European Community Shipowners' Associations

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GUIDELINES ON THE APPLICATION OF ARTICLE 81 EC TO MARITIME TRANSPORT SERVICES

Tramp issues

The European Community Shipowners' Associations (ECSA) welcomes the opportunity to comment on the draft Guidelines on the application of Article 81 EC to maritime transport services – hereinafter referred to as the "draft Guidelines".

In this paper, ECSA's comments are limited to the section of the draft Guidelines that deal with tramp vessel services. The comments developed in the present paper will build further upon the arguments that ECSA has presented in its previous submissions, i.e.

- The Clarksons' report on the tramp shipping market (April 2004);
- ECSA's note on the required guidance for the application of EC competition law to tramp/non-liner shipping pools (November 2005);
- ECSA's replies to the Commission questionnaire on competition rules for tramp shipping (September 2006).

Furthermore, ECSA refers to the copies of anonymous pool agreements it has provided at the request of the Commission (DG Competition). Finally, ECSA refers to the invitations extended by some of its members to the Commission in 2005 and 2006 to visit tramp shipping companies and tramp pools to learn more about this sector.

Tramp vessel services, including tramp pools, have always been subject to EC competition law, i.e. long before the adoption of Regulation 1419/2006 granting enforcement powers to the European Commission with regard to these services. During this period there have been – to ECSA's knowledge – no complaints from charterers[1] with regard to this sector.

ECSA notes that the draft Guidelines provide guidance in terms of the criteria for market definition in relation to tramp vessel services. They also provide guidance to assess pool agreements under EC competition law. In this respect, ECSA notes that the draft Guidelines consider that tramp pools are *per se* not in conflict with EC competition law, whilst acknowledging that individual pool agreements will always require a case-by-case assessment to test their compliance.

Summary of the ECSA key points

In this paper, ECSA has concentrated in particular on the qualification of the relevant market which applies to tramp shipping and on the assessment of pools within the context of Articles 81(1) and 81 (3).

With regard to the relevant market, ECSA feels that the Guidelines should take better into account that there is a substantial element of substitutability or interchangeability in tramp shipping on both the demand as well as the supply side, notably with regard to vessel type, vessel size, types of transportation contracts and geographic market.

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[1] A charterer is the entity that employs or hires the vessel.

It is also essential to understand that, as a consequence of the tendering nature of tramp shipping and the prominent role of brokers, tramp owners as well as pools are price takers and not price makers. The influence in the market of an operator or a pool has to be assessed at the start of the tendering process taking into account the capacity available in terms of time and place. This is a key point that comes back under the ECSA comments dealing with market share. An assessment over time of the activities of the pool is required and ECSA agrees that the factors listed in the draft Guidelines may give an indication of the parties' general position in the market.

In the assessment of tramp vessel pool agreements within the context of Article 81 it should be emphasised that the pool manager “manages” the fleet put into the pool in both operational and commercial terms and hence offers a joint product through a single pool entity. The tendering of vessels in the market is de facto ancillary to the pool manager’s managerial task of the service being offered. Individual owners on their part retain responsibility for the pure nautical/technical operation of the vessels. Pools provide a jointly “produced” service that is the result of a significant degree of integration of the parties’ activities. The authors of the Fearnleys Report appear to have reached the same conclusion. Thus, pool agreements should be assessed on a par with other forms of joint production or specialisation agreements.

ECSA believes that any reference to “price fixing” as a characteristic of pool functioning (and hence as a hardcore restriction of competition) cannot be sustained in the Guidelines as the agreement of the price between the pool manager and the customer is an inherent part of the service being offered and it is the subject of negotiation on a ship by ship basis according to the demand and supply conditions prevailing at that particular time.

If pools require to be assessed under Article 81(3), ECSA feels that given the purpose of pool agreements and its fundamental characteristics, the four conditions contained in this article are typically fulfilled to exempt pools. The fact that pools were established also to respond to the needs and requirements of charterers and have for decades operated without complaint bolsters this view. ECSA would, however, welcome more specific guidance on Article 81 (3) with regard to shipping.

It should, however, be noted that shipping pools do not constitute the majority of the tramp shipping markets. Indeed, most tramp vessel services are operated by many small entrepreneurial companies that compete with each other for cargo. ECSA would welcome a specific clarification in the Guidelines acknowledging this point.

Following this detailed submission, ECSA is – as always – prepared to co-operate further with the Commission services and to provide any further clarification required. ECSA hopes that this will result in a further clarification of the Guidelines.

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I. INTRODUCTION

Tramp shipping markets are global and highly competitive and they satisfy many of the characteristics of the perfect competition model. The commodity is homogeneous and entry costs are generally very low. Many companies compete for business with substitution taking place between the different vessel sizes and vessel types depending on market circumstances. Information flows also make the market very transparent. Business is mainly carried out on the basis of voyage charters, consecutive voyage charters, contracts of affreightment or time charters. The freight rates achievable in these markets are highly volatile, depending on market circumstances. Finally, tramp shipping markets are able to respond rapidly to market developments and to shippers' needs[2].

Shipping pools operate in every sector of the tramp shipping business. A "pool" is a collection of similar vessels, under different ownership, operating under a single administration. The pool manager manages the vessels as a single, cohesive fleet unit, collects their earnings and distributes them under a pre-arranged "weighting" system, while the individual owner is only left to conduct the nautical/technical operation of the ship. Pools are generally developed for two reasons. Firstly, they are set up to allow participants to provide the service levels that their major customers increasingly demand. Secondly, they aim at improving transport efficiency by special investment and increased ship utilization[3]. Pools operate in an environment of supply and demand where contracts are concluded based on tenders, rates are driven to a large extent by a spot market, buyers are large and sophisticated and brokers are offering an exceptional visibility of tonnage and conditions at any given time.

Tramp vessel services as well as tramp pools have always been subject to EC competition law, i.e. long before the adoption of Regulation 1419/2006 granting enforcement powers to the Commission with regard to these services. But –to date – they have not yet been subject to any complaints from charterers[4] or customers.

Moreover, as acknowledged in the Fearnleys Report, there is no indication that "*pools have historically ever been able to use their joint resources and combined market power to push prices up at any time in any segment of the industry. Far from it. Where there are pools, they operate as a single commercial entity in competition with other operators (both independent and pooled) and the freight rates show all the signs of responding to normal forces of supply and demand without the existence of pools apparently causing any distortions.*"

ECSA firmly believes that whatever the precise legal qualification of pool agreements would be under EC competition law, tramp pools should not be treated as hardcore restrictions of competition as, in fact, the reports suggest that these agreements are pro-competitive and welcomed by customers.

