.

15. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use (19). The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas (20). Carrier(s) cannot have a significant impact on the prevailing conditions of the market if customers are in a position to switch to other service providers, in the short term, in response to small and permanent changes in the relative price without incurring significant additional costs or risks (21).

2.3.1. Liner shipping

16. Containerised liner shipping services have been identified as the relevant product market for liner shipping in several Commission decisions and Court judgments (22). Other modes of transport have not been included in the same service market even though in some cases these services may be, to a marginal extent, interchangeable. This is because a substantial proportion of the goods carried by container cannot easily be switched to other modes of transport, such as air transport services (23).


(17) For guidance on the application of the effect on trade, see the Commission Guidelines, cited above in footnote 13.


(19) Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, the definition of the relevant market, demand substitutability constitutes the most immediate and effective disciplinary force on the suppliers of a given service. The competitive constraints arising from supply side substitutability are in general less immediate and in any case require an analysis of additional factors. Potential competition is not taken into account when defining markets since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry.

(20) Notice on market definition, cited above in footnote 17, paragraph 10.

(21) Notice on market definition, cited above in footnote 17, paragraphs 13 and 20.


17. It may be appropriate under certain circumstances to define a narrower product market limited to a particular type of product transported by sea. For example, the transport of perishable goods could be limited to refrigerated containers or include transport in conventional refrigerated vessels (23). While it is possible in exceptional circumstances for some substitution to take place between break bulk and container transport (24), there appears to be no lasting change over from container towards break bulk. For the vast majority of categories of goods and users of containerised goods, break bulk does not offer a reasonable alternative to containerised liner shipping (25). Once cargo becomes regularly containerised it is unlikely ever to be transported again as non-containerised cargo (26). Containerised liner shipping is therefore mainly subject to one way substitutability (27).

18. The relevant geographic market consists of the area where the services are marketed, generally a range of ports at each end of the service (28). As far as the European end of the service is concerned, to date the geographical market has been identified as a range of ports in Northern Europe and/or in the Mediterranean. As liner shipping services from the Mediterranean are only marginally substitutable for those from Northern European ports, these have been identified as separate markets (29).

2.3.2. Tramp services

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

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

20. The ‘main terms’ of an individual transport request are a starting point for defining relevant service markets in tramp shipping since they generally identify the essential elements (30) of the transport requirement at issue. Depending on the transport users’ specific needs they will be made up of negotiable and non-negotiable elements. Once identified, a negotiable element of the main terms, for example the vessel type or size, may indicate, for instance, that the relevant market with respect to this specific element is wider than laid down in the initial transport requirement.

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

---


(24) TACA Decision, cited above in footnote 15, paragraph 71.


(29) For voyage charter for instance the essential elements of a transport requirement are the cargo to be carried, the cargo volume, the loading and discharging ports, the laydays and technical details regarding the vessel required.
Elements to take into account when determining the relevant product market from the supply-side (supply substitution)

22. The physical and technical conditions of the cargo to be carried and the vessel type provide the first indications as to the relevant market from the supply-side (31). If vessels can be adjusted to transport different cargos at negligible cost and in a short time-frame (32), tramp shipping service providers are able to compete for the transport of several types of cargo. In such circumstances, the relevant market will comprise more than one type of cargo.

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

24. Vessel types are usually subdivided into a number of standard industrial sizes (33). In normal market conditions, due to considerable economies of scale, a service with a significant mismatch between cargo volume and vessel size does not appear to be able to offer a competitive freight rate. In addition, substitutability of vessel sizes may be limited by draught restrictions in ports and canals. In general therefore, the substitutability of different vessel sizes needs to be assessed so as to ascertain whether each vessel size constitutes a separate relevant market.

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

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

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

Geographic dimension

28. Transport requirements usually contain geographic elements such as the loading and discharging ports or regions. These ports provide the first orientation for the definition of the relevant geographic market from the demand-side.

29. In tramp shipping, ports are generally substitutable from the supply-side as services are not scheduled but respond to a specific demand. Substitutability of ports may be limited by restrictions on vessel mobility such as terminal and draught restrictions or environmental standards for particular vessel types in certain ports or regions.

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

(32) Switching a dry bulk vessel from the transport of coal to grain might require only a one-day cleaning process that might be done during a ballast voyage.

(33) It appears to be the industry's perception that vessel sizes constitute separate markets. The trade press and the Baltic Exchange publish price indexes for each standard vessel size. Consultants' reports divide the market on the basis of vessels' sizes.
30. Repositioning of vessels, ballast voyages and trade imbalances should be taken into account for the delineation of relevant geographic markets. Certain geographic markets may be defined on a directional basis or may occur only temporarily for instance when climatic conditions or harvest periods periodically affect the demand for transport of particular cargos.

