



University of Lund
School of Economics and Management
Department of Business Law

Fall 2009
Master Thesis, 30 credits

Business at Sea

Navigating through EU Competition Law

Sofie Gellin

Tutor: Boel Flodgren

Abstract

The shipping industry is of great importance within the European Union since approximately 90 per cent of the Unions external trade goes by sea. There have been several block exemptions that have enabled, and simplified for liner consortia to cooperate and on the 26th of April 2010 a new exemption will enter into force. This thesis focuses on this new exemption and its aim is to investigate under what forms liner shipping companies can cooperate after the new exemption has entered into force. To enable this, an extended legal method is used with a broad source material ranging from doctrine to case law, EU regulations and interviews with representatives for the shipping and competition law sector.

Initially a brief introduction to the history of shipping and EU competition law as well as the economics behind competition law is made. Following is a presentation of different forms of cooperation where cartels, liner conferences, joint ventures, consortia and information exchange agreements are mentioned. Also the possibility for leniency within the EU is discussed. Subsequently, the scope of the hard core restrictions cited in the new group exemption, price fixing, allocation of markets or customers and limitation of capacity or sales, are accounted for and referred to through case law which seeks to identify useful guidelines for non-deterrence of EU competition law. The scope and conditions for the new group exemption is then discussed. Throughout the thesis a discussion regarding the different matters is held and comparisons are made with US antitrust law and foremost economic theory.

Finally, the results of the thesis are presented with advices for how liner shipping companies and consortia should act in matters regarding horizontal cooperation after the new block exemption enters into force. Amongst these are the advices to expand the economic skills and focus of the liner shipping companies as well as to deepen information exchange programs.

Key words: Competition Law, Liner Shipping, European Union, Horizontal Cooperation, Consortia, Block Exemption

Preface

I would like to take this opportunity and thank those who have set aside valuable time to help me in the work with this master thesis.

First and foremost I would like to express my gratitude towards Anette Ryde, Head of Group Competition Compliance at A.P. Møller-Mærsk, who not only suggested several potential topics for my thesis but also took the time to meet with me on multiple occasions.

I would also like to thank Chris Bourne, Executive Director of the European Liner Affairs Association and Charlotte Landström Axelsson, Head of Division at the legal department of the Swedish Competition Authority, for answering all of my questions and allowing me to refer to their knowledge.

In addition, my tutor Boel Flodgren, former President of Lund University and Professor in law, deserves to be mentioned since she, in spite of my last minute inquiries, manages to give valuable comments regarding my work.

Last but not least I would like to thank my mother, Karin Gellin, for indefatigably proofreading and encouraging my work, even though neither competition law nor shipping lies within her area of expertise.

Abbreviations

CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
ECN	European Competition Network
EEA	European Economic Area
ELAA	European Liner Affairs Association
EU	European Union
ICC	International Chamber of Commerce
OECD	Organisation for Economic Co-operation and Development
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States

Table of Contents

1	Introduction.....	1
1.1	Objective of Thesis.....	1
1.2	Sources and Method	2
1.3	Delimitation and Terminology	3
1.4	Structure of Thesis	4
2	Initial Overview.....	5
2.1	The History of Shipping and Maritime Law	5
2.1.1	The Shipping Industry Today.....	7
2.2	The History of EU Competition Law	8
2.2.1	Exemptions from EU Competition Law.....	9
2.3	Competition Law and Economic Theory	9
3	Cooperation in Liner Shipping.....	11
3.1	Cartels.....	11
3.2	Joint Ventures.....	13
3.3	Consortia	15
3.4	Information agreements.....	16
3.5	Leniency Programs.....	18
4	Exploitative Conducts.....	21
4.1	Definitions of Relevant Markets	21
4.1.1	Relevant Geographic Market	22
4.1.2	Relevant Product or Service Market	24
4.2	Joint Fixing of Prices.....	26
4.2.1	Excessive Tariff Rates.....	26

4.2.2	Predatory Pricing.....	27
4.2.3	Price Discrimination.....	29
4.3	Limitation of Capacity or Sales.....	31
4.4	Allocation of Markets or Customers	33
5	Block Exemption for Liner Consortia	35
5.1	Scope and Aim of the Exemption	35
5.2	Exempted Agreements and Conditions	37
6	Summary.....	39
6.1	Conclusions	42
7	References.....	44

1 Introduction

“How inappropriate to call this planet Earth when it is quite clearly planet Ocean”

Arthur C. Clarke

Since time immemorial man has transported goods by sea. Today, the shipping of goods is an evident industry at the same time as it is an essential one since without it trading and business as known today would not exist. This is very much true in the EU since almost 90% of the union’s external trade goes by sea.¹ All the great seas are constantly travelled on by vessels carrying merchandise from one port to another and the legal regulations concerning this industry are, unmistakably, of great importance. Within the EU there are a vast number of rules regarding the shipping industry, this is not at least true for the rules on competition. Articles 101 and 102² of the Treaty on the Functioning of the European Union³ can both be applied to matters of shipping even though for the past 25 years there have been several group exemptions that could be said to have worked in the benefit of carriers. On the 26th of April 2010 a new group exemption for liner consortia will enter into force which will affect the continuous possibilities for horizontal cooperation within the liner shipping industry. This thesis is focused on the new exemption as well as the general rules concerning competition within the EU, notably article 101 and 102 and horizontal cooperation.