[2] Fearnleys Report, "The Legal and Economic Analysis of Tramp Maritime Services", February 2007, p 14-31. Clarckson Research Studies: "The tramp shipping market", April 2004, p 3.
[3] Clarckson Research Studies, p. 5
[4] Definition of charterer, see footnote 1.

II. SCOPE OF THE DRAFT GUIDELINES

As set out in § 1 of the draft Guidelines, they apply to the maritime transport services directly affected by the changes brought about by Council Regulation (EC) No 1419/2006, i.e. liner shipping services, tramp vessel services and cabotage.

In § 10, the draft Guidelines provide a definition of 'liner shipping chiefly by container' and 'tramp shipping'. However, in footnote 10, the draft Guidelines sets out that the Commission has – in addition to liner shipping and tramp vessel services – identified a third category of maritime transport services, i.e. 'specialised transport'. Specialised transport is characterised as involving the provision of regular services for a particular cargo type. The service is usually provided on the basis of contracts of affreightment (CoAs) using specialised vessels technically adapted and/or built to transport specific cargo.

Whilst the draft Guidelines are said to apply to maritime transport services, footnote 10 seems to give an impression that specialised transport services would not fall within the scope of the Guidelines and that the Guidelines would only apply to liner shipping chiefly by container and tramp vessel services.

ECSA, however, sees no reason why the Guidelines should not also apply to specialised transport services, particularly given the fact that agreements exist in relation to specialised transport that are very similar to the pool agreements to which the draft Guidelines in relation to tramp shipping would apply. In addition, specialised transport – which is not very well defined – is subject to the same rules as tramp and liner shipping and must therefore be treated equally. One could even argue that the term "specialised transport" is obsolete in competition law terms since no special rules exist anymore. ECSA would therefore welcome clarification of the Guidelines on this point.

III. MARKET DEFINITION

1. INTRODUCTION

To assess, for the purposes of Article 81 EC, the effects on competition of agreements between operators of maritime transport services, the draft Guidelines set out some general principles that undertakings offering these services may rely on in determining the relevant product and geographic market(s).

ECSA agrees that the Guidelines should aim at establishing general guidance on which tramp (pool) operators may rely on and supports a case-by-case assessment, guided by the principles to be established in the Guidelines.

2. PRODUCT MARKET DEFINITION - DEMAND-SIDE SUBSTITUTION

a. Starting point for product market definition

The draft Guidelines suggest in § 20 that in considering the definition of the relevant product market from the point of view of charterers, one should start from the "*main terms*" of an individual transport request, considering the aspects of that request which are negotiable and those which are non-negotiable. The negotiable elements may indicate a wider relevant product market than initially laid down in the transport requirement. The draft Guidelines mention vessel type and vessel size as possible negotiable elements.

The approach outlined in § 20 is – in ECSA's view – correct insofar as it recognises that, from the charterer's point of view, vessel type and vessel size and possibly other "essential

elements" of a transport requirement are not necessarily decisive. Depending on the specific circumstances, two or more vessel types may be substitutable, as may be vessels of the same type classified within different standard industrial sizes. What will tend to matter most is whether a competitive freight rate is offered.

Most other aspects of the transportation requirement are, in principle, also negotiable and may be amended by the charterer depending on the circumstances at hand. These include, for example, the cargo volume/size, as well as possibly the load and discharge port and laydays. The only aspect of a transportation requirement which clearly is not negotiable – from a charterer's point of view – is the cargo.

A charterer will, before going to the market and then again once operators bid for the transportation contract, consider a broad range of alternatives in an effort to minimise the total transported cost of the cargo. The charterer may - depending on how rates for different vessel types and sizes compare at that point in time - consider as possible substitutes different vessel types, different vessel sizes (including splitting a cargo lot between two smaller vessels instead of a larger one), or even different suppliers of product and different load ports.

Given this broad frame of reference, ECSA believes that it would be more accurate if the starting point in the Guidelines to define the relevant product market – from a charterer's viewpoint – would be the type of cargo for which transportation is required.

In § 26 of the draft Guidelines, the Commission refers to vessels which may be considered as "captive capacity". ECSA would point to the fact that vessels owned or bare boated by charterers (oil companies, grain houses, ore exporters, steel industry, etc.), will enter the spot market regularly to reduce empty ballast return voyages. Such ships may also be re-let for extended periods when they are surplus to requirements. In ECSA's view the cargoes carried by these vessels as well as the vessels must be included in the relevant market.

b. Demand-side substitution and segmentation based on vessel type

The draft Guidelines do not provide further guidance on the circumstances in which demand substitution between vessel types may warrant a broadening of the market definition.

According to the case law of the Community courts, the relevant market (from the demand-side) comprises all those products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (Case 322/81 *Michelin v Commission*). On that basis, the Commission has concluded that distinct markets exist for container liner services and (refrigerated) bulk transport (decision of 16 September 1998 in Case IV/35.134 - *Trans-Atlantic Conference Agreement (TACA)*). It reached that conclusion given that bulk transport only to a marginal extent is a substitute for containerised transport and no lasting substitution is noted from container services to bulk services.

From the charterer's point of view, switching between vessel types takes place, mainly in response to variations in freight rates or the availability of tonnage. A charterer may in response to a better rate or faster availability of tonnage decide to switch to a vessel of a different type than indicated in the transportation request, as long as that vessel is technically able to carry the cargo. In the majority of cases it will not entail any significant disadvantage.

Switching between vessel types takes place in the dry bulk market but also in the liquid bulk market.

In the dry bulk market, commodities, such as coal, steel or iron ore, are transported on four generic vessel types, i.e. capesize, panamax, handysize or handymax ships. As these vessel types are, in principle, capable of carrying all types of dry bulk commodities, they are substitutable with each other.

Liquid bulk cargoes and vessels are more differentiated. Vessel types may be distinguished by reference to the product they most typically carry (e.g. chemicals, petroleum, crude oil, LPG/ethylene etc.) and within some of these categories, vessels may be further distinguished based on technical characteristics (e.g. IMO classes for chemical carriers, clean and dirty petroleum products, refrigerated and pressurized LPG vessels, etc.). But these distinctions do not – in ECSA's view – necessarily lead to the existence of distinct relevant markets from the demand side.

From a technical perspective, liquid bulk vessels are able to carry more than one type of cargo and there is significant overlap between the different categories. For example, crude oil – in addition to being carried in crude oil tankers – can be and is also carried in clean petroleum product tankers and combined carriers. Dirty petroleum products can be and are carried in all types of tankers with the required heating systems installed. IMO 3 chemicals can be and are carried on chemical parcel tankers as well as clean petroleum product tankers. These possibilities for substitution also exist within categories that include different types of highly specialised vessel types. For example, LPG can be carried in semi-refrigerated, fully-refrigerated vessels or pressurized LPG vessels. All chemicals can normally be carried on chemical parcel tankers to the extent that the holds are equipped to carry the required IMO class of product. Last but not least, liquid bulk cargoes may also be carried by pipelines. So, the degree of substitution between types of transport is widened.