2.4. Calculation of Market share

31. In liner shipping, volume and/or capacity data have been identified as the basis for calculating market shares in several Commission decisions and Court judgments (34).

32. In tramp shipping markets, service providers compete for the award of transport contracts, that is to say, they sell voyages. Depending on the specific services in question, the various data may allow operators to calculate their annual market shares (35) for instance:

(a) the number of voyages;
(b) the parties’ volume or value share in the overall transport of a specific cargo;
(c) the parties’ share in the market for time charter contracts;
(d) data in relation to the parties’ contract negotiations;
(e) the parties’ capacity shares in the relevant fleet (by vessel type and size) (36).

3. Horizontal agreements in the maritime transport sector

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

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

3.1. Technical agreements

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

(34) TACA Decision, cited above in footnote 15, paragraph 85; the Revised TACA Decision, cited above in footnote 15, paragraphs 85 and 86 and the TACA Judgment, cited above in footnote 21, paragraphs 924, 925 and 927.

(35) Depending on the specificities of the relevant tramp shipping market shorter periods may be envisaged.

(36) Vessel capacity provides information on the parties’ ability to compete for voyages. Volume and value share data may illustrate the parties’ general position in the market. Data in relation to contract negotiations may indicate the parties’ possibilities to exert market power in contract negotiations.

3.2. Information exchanges between competitors in liner shipping

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

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

38. In the liner shipping sector, exchanges of information between shipping lines taking part in liner consortia which otherwise would fall under Article 81(1) of the Treaty are permitted to the extent that they are ancillary to and necessary for the joint operation of liner transport services and the other forms of co-operation covered by the block exemption in Commission Regulation (EC) No 823/2000 (38) or irrespective and outside the scope of the block exemption, if and to the extent that they can be individually justified on the basis of Article 81 of the Treaty.

3.2.1. In general

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

40. The exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel. Where an exchange of information is ancillary to an anti-competitive practice its assessment must be carried out in combination with an assessment of that practice. These Guidelines do not address such exchanges of information.

41. However, an exchange of information might constitute an infringement of Article 81 of the Treaty in its own right. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (39).

42. Where there is a truly competitive market, transparency between traders is likely to lead to intensification of competition between suppliers (40). Furthermore, it is settled case-law that Article 81 of the Treaty does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of competitors (41).

43. Every economic operator must, however, determine autonomously the policy which it intends to pursue on the market. Undertakings are, therefore, precluded from direct or indirect contacts with other operators which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and the volume of the market (42).

(38) OJ L 100, 20.4.2000, p. 24. Regulation (EC) No 823/2000 applies to international liner transport services from or to one or more Community ports exclusively for the carriage of cargo chiefly by container — see Articles 1, 2 and Article 3(2)(g) thereof.


44. The case law of the Community Courts provides some general guidance in examining the likely effects of an information exchange. The Court has found that, on a highly concentrated oligopolistic market on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and of consumers, are likely to impair substantially the competition that exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors (43). The Court of Justice has also found that an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings’ decision making autonomy resulting from pressure during subsequent discussions with competitors (44). By contrast, the Court has found 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 constitute an infringement of Article 81(1) of the Treaty (45).

45. It follows that the actual or potential effects of an information exchange must be considered on a case-by-case basis as the results of the assessment depend on a combination of factors, each specific to an individual case. The structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange. The assessment must also consider the potential effects that the information exchange could have in the market compared to the competitive situation that would result in the absence of the information exchange agreement (46). To be caught by Article 81(1) of the Treaty, the exchange must have an appreciable adverse impact on the parameters of competition (47).

46. The guidance below is related to the analysis of a restriction of competition under Article 81(1) of the Treaty. Guidance on the application of Article 81(3) of the Treaty is to be found in the general notice on the subject (48).

3.2.2. Market structure

47. The level of concentration and the structure of supply and demand on a given market are key issues in considering whether an exchange falls within the scope of Article 81(1) of the Treaty (49).

48. The level of concentration is particularly relevant since, on highly concentrated oligopolistic markets (50), restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Greater transparency in a concentrated market may strengthen the interdependence of firms and reduce the intensity of competition (51).
49. The structure of supply and demand is also important, notably the number of competing operators and the symmetry and stability of their market shares and the existence of any structural links between competitors (52). The Commission may also analyse other factors such as the homogeneity of services and the overall transparency in the market.

3.2.3. Characteristics of the information exchanged

50. The exchange of information already in the public domain does not constitute an infringement of Article 81(1) of the Treaty (53). However, it is important to establish whether the exchange of information enhances and/or combines publicly available information with other information rendering the combined information commercially sensitive and its exchange potentially restrictive of competition.

51. Information which is not historic and relates to parameters of competition, such as price, capacity or costs will be considered commercially sensitive. The exchange of such data between competitors is more likely to be caught by Article 81(1) of the Treaty than the exchange of information that is commercially less sensitive.