Based on the above, ECSA is of the opinion that where the degree to which substitution between vessel types occurs is sufficiently significant to act as a competitive constraint on the behaviour of operators, it should be taken into account in relation to the definition of the relevant product market.

Furthermore, ECSA would add that, for certain segments, substitution towards containerised shipping plays an increasingly important role. That is true for the transportation of break-bulk cargo, but substitution can be observed even in relation to traditional bulk cargo such as grain, coal or iron ore. The Commission appears to have recognised this in its decision in *TACA,* where significant one-way substitution from bulk shipping to liner shipping was observed. That raises the question whether liner shipping might act as a significant constraint on operators and owners in certain segments of the tramp shipping industry and therefore should be included in the relevant product market. ECSA suggests that it might.

However, whilst there has been substitution towards containerised liner shipping, cargo may well move out of containers again over time. With the current historical large orderbook for bulk carriers, it is very likely that there will be a moment when there is significant overcapacity in the bulk market which will drive down freight rates to such levels that it will be more attractive to move back to bulk carriers. Shippers will continue to compare alternatives and move from one mode to the other.

Apart from freight levels, other issues – such as logistics – play also a role. For example, in the reefer market, cargo packages have been moving from specialized reefer vessels to containers but also back from containers to specialized reefers. The two modes compete on a continuous basis. As the world specialized reefer fleet is slowly reducing – while at the same time the world container fleet is growing at levels exceeding 10% per year – it is logical that an increasing share of the total refrigerated cargo is carried by container lines. But depending on issues such as – but not limited to – transit times, production areas, location of ports, cargo sensitivity as well as schedule reliability, shippers are moving cargo back into specialized reefers from containerised liner shipping. The fruit trades from New Zealand are

an example. A number of years ago the trade was on its way to be completely taken over by container lines but now the market share of and total volume carried by specialized reefer vessels is increasing on a structural basis. There are various other trades (e.g. from Chile, South Africa and Central America) in which shippers opt to ship their cargo on a combination of container lines and specialised reefers. Apart from the reasons mentioned above, they also benefit from the competition between the modes which helps to ensure that they achieve competitive freight levels.

c. Demand-side substitution and segmentation based on vessel size

Similarly, the draft Guidelines do not discuss in any detail the circumstances in which charterers' substitution between vessel sizes would warrant a broader market definition.

In ECSA's view, two main factors play a role in this respect. Firstly, chain substitution effects as charterers will generally consider vessels at the extremes of segments to be directly substitutable. Secondly, the possibility for charterers to switch between segments in circumstances where peaks and troughs in freight rates renders this economically attractive.

As regards chain substitution effects, looking at vessels within a given size segment (e.g. dry bulk panamax vessels), the vessels included typically cover a relatively broad size range (in the case of panamax vessels, from approximately 50,000 dwt to 80.000 dwt). Although the smallest vessels and the biggest vessels within a segment generally will trade at different rates, operators of larger vessels may "down-trade" to compete with smaller vessels and charterers may accept to pay higher rates for a smaller vessel where it is the most suitable offer, given factors such as cargo size or waiting time. Since fleets are highly mobile, the exact mix of supply that a charterer will face at any given point in time is impossible to predict beyond the short term and vessels within a segment are generally substitutable. Although there is a relatively clear distinction between vessel classes[5], freight rates are not significantly different at the extremes of each size segment. There is therefore no clear breaking point between classes when considering only the applicable freight rate. That means that vessels at the extremes of adjacent segments constrain each other in terms of pricing, and charterers will generally consider vessels to be fully substitutable at this level (e.g. a small panamax is substitutable for a large handymax and vice versa, and a large panamax is substitutable for a small cape size and vice versa).

Shippers of coal and iron ore are often able to choose between panamax and capesize vessels. They can ship lots from 60,000 to 160,000 mt depending on freight cost and availablity of vessels.

Even where vessels are not directly substitutable by reason of their size, charterers may nonetheless be in a position to switch and thereby constrain vessel owners and operators. Firstly, the charterer may decide to adapt the cargo volume to optimise the use of the vessel and thereby minimise the transportation cost. Secondly, cycles in freight rates may lead to situations in which it is economical for the charterer to split a large cargo volume between two smaller vessels.

The above in ECSA's view means that strict segmentation of the market based on vessel size is not as a general rule warranted. ECSA would in this respect also refer to the sections of chapter 3 in the Fearnleys Report which underline the strong price competition between vessel sizes in many of the segments considered.

[5] Although even this is constantly moving and some would argue that for example the panamax class includes vessels of up to 100.000 dwt.

d. Demand-side substitution and segmentation based on type of transportation contract

In addition to possible segmentation of the product market by reference to the "*main terms*" of a transportation requirement such as cargo volume vessel type or vessel size, the draft Guidelines suggest in § 21 that the type of transportation contract (time charter, voyage charter and contracts of affreightment) may warrant further segmentation, unless the demand-side considers the services provided under these different types of contracts to be substitutable.

Although there are important differences between the types of contracts, ECSA's view is that - as a general principle - segmenting the product market on this basis is neither warranted, nor practical.

On the demand-side, charterers will at any given time consider how best to cater for their transportation needs and each charterer's preference at any given time will depend on a number of factors. These include the volume to be transported and the nature of the underlying supply contract, the level of freight rates at a given time, and the mix of transportation contracts the charterer already has entered into. For example, a charterer may prefer to take less exposure to freight rates that are going up or already are at a peak and therefore seek transportation in the spot market on the basis of a voyage charter, rather than enter into a time charter or a COA. In different conditions, he may prefer to negotiate a longer term COA, which provides a more balanced freight rate and fixes his cost for a certain period and certain volumes. Finally, he may prefer to take a vessel on time charter for a longer period, for example to take advantage of depressed freight rates.

These dynamics mean that there is no constant demand for any given type of contract and that rates and conditions that can be negotiated for any of the above types of contracts necessarily are inter-dependent.

Given the above, segmentation of the market according to the type of contract is in ECSA's view not - or only in exceptional circumstances - warranted, something which ECSA would suggest needs reflecting in the Guidelines.

3. PRODUCT MARKET DEFINITION - SUPPLY-SIDE SUBSTITUTION

The concept of supply-side substitution implies that suppliers not presently offering the products or services defined as the relevant market from the demand-side, may switch production to the relevant products or services and market them in the short term, without incurring significant additional costs or risks, in response to small and permanent changes in price. When these conditions are met, the additional supplies will have a disciplinary effect on the competitive behaviour of the other companies in the market that is equivalent to that of demand-side substitution. In other words, supply-side substitution may lead to products or services being included in the market which are not substitutable from a demand-side perspective.

In its Notice on the definition of the relevant market, the Commission has stated that "demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions".[6] However, it accepts that in the circumstances spelled out in §§ 20 to 23 of the Notice competitive constraints arising from supply-side substitutability may be considered sufficiently immediate to be taken into account for market definition purposes on equal level with demand side

[6] Commission notice on the definition of the relevant market for the purposes of Community competition law

substitutability. In ECSA's view, those circumstances are present in relation to tramp services and supply-side substitutability should be recognised as a prime factor in defining the relevant product and geographic market(s). ECSA would encourage the Commission to bring this out as clearly as possible in the Guidelines.

a. Substitution of vessel type

In considering the relevant product market from the supply-side, the draft Guidelines suggest starting from the physical and technical conditions of the cargo to be carried and the vessel type.

As regards the physical conditions of the cargo, the draft Guidelines refer by way of illustration to the distinction between liquid and dry bulk for which switching generally is not possible (except for Ore/Bulk/Oil combined carriers OBOs). As regards the technical conditions, the draft Guidelines refer by way of example to clean and dirty petroleum products and the fact that tankers require cleaning in order to switch between the two.

However, if a vessel can be adjusted to transport different cargos at negligible cost and in a short timeframe, the relevant market will include those additional cargos too. That is for example the case for dry bulk vessels which can switch between coal and grain with a simple one-day cleaning process done during a ballast voyage.

The Commission then goes on to explain that where the vessel is of a type that is technically adapted and/or specially built to provide "specialised transport services", they will tend to be at a competitive disadvantage and their ability to compete in other markets may therefore be limited. However, this seems to be too broad a generalisation. For example, a Pure Car and Truck Carrier (PCTC) or a Roll-on/Roll-Off (RoRo) vessel can transport different cargoes without any additional cost at all. For example, these "specialised" vessels can transport any type of vehicles, other non-containerised cargo on mafi/roll trailers/rubber tyre bogeys, or lift cargo on bolsters as well as carry containers.

In principle ECSA does not disagree with the framework proposed by the Commission but would point out that the number of vessel types that only carry one type of cargo due to technical adaptations and ensuing disadvantages in carrying other cargoes is very limited. This point is also reflected in the Fearnleys Report, in particular in §§ 93 and 97-98.

Given the above findings, ECSA is of the opinion that the suggestion in § 23 of the draft Guidelines that vessels that are technically adapted towards a given trade will only compete for one type of cargo seems to be too broad a generalisation. ECSA would therefore suggest amending the wording to reflect this.

b. Substitution of vessel size

The draft Guidelines also discuss substitution between vessel sizes from the supply-side. The Commission suggests that substitutability will be limited where either there is a significant mismatch between cargo volume and vessel size or where port and canal restrictions limit the ability of a vessel to trade. It is therefore necessary to ascertain whether each vessel size constitutes a separate relevant market. In carrying out that assessment, regard should be had to chains of substitution and pricing constraints that vessels at the extremes of the segments exercise on each other.

As regards factors such as draught limitations in ports and canals, this is in ECSA's view not - as a general principle - sufficient reason to define distinct markets for specific vessel sizes. Draught restrictions only play a role for the largest vessels and even then these limitations may be overcome. Vessels can be lightened or cargoes can be transhipped into smaller vessels (or even into pipelines). Already from the demand-side, therefore, substitution takes

place as charterers will weigh these possibilities as part of their overall logistic chain management, to decide what is most attractive from a commercial perspective.

4. CONCLUSION REGARDING PRODUCT MARKET DEFINITION

With regard to the product market definition, as set out in the draft Guidelines, ECSA would conclude by making the following suggestions:

- The Guidelines should spell out that the starting point to define the relevant product market – from a charterer's viewpoint – is the type of cargo for which transportation is required.
- With regard to demand-side substitution and segmentation based on vessel type, the Guidelines should take into account that – from the charterer's point of view – switching between vessel types is observed and takes place mainly in response to variations in freight rates or the availability of tonnage. Furthermore, the Guidelines should spell out that as substitution towards containerised shipping plays an increasingly important role, particularly with regard to the transportation of break-bulk cargo but even in relation to traditional bulk cargo such as grain, coal or iron ore, liner shipping might act as a significant constraint on operators and owners in certain segments of the tramp shipping industry and therefore should not be excluded from the relevant product market.
- With regard to demand-side substitution and segmentation based on vessel size, the Guidelines should reflect that two main factors play a role in this respect. Firstly, chain substitution effects as charterers will generally consider vessels at the extremes of segments to be directly substitutable. Secondly, the possibility for charterers to switch between segments in circumstances where peaks and troughs in freight rates renders this economically attractive. Consequently, the Guidelines should take into account that strict segmentation of the market based on standard vessel size is not warranted as a general rule.
- The Guidelines should reflect that strict segmentation of the market according to the type of contract is not - or only in exceptional circumstances – warranted.
- The Guidelines should take into account more clearly that supply-side substitution does play a significant role, in particular supply-side substitutability should be recognised as a prime factor in defining the relevant product market(s).

5. GEOGRAPHIC MARKET DEFINITION

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and 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.

As regards tramp services, the draft Guidelines start from demand-side substitutability, suggesting that ports provide the first orientation to define the relevant geographic market(s). From the supply-side, the draft Guidelines recognise that ports are generally substitutable as tramp services are not scheduled but respond to a specific demand. Nevertheless, the draft Guidelines go on to state that "*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*".

a. Substitution from the demand-side

It is clear that charterers generally will tender contracts for transportation between a given range of ports servicing the hinterland from which the cargo is sourced and ports servicing the hinterland to which the cargo is being transported. However, ECSA does not believe that port ranges or trades would be a meaningful way to look at the geographic markets. Such an

approach, which is known from the liner shipping sector, would be a far cry from the reality of tramp shipping.

As already noted, charterers will take into account a long list of factors in deciding how to procure the product they need. On the basis of these factors, the charterer will aim to optimise his logistics chain to the furthest extent possible, taking into account the market conditions at any given point in time with regard to for example commodity prices, sea freight, and inland freight, each of which undergo frequent changes. A charterer may have several sources of supply and different compositions of his logistics chain that are attractive and interchangeable, and will constantly rely on a mix of those options. Given these dynamics, ECSA does not believe that, even from the demand-side, segmentation based on port ranges is warranted for the purpose of geographic market definition.

b. Substitution from the supply-side

The Commission does not dispute that on the supply-side, there is a very high degree of substitutability between ports. As the draft Guidelines say, ports are generally substitutable as tramp services are not scheduled but respond to a specific demand. ECSA agrees with that analysis.