52. Information may be individual or aggregated. Individual data relates to a designated or identifiable undertaking. Aggregate data combines the data from a sufficient number of independent undertakings so that the recognition of individual data is impossible. The exchange of individual information between competitors is more likely to be caught by Article 81(1) of the Treaty (54) when it relates to commercially sensitive data. The exchange of aggregated information does not, in principle, fall within Article 81(1) of the Treaty. The Commission will pay particular attention to the level of aggregation. It should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.

53. The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertaking’s future behaviour. In past cases, the Commission has considered information which was more than one year old as historic (55) whereas information less than one year old has been viewed as recent (56). The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. Future data relates to an undertaking’s view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an undertaking intends to adopt in the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.

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

55. In liner shipping, for example, exchanges of historic data on volume and capacity, even on a disaggregated basis, are unlikely to be restrictive of competition: whether data can be considered historic must be determined by the effect its disclosure is likely to have on the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of

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

(53) TACA Judgment, cited above in footnote 21, paragraph 1154.


competition if the data is aggregated to an appropriate level such that individual shippers’ or carriers’
transactions cannot be identified either directly or indirectly.

56. Conversely, caution should be used when assessing exchanges of capacity forecasts not based on
generally publicly available data, even in aggregate form, especially when it takes place in concen-
trated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct
and it has a direct effect on prices. Aggregated capacity forecasts indicating in which trades capacity
will be deployed may be anticompetitive to the extent that they may lead to the adoption of a
common policy by several or all carriers and result in the provision of services at above competitive
prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual
announcements by liner carriers. This would enable undertakings to identify the market positions
and strategies of competitors.

57. In liner shipping, a price index shows average price movements for the transport of a sea container.
A price index based on appropriately aggregated price data is unlikely to infringe Article 81(1) of the
Treaty, provided that the level of aggregation is such that the information cannot be disaggregated so
as to allow undertakings directly or indirectly to identify the competitive strategies of their competi-
tors. If a price index has the effect of reducing carriers’ uncertainty as to the future attitude of compe-
titors, it would violate Article 81(1) of the Treaty. In assessing the likely effect of such a price index
on a given relevant market, account should be given to the level of aggregation of the data and its
historical or recent nature and the frequency at which the index is published. It is also important to
assess all individual elements of any information exchange scheme together, in order to take account
of potential interactions, for example between exchange of capacity and volume data on the one
hand and of a price index on the other.

58. An exchange of information between carriers that restricts competition may nonetheless create effi-
ciencies, such as, better planning of investments and more efficient use of capacity. Such pro-compete-
titive benefits will have to be passed on to customers and weighed against the anti-competitive effects
of the information exchange in the framework of Article 81(3) of the Treaty. In this context, it is
important to note that one of the conditions of Article 81(3) of the Treaty is that consumers should
receive a fair share of the benefits generated by the restrictive agreement. If all four cumulative condi-
tions set out in Article 81(3) of the Treaty are fulfilled, the prohibition of Article 81(1) of the Treaty
does not apply (57).

3.2.4. Availability of the information and institutional structure

59. The more the information is shared with customers, the less likely it is to be problematic. If market
transparency is improved for the benefit of suppliers only, it may deprive customers of the possibility
of getting the advantage of increased ‘hidden competition’. An exchange between suppliers only may
also constitute a barrier to entry.

60. In liner shipping, for example, carrier only meetings convened to discuss recent and detailed data
violate Article 81(1) of the Treaty where they eliminate rivalry between the parties to the exchange.
In this case, participants to the exchange would have to demonstrate that it fulfils the four cumulative
conditions of Article 81(3) of the Treaty. This situation should be distinguished from the discussions
legitimately conducted within a trade association, for example, on the basis of publicly available
market information, or on technical and environmental standards.

3.3. Pool agreements in tramp shipping

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

(57) Guidelines on the application of Article 81(3) of the Treaty, cited above in footnote 7.
62. A standard shipping pool brings together a number of similar vessels (58) under different ownership and operated under a single administration. A pool manager is normally responsible for the commercial management (for example, joint marketing (59), negotiation of freight rates and centralization of incomes and voyage costs (60)) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices, ordering bunkers, collecting the vessels' earnings and distributing them under a pre-arranged weighting system etc.). The pool manager often acts under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels remains the responsibility of each owner (safety, crew, repairs, maintenance etc.). Although they market their services jointly, the pool members perform the services individually.

63. It follows from this description that the key feature of standard shipping pools is joint selling, coupled with some features of joint production. The guidance on both joint selling, as a variant of a joint commercialisation agreement, and joint production in the Commission Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements (61) is therefore relevant. However, given the variation in pools' characteristics, each pool must be analysed on a case-by-case basis to determine whether it is caught by Article 81(1) of the Treaty and, in the affirmative, if it fulfils the four cumulative conditions of Article 81(3) of the Treaty.