There also are no trading corridors of any significant relevance in these markets. While trade in certain products may be concentrated between different geographic regions, or some vessels may be used more for short-haul and therefore may be employed on a regional basis, tramp vessels can easily be – and are – redeployed between different geographic regions and, as explained above, between different cargoes. Rather than letting vessels sail only in a given corridor, tramp operators will attempt to maintain a portfolio of contracts that achieves a balanced position of vessels in the different regions where contracts are offered, so as to avoid (long) ballast voyages.

c. Conclusion regarding geographic market definition.

Based on the above, ECSA believes that supply-side substitution in these markets is sufficient to overcome any distinctions based on demand-side substitution (e.g. environmental or port or canal restrictions - however, as discussed above in relation to the product market definition, in our view these elements are not determinative from the demand-side either). Furthermore, it can be concluded that the relevant geographic market for tramp vessel services is, in principle, the global market. The global market in which tramp vessel services are generally being operated in is an element which – in ECSA's view – should be taken into account.

6. CALCULATION OF MARKET SHARES

As indicated in a previous ECSA submission[7], ECSA is of the opinion that in relation to tramp vessel services competition is *for* the market, not *in* the market. Customers tender their cargo for transportation and shipowners make their bids, often through brokers, following which customers will select the preferred offer. Regardless of whether shipowners compete for spot voyage contracts or for period contracts, customers are therefore in the driving seat. What matters when competing for a new contract is not whether a given shipowner has transported a large share of the given cargo in the past six or twelve months, but whether he has capacity available at the right time and place and is offering competitive terms.

As a consequence of the tendering nature of the tramp shipping business and the prominent role of brokers, tramp owners as well as pools are price takers and not price makers, even in situations where they might account for "shares of sales" of some significance.

Conclusion on calculation of market share

Against the above background, market shares calculated in terms of historic share of sales may in ECSA's view provide little or no information on competitive strength. Each time a transport contract is tendered there will be several competitors bidding, each of which may be equally credible irrespective of their share of sales by value or volume.

However, ECSA agrees that, depending on the specific service, one or a combination of the factors listed in § 32 a-e) may give an indication of the parties' market share and general position in the market.

IV. ASSESSMENT OF TRAMP VESSEL POOL AGREEMENTS UNDER ARTICLE 81(1) AND 81(3) EC

a. Introduction - Pool agreements anti-competitive by object?

The difference between tramp shipping pools and liner conferences cannot be emphasized enough. Liner conferences were allowed to fix prices and regulate capacity under Council Regulation 4056/86. In tramp shipping, contracts or cargoes are tendered for competitive bidding, mostly through brokers who have a very good view of the available capacity and the general conditions in the market. Prices are always subject to individual negotiations, including when a pool presents itself to the market as an entity. The bids submitted by a pool manager are not the result of prior agreements between the pool members of what terms and conditions should be offered. They are decided upon unilaterally by the pool manager, acting within its scope of authority. That authority is generally broad and only rarely will the pool manager need the consent of the participants, and only on certain aspects. That may be the case, for example, when very long term agreements are concluded that may expose the pool to a significant degree of risk.

In the Fearnleys Report, §§ 1927 to 1931 summarise the consultant's analysis of whether pool agreements contain hard-core restrictions of competition. The consultants' detailed analysis is set out in §§ 1505 to 1533.

In their analysis, the consultants rely on the Commission's Horizontal Cooperation Guidelines, in particular the sections dealing with *commercialisation agreements* and *joint production agreements*. They state in § 1508 that to qualify as joint commercialisation, pools

[7] The ECSA Note on Required Guidance for the Application of EC Competition Law to Tramp/Non-Liner Shipping Pools, November 2005.

would have to be concerned solely with the “selling, distribution and promotion” of the relevant services. Having analysed in detail the functions that a pool manager usually performs, they conclude in § 1524 that it would be wrong to view the vessel owners as providers of the service and pool manager as merely having a sale, distribution and marketing function. The key point in their view is that the establishment of a pool leads to the integration of the operational aspects of the transport service that is provided to shippers. Those operational aspects include for example planning vessel movements and instructing vessels, dealing with bunkers, port charges, towage fees, compulsory pilotage, agencies, commission payments, consular charges, and loading, stowing and discharging of cargoes. The owners only retain limited responsibilities, such as vessel maintenance, conformity with class and arrangement of ship inspections, ISM and ISPS compliance and other safety issues (§ 1518), as well as crewing. In other words, the consultants view pools as a form of joint production, with the consequence that the commercialisation of the services provided by the pool should be assessed as an inherent part of the cooperation, not as “price fixing” in relation to independently provided services.

As a variation on the same subject, the consultants discuss in § 1551 whether pool agreements could benefit from the principles set out in the Commission’s *De Minimis* Notice. It is common knowledge that the Notice does not apply to agreements that contain hard core restrictions of competition and so would not as a starting point apply to commercialisation agreements that involve “price fixing”. Given the conclusion above that pools should be treated as forms of joint production (of which commercialisation is an inherent element) the logical conclusion would be that pools with market shares below 10% do come within the scope of the Notice.

From an economical point of view, a pool creates a new market actor with a substantial fleet, reliability, etc. In a given market charterers might welcome such a development and it would therefore be wrong to assume that the creation of a pool is necessarily anti-competitive – it could very well be pro-competitive.

ECSA would welcome a clarification of the guidelines to reflect the above.

b. <u>Comments to the draft Guidelines</u>

The draft Guidelines describe the operations of a “standard pool” in § 62. In this respect, the Commission highlights the commercial management and operation that the pool manager is responsible for on behalf of all pool members. It also highlights the ability that pool cooperation offers of providing a service that responds to the needs of charterers with large COAs, and the efficiencies that pool cooperation may lead to in the form of amongst other reduced ballast voyages through careful fleet planning. ECSA generally agrees with this description.

However, the link apparently made in footnote 58 of the draft Guidelines between vessels in the pool being of similar type and the ability to cater for large COAs appears to omit one critical element in the equation. The fact that the pool disposes of vessels of similar type does not in itself create economies of scale or allow it to cater more effectively for these large contracts. It is only through the combination of the large fleet, the ability of the pool manager to manage this fleet exclusively and efficiently by striving to always achieve a balanced spread and optimised employment of the vessels, and the sharing between the participants of the significant financial risks, that allows the pool to perform these contracts in a manner that is efficient in terms of service level and cost.

ECSA also does not agree with the conclusion drawn by the Commission in § 62 of the draft Guidelines that “*although they market their services jointly, the pool members perform the services individually*”. The conclusion appears to be based solely on the fact that the so-called “nautical/technical operation” of vessels remains the responsibility of each owner.

Nautical/technical operation - as the Commission points out - involves matters such as safety, crew, repairs and maintenance. Clearly, that is not what makes up the transportation service. It is the quality of the nautical/technical operation combined with the elements described above – the ability to efficiently operate a fleet of vessels with a high degree of specialisation, flexibility and reliability - that charterers demand. In other words, the pool provides a jointly “produced” service that is based on the availability of the parties’ vessels/means of production. The authors of the Fearnleys Report appear to have reached the same conclusion.

The logical consequence of the above is that pool agreements should be assessed on a par with other forms of joint production or specialisation agreements. In particular, the cooperation between the participants to provide the jointly “produced” service may not necessarily restrict competition as such and the commercialisation of the service by the pool manager is no more than the direct consequence of the use of the vessels as jointly supplied means of production within the pool.

c. How to qualify tramp pools under EC competition law?

As mentioned above, tramp pools – contrary to liner conferences – do not fix prices or regulate capacity, which are hardcore restrictions of competition under EC competition law. In tramp shipping, contracts are tendered for competitive bidding, mostly through brokers who have a very good view of the available capacity and the general conditions in the market. Prices are always subject to individual negotiations, including when a pool presents itself to the market as an entity. It therefore seems inappropriate to talk of “joint sales” in the context of one service being provided by the pool. Quite clearly it would be different if the parties continued to hold themselves out to the market as individual transport service providers and used the pool to agree on commercial terms, but that is not the case. On this basis, ECSA firmly believes that tramp pool agreements may qualify as joint production agreements under EC competition law. ECSA would in this respect also refer to the Commission’s Horizontal Cooperation Guidelines, paragraph 90, which provides that agreements that “fix the prices for market supplies of the parties” do not as a rule fall under Article 81 (1) where “a production joint venture that also carries out the distribution of the manufactured products sets the sales prices for these products, provided that the price fixing by the joint venture is the effect of integrating the various functions”.

Nonetheless, the draft Guidelines provide that pools should be assessed as “joint selling arrangements, coupled with some features of joint production”. As a result, the guidance in the Horizontal Cooperation Guidelines that deals with joint selling, as a variant of a joint commercialisation agreement, and the guidance on joint production are therefore both relevant.

However, ECSA does not agree with the assessment, which appears to hinge on the idea that the technical management of a fleet amounts to the production of a transport and logistical service. This is clearly a misunderstanding.

Pools are indeed much more than a sales agency. Pools are a way of specialisation in and joint provision of services that allow the participants to achieve the critical scale and profile required to service the largest charterers and to improve efficiency generally. The pool manager has the exclusive authority to decide how to employ the vessels, which involves a very significant task of planning in addition to seeking out business opportunities and deciding which contracts or cargoes to bid for and on what terms, a role that is in many ways equivalent to the role of a chartering department of any individual operator.

Apart from marketing and selling the Pool’s services, a pool manager will usually have an operations department to coordinate the operations of the vessels in the pool (appointing and coordinating the activities of port agents/stevedores etc) that knows all the ins and outs of the

trades in which the vessels are employed and that instructs the vessels, communicates with shippers/charterers/port agents/stevedores and any other parties involved in performance of the services. There will be an owners' desk assisting the members with operational and technical issues. Furthermore a pool manager may have a vetting and/or quality department that works towards maintaining and improving the quality of the vessels as well as the services provided. The pool manager will have a trade analyst function as well as business development. Some Pool managers will have in depth technical knowledge in-house to assist the pool members when ordering newbuilding vessels.

Should the Commission, however, maintain its line of thought according to which tramp pools are no more than "joint selling arrangements, coupled with some features of joint production", ECSA would welcome clarification on what is meant by "aspects of joint production" and the impact this has on the assessment discussed below. As noted in the Horizontal Cooperation Guidelines, paragraph 141, "[a] further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another cooperation. This can for instance be the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation."

d. An assessment of pools under Article 81 (1) and 81 (3)

The following paragraphs set out ECSA's further comments on the Commission's analysis. These comments address the current text of the draft Guidelines and do not reflect ECSA's view on the proper assessment of pool agreements. Indeed, if the Commission agrees that pool agreements are in fact forms of joint production agreements, many aspects of the analysis addressed in the comments below would be likely to change.

Pools that do not fall under Article 81(1) EC

The draft Guidelines consider whether, in certain circumstances, a pool agreement may not fall under Article 81(1) EC at all. According to the Guidelines, that is only the case 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*".

The principle expressed above appears to be a variant of the principle expressed in the Horizontal Cooperation Guidelines. In § 143 of those Guidelines, the Commission explains that joint commercialisation agreements fall outside Article 81(1) EC "*if a cooperation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved.*"

Referring to the recent judgment by the Court of First Instance in Case T-328/03 *O2 v Commission*, the formulation used in the draft Guidelines appears to suggest that the Commission would only consider that a pool agreement does not trigger the prohibition in Article 81(1) EC in cases where the pool is justified by the parties' "complete inability" to individually offer the service in question. Such an approach appears to be too restrictive as, based on the above judgment, even in a situation where the parties could have offered the service individually but only with difficulty, a restriction of competition may not exist in the first place.

Members of a pool are rarely, if ever, in a situation of complete inability to provide maritime transport services at large. However, through the pool they provide an enhanced service, both in scope and in quality/reliability for which there is a clear demand and which, given the above factors, they could not reasonably be expected to provide autonomously or only to a significantly more limited extent.

In the draft Guidelines, the Commission provides one example of a situation in which Article 81(1) might – in its view – not apply at all - a pool set up to cater only for large COAs. ECSA questions this apparently very restrictive approach and wonders if the requirement that the pool does not engage in any other ancillary activities is justified. The purpose of a pool is to allow the members to achieve the critical scale and efficient operations required to perform the contracts from which large charterers are in demand. It would defeat the whole purpose of a pool if it were to limit its activities to large COAs and leave vessels idle when not employed under those contracts, since costs would be excessively high.

In addition to bringing out these general points, ECSA considers that it would add clarity if the Commission were to include at least one further example of an arrangement between tramp shipowners which does not fall under Article 81(1). Without at least one further example, the implication of the draft Guidelines is that the Commission considers that there are not, or may not be, any circumstances other than the narrow situation described in § 65, where a pooling or pooling-like arrangement falls outside Article 81(1). Such a further example is set out below.