64. Pools that fall within the scope of Council Regulation (EC) No 139/2004 (62) because they are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures, see Article 3(4) of Council Regulation (EC) No 139/2004) are not directly affected by the changes brought about by Regulation (EC) No 1419/2006. Guidance on the relevant issues can be found, inter alia, in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (63). Insofar as such pools have as their object or effect the coordination of the competitive behaviour of their parents, the coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) EC with a view to establishing whether or not the operation is compatible with the common market (64).

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

65. 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, or are competing companies that cannot by any means provide the service(s) covered by the agreement individually. This would be the case, for instance, when two or more ship-owners set up a shipping pool for the sole purpose of tendering for and providing CoAs for which as individual operators they could not bid successfully or which they could not carry out on their own. In practice, however, pools may often not assign all their ships to CoAs since engaging all the pool's ships in one sole type of contract could result in other opportunities for maximising revenue being lost, hence invalidating the purposes for which pools are usually set up.

66. 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 (65), are not caught by Article 81(1) of the Treaty. For the former criterion to apply the pool in question cannot contain provisions regarding joint price fixing and joint marketing. As for the latter criterion, considering the

(58) Vessels participating in the pool are often of a more or less similar type. This results in the pool being able to attract large CoAs, combine various CoAs and reduce the number of ballast legs by careful fleet planning.
(59) For example, the pool's vessels are marketed as one commercial unit offering transport solutions regardless of which ship performs the actual voyage.
(60) For example, the pool's income is collected by the central administration and revenue is distributed to the participants based on a complex weighting system.
(61) Respectively in section 5 and section 3 of the Guidelines, cited above in footnote 5.
(63) To be published.
(64) Article 2(4) of Regulation (EC) No 139/2004.
nature of transport services offered by pools they are likely to affect trade between Member States (66).

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

67. If a pool agreement between competitors has as its object the restriction of competition by means of price fixing, output limitation or sharing of markets or customers it will fall under Article 81(1) of the Treaty. Agreements between competitors involving price fixing (67) will always fall under Article 81(1) of the Treaty irrespective of the market power of the parties (68).

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

68. If the pool does not have as its object a restriction of competition, an analysis of its effects in the market concerned is necessary. An agreement is caught by Article 81 (1) of the Treaty when it is likely to have an appreciable adverse impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties (69).

69. The pool’s ability to cause appreciable negative market effects depends on the economic context, taking into account the nature of the agreement and the parties’ combined market power together with other structural factors in the relevant market. It must also be considered whether the pool agreement affects the behaviour of the parties in neighbouring markets closely related to the market directly affected by the cooperation (70). This may be the case for example where the pool’s relevant market is that for the transport of cars in specialised car carrier vessels (market A) and the pool’s members also operate ships in the ro-ro market (market B).

70. Concerning the nature of the agreement consideration should be given to whether the pool agreement contains clauses prohibiting members from being active in the same market outside the pool and the extent to which there is an exchange of commercially sensitive information which could for example unduly influence the competitive behaviour of pool members operating in the same market outside the pool in relation to the pool’s commercial policy. Any links between pools, whether in terms of management or members as well as cost and revenue sharing should also be considered.

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

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

72. Where pools are caught by Article 81(1) of the Treaty it is necessary to assess whether they fulfil the four cumulative conditions of Article 81(3). It is up to the undertakings involved to demonstrate that:

(a) The pool improves the transport services or promotes technical or economic progress. It must be shown that the pool causes efficiency gains. The efficiencies generated cannot be the saving of costs that are an inherent part of competition but must result from the integration of economic activities. The level of the parties’ contribution in terms of investment and technology should be considered.

(66) See above footnote 13.
(67) Price-fixing activities of independent ship-brokers when fixing a vessel do not fall under this category.
(68) Guidelines on Horizontal Cooperation Agreements, cited above in footnote 6, paragraphs 144 and 148.
(69) Guidelines on the application of Article 81(3), cited above in footnote 7, paragraph 16.
(70) Horizontal Guidelines, cited above in footnote 6, paragraph 142.
(b) The economic efficiencies mentioned in (a) must benefit not only the members of the pool but also consumers in the sense that they must at least compensate the consumer for the loss resulting from the restriction of competition. The greater the restriction of competition, the greater must be the efficiencies and the pass on of benefits to transport users. For example, the lower cost base could translate into lower rates and/or more flexible terms. Pools could be a response to customer demand for a specific service.

(c) There are no less restrictive ways of achieving similar benefits.

(d) The pool must not be afforded the possibility of eliminating competition in respect of a substantial part of the services in question.