In this example, a Manager manages a number of chartered dry bulk vessels. The vessels are chartered from owners who are in turn remunerated with a share of the net revenue produced by the Manager's trading of the ships in the market, at a rate set by a formula determined by the Manager. The relationship between the Manager and the owner is strictly at arm's length - the Manager is providing a service to the owner, trading its vessel in the spot market and seeking to maximise the profits it can generate for the vessel. The Manager takes a commission on the results of the operation and runs the pool as a distinct business.

The owners do not participate in the management of the fleet and have no say on how the vessels are employed. The interest for them lies in the access they gain to the expertise, market intelligence and scale of operations that the Manager has established.

It follows that the owners and the manager operate at different levels of the trade and that for the purpose of the service being provided they are not competitors. The arrangement may be considered as akin to an investment vehicle available to shipowners who do not have the expertise, market intelligence or scale to operate in the highly volatile spot markets and so prefer to delegate that task to a manager. These forms of pools are intended to allow owners to enter their vessels into the spot markets, on individual, short term contracts. The spot markets are characterised by potentially high rewards but also by potentially high risks, since returns depend upon the market price at any given time (which is outside owners' or the Manager's control); they are also characterised by unpredictable and irregular demand.

Equally, individual owners are too small and inexperienced to operate in the derivative FFA market to provide their own hedging against risk. These arrangements allow individual, often smaller shipowners to participate in the spot markets and to choose the degree of risk that they wish to take, matched by a potential reward. Whilst any ship owner could, in theory, participate in the spot market, even with a single vessel, in practice the risks of a doing so are so great that this is not a viable option.

Agreements of the sort described above are in ECSA's view vertical agreements and would seem not to restrict competition in the absence of other vertical restraints or possibly other specific circumstances. Furthermore, where small companies are involved, typically owning no more than one or two vessels and with no chartering department, these pools are a means for them to trade the vessels in the market in circumstances where they would not otherwise have done so.

Pools that generally fall under Article 81(1) EC

In this category, the Commission considers pool agreements between competitors that have as their object to fix prices, limit output or share markets or customers.

Subject to the comments above regarding pools that do not come within Article 81 EC in the first place, the approach suggested by the Commission of regarding pools as commercialisation agreements rather than joint production or specialisation agreements, is likely more often than not to lead to a conclusion of infringement under Article 81(1). ECSA disagrees with this approach.

ECSA considers that a distinction needs to be drawn between "price fixing" as a classic hard-core restriction on the one hand and the agreement of prices with customers as an important, necessary but secondary feature of pools. The pool manager's agreement on prices with customers is not the object but a necessary consequence of the pool arrangement, in the same manner as described in the Commission horizontal guidelines paragraph 90.

In its ordinary meaning "price fixing" implies the setting of a price by several independent entities who towards the market give the impression of offering individual competing prices. If those entities combined have market power, the implication is that the market price would have been lower had the price not been “fixed”. In the draft Guidelines, the meaning of the words has been extended to include the situation where individual owners integrate their operations to offer one joint transport service (including offering one price) through the pool manager, regardless of the pool’s market power.

ECSA would like to question that notion. First, the pricing by a pool manager is the result of integrating operations and offering one service. Second, pools are generally not able to *set* a price as most tramp shipping markets are bidding markets and pools are therefore price takers, not price makers. It is unlikely that prices would be lower had it not been for pool managers “setting” the price. The reason for that is that brokers offer shipowners and pool managers the possibility to bid for cargoes and the lowest bid will win, whoever made the offer. In the absence of pricing power, behaviour which impacts on the establishment of a price, even if it could technically be characterised as “price fixing” (quid non) should not cause competition concerns. Against the above, ECSA believes that it is unfortunate and incorrect if pools are defined as “price fixers” and considers that there should be a distinction between price fixing as the hard-core restriction and the pool manager’s bid for cargoes.

Pools that may fall under Article 81(1) EC

Under this category the Commission considers pools which do not have as their object any of the restrictions listed above but which may nonetheless restrict competition, e.g. by reducing rivalry between the pool members and between pool members and third parties. The Commission goes on to note some of the other factors that may be relevant to take into account in this assessment.

With regard to the nature of the agreement the draft Guidelines provide that regard should be had to clauses prohibiting members from being active outside the pool. Regard should also be had to the extent to which commercially sensitive information is exchanged that may give rise to spill-over effects. Finally, regard should be had to links between distinct pools.

ECSA would welcome clarification by the Commission on the manner in which these factors are to be assessed. For example, will a non-compete clause always be deemed to bring the agreement within Article 81(1), including when such a restriction on the parties’ commercial freedom is necessary, for example to avoid free-riding or during an initial start-up period where the pool members commit significant resources to the cooperation?

Certain types of commercial information are necessary to exchange as part of the integration of activities, such as information on the performance of each vessel in the pool and the pool’s

overall performance. Will the exchange of such information always bring the cooperation within Article 81(1) and is it relevant whether a non-compete provision prevents members from being active outside the pool (and therefore from using the information to coordinate independent activities)?

Assessment under Article 81(3) EC

The draft Guidelines give little guidance on the approach that should be taken to the assessment of pool agreements under Article 81(3) EC. Given the Commission's apparent inclination to treat pools as joint commercialisation agreements (with which ECSA disagrees), that assessment is all the more critical. As noted above, if one were to follow the Commission's assessment - *quod non* - the large majority of pool agreements would contain per se restrictions of competition and thus be caught by Article 81(1) EC irrespective of the market power of the pool.

ECSA wishes to stress that, to the best of its knowledge, charterers have not complained about the cooperation between shipowners in pools. Charterers appreciate the increased scale, efficiency, and flexibility that pools offer, and given the importance of the spot markets in creating liquidity, the competitive award of contracts through tenders, and the transparency created by brokers, charterers have no difficulty counterbalancing any perceived negotiating power of a pool or large ship owner.

To the extent that tramp pool agreements may be covered by the prohibition of Article 81 (1), it must be determined whether the four cumulative conditions set out in Article 81 (3) are satisfied. In this respect, ECSA believes that tramp pool agreements typically satisfy all of the four cumulative conditions set out in Article 81 (3). Below, ECSA will consider each of these conditions in turn.

i. *Economic benefits*

Pool agreements create efficiencies in terms of both cost and quality.

With regard to cost efficiencies, cooperation in pools enables the participants to make more efficient use of their vessels, to reduce ballast voyages and to achieve operational economies of scale without the need to invest in large fleets. The operation of a large fleet and the ability of the pool manager to unilaterally plan vessel employment means that a balanced spread of vessels can be achieved, which in turn leads to important reductions in the number of ballast voyages and idle time for vessels.

With regard to quality efficiencies, pools enable the participants to provide enhanced services in terms of flexibility, stability and reliability. Pools can respond quicker to customers' demands for transportation as a result of the global reach and spread of vessels that a large fleet under central management can achieve. By avoiding the need for individual participants to invest in large and expensive fleets and by sharing revenues, the risk associated with a highly fluctuating market is limited. As a result, services are more stable and reliable.

Other quality efficiencies achieved through pooling include the ability for large pools to substitute vessels in case of delays due to bad weather or congestion. The enhanced efficiency of operations (including the reduction in ballast voyages) also contributes to a more environment-friendly performance.

Finally pooling allows participants to respond to shippers' requirements for large volume and long term commitments. These large contracts (COAs) are typically entered into for periods of one to two years during which the carrier commits to transport cargoes for a fixed price per

unit/volume. Pools allow participants to provide tonnage as and when required for servicing these contracts.

ii. A *fair share to consumers*

Pools are primarily established to create efficient employment of vessels and to meet the requirements of customers and are as such a reaction to developments in the market. They allow shipping companies to meet the following demands from their customers:

- Output is increased at reduced cost as customers are offered a broader choice of service providers that are able to provide the flexibility and capacity required.
- Customers can use pools as a “one stop shop” grouping the capacity they require.
- As a result of security of supply, customers can plan their transportation schedule better, rely on just in time delivery and inventory management, and keep smaller stocks.
- Customers save time and money which they would otherwise need to spend on market research as pools of vessels of a specialist type or construction can provide a known reference.

It follows that the users of pools enjoy the benefits of improved services provided by a high degree of flexibility, stability and reliability as well as economies of scale. The fact that a fair share of the efficiencies generated is passed on to the users of the pool is also indicated by the absence of complaints by customers.

iii. *Indispensability*

It appears to us that a critical question to be addressed is whether the authority given to the pool manager to negotiate freight rates, which is a feature of most pools, is necessary for pools to function and achieve the efficiencies that justify their existence.

As mentioned above, one of the primary benefits of operating a pool is the ability to achieve critical mass without taking on excessive risks. Only pooling capacity, however, would not lead to any significant benefits in tramp shipping markets. Only with the exclusive management of that capacity by the pool manager can the benefits of a large fleet be exploited to the full.

By granting a pool manager the exclusive authority to manage the fleet, he will be able to plan the employment of each vessel and avoid conflicts between contractual obligations undertaken by the pool. He will also be able to present the pool as an entity to the market that is capable of credibly and speedily bidding for even the very large contracts. At the same time, he will be able to ensure that vessels not required for large contracts are efficiently employed in the spot market. And he will be able to judge when additional capacity is required and charter that capacity in on an ad hoc basis, without creating excessive overcapacity within the pool.

Can the pool manager perform these functions without offering one rate per contract to the market on behalf of all pool members? ECSA does not see how, at least not without giving up necessary efficiencies. If the pool manager shall be able to employ the fleet effectively, he must necessarily have the exclusive authority to decide which vessel to employ when and for what contract (so that he always offers the most competitive vessel for a cargo). Requiring that the pool manager should market different pool vessels towards a given transportation requirement would mean that the pool manager effectively bids against himself. Clearly, that would not work either and the pool members would have no assurance that employment and revenues are optimised or that attractive employment opportunities are fairly distributed.

In ECSA’s view, therefore, the *modus operandi* on which pools rely is necessary and offering one rate to the market is the result of integrating the fleets of the pool members.

It may be useful again to note that this is fundamentally different from the models which function in the liner shipping markets. Liner services are regularly scheduled on given trade routes. That means that the uncertainty about when and where a vessel will become “open” is taken away. Liner services which are chiefly by container involve the transportation of containers placed in slots on the vessel. That means that several operators can share capacity on the same vessel. In bulk shipping, that is as a rule not possible. Instead the whole vessel is chartered out (exceptions do however exist in relation to, for example, chemical parcel tankers). The combination of regular schedules and the possibility to share capacity on a vessel also means that each party to the cooperation can with much less difficulty market the shared capacity independently. All that is required is that he reserves capacity on the vessel. Taking inspiration from the capacity sharing arrangements in the liner markets therefore is of little (or no) use in considering the pools that operate in the typical tramp markets. The situation might be different for certain segments of what the Commission has termed specialised shipping, wherefore the scope of the present Consortia Regulation ought to be expanded so as to cover all relevant segments of the global shipping market.

In its Horizontal Cooperation Guidelines, section 5.4., the Commission explains that “*the efficiencies to be taken into account when assessing whether a joint commercialisation agreement can be exempted will depend upon the nature of the activity. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies.*” ECSA believes that, as illustrated above, the exclusive authority of the pool manager to negotiate freight rates is indispensable for the integration of the other functions of the pool manager and that this leads to substantial efficiencies.

In its Horizontal Cooperation Guidelines the Commission provides examples of the situations in which the conditions of Article 81(3) are likely to be satisfied and situations in which that is not the case. The example provided of a situation in which it would consider joint selling - including cooperation on prices - to be indispensable is in our view not particularly illustrative for tramp vessel operators considering whether a pool agreement is likely to be exempt, even though some of the elements the Commission highlights are certainly also found in relation to pools (low market shares of the parties, presenting the parties to the market as an entity with one “brand”, and facing large, powerful and sophisticated clients who for their major transport requirements do not want to deal with a multitude of small suppliers). Fundamentally, given the ad hoc nature of sailings in tramp markets and given the mobility of fleets, a pool cannot work without exclusive authority for the pool manager to negotiate contracts. ECSA wonders therefore if a better suited example could be given in the draft Guidelines of what the Commission would consider acceptable.

ECSA would encourage the Commission to include guidance on the above points in the final Guidelines, in particular to the extent that it maintains its view that pools are joint commercialisation arrangements.

iv. *No elimination of competition*

The Commission's Notice on the application of Article 81(3) provides that whether competition is eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on that competition. This analysis calls for an assessment not only of market shares, but also of the capacity of actual competitors to compete and their incentive to do so.

As explained above, pools operate in a spot or bidding market in which market share gives little or no indication of market power and in which even smaller players can credibly take part. Furthermore, having regard to the high degree of supply-side substitutability, the relevant market is likely to be broad and entry relatively easy. Added to this comes the role played by the global ship-broking community, providing market reports and instant information of available cargoes, and the presence a vast number of shipping companies (including single shipowners, rival pools and large vessel operators) competing for business. In other words, tramp shipping is a highly competitive market. Almost irrespective of a pool's market share, pool agreements therefore do not in ECSA's view entail a substantial elimination of competition. In this respect ECSA would also refer to the findings of the Fearnleys Report which states that "the evidence did not indicate that pools have historically ever been able to use their joint resources and combined market power to push prices up at any time in any segment of the industry. Far from it."