1.1 Objective of Thesis

The purpose of this thesis is to investigate the terms for liner consortia within the EU where focus will lie on the new group exemption that will enter into force on the 26th of April 2010 and the possibilities for horizontal cooperation. Shipping, as previously mentioned, is one of the largest industries in the world and a significant part of EU merchandises are exported by sea. This makes the subject highly relevant to European parties from an economic point of

¹ IP/08/760

² Previously Articles 81 and 82 in the EC Treaty

view and thus should the European law that regulates shipping within the community also be of interest. Since competition law is said to be extendedly based on economic theory some of these will also be accounted for in the thesis, mostly to provide rational arguments for either conducts by business parties or by the Commission.

To enable a deeper understanding for liner shipping and competition rules today a brief introduction to their history is necessary. An attempt will also be made to find what ambitions that lie behind EU competition policies⁴ and the group exemptions for liner consortia. Focus will not only be on *de lege lata* but discussions regarding *de lege ferenda* will also be conducted as will discussions on soft law, principles and practises performed within the industry and so called gentlemen's agreements. Since this thesis is produced in order to be of use to not only the academic world but also to parties within the shipping industry, I believe this view on rules and regulations to be crucial. This is also why I have chosen to use several representatives from the shipping industry and the work with competition law as references. This thesis seeks not to be a comparative study between different legislations, although comparisons with US antitrust law can sometimes be made with the purpose of clarifying a statement or conclusion.

Ultimately I seek to clarify under what forms horizontal cooperation between liner shipping companies can operate within the EU after the new block exemption enters into force.

1.2 Sources and Method

It can be argued whether or not law scholars have a particular method when performing research. Despite this I would like to state that in this thesis I implement what can be described as an extended legal method. This includes a broad use of legal, and other, sources of relevance, the processing and presenting of the facts and statements in the sources and the drawing of sensible conclusions from them whilst providing rational argumentation.⁵

³ Further referred to as the EU Treaty or simply EU, so is also the Treaty on European Union

⁴ In this thesis e.g. EU competition law is used in stead of the previous EC competition law because of the entry into force of the EU treaty.

⁵ Sandgren 2007 p. 46 et seq.

There is a wide variety of material in this thesis and, because of the nature of the thesis, most of them have a European focus. Existing EU legislation, ECJ and CFI case law and Commission decisions, preparatory work and other EU official documents such as memoranda, press releases and communications are all accounted for. Furthermore, other written materials in the form of doctrine on shipping and competition are frequently used. I have also included material that I have gained from interviews with representatives from the European shipping industry or from people who practise matters regarding competition law. I believe this to be of great importance since one of the aims of this thesis is to make it available and approachable in a general sense. I would like to highlight that all translations of non-English sources, including both doctrine and interviews, are made by me and thus should not the source itself be at fault for any potential factual or linguistic mistakes in this thesis.

The objectiveness of the material used is an important issue that must be addressed. I do believe that no information can ever be truly objective since it is always nuanced by the senders own opinions and values. I also believe that this should not constitute a problem since I am well aware about this and since I am convinced that the written material I have used at least have an ambition to be objective. Nevertheless, the interviews I have performed must be interpreted as subjective as they reflect the experience and opinions of people working in the industry. I do not think this makes them any less relevant to the thesis. On the contrary, they provide a professional insight that can never be gained through literature.

1.3 Delimitation and Terminology

Since the span of this thesis is limited, not all aspects of liner shipping within the EU will be accounted for. As mentioned earlier, focus will lie on the new block exemption for liner consortia and how it will affect horizontal cooperation between liner shipping companies as well as historical information to facilitate a deeper understanding of this. The first part of the thesis can be considered shallow by those who are well travelled in the world of shipping and competition law. Nevertheless I believe it to be important to enable a wider usage of the thesis.

Throughout this thesis, several sector specific terms are used. These are not always explained since I have made the assumption that recipients of this thesis have basic knowledge of both shipping, to some extent economics and competition law or at least have the possibility to, if necessary, themselves investigate the meaning of the terms.

1.4 Structure of Thesis

In the chapter subsequent to this, the history of both shipping and EU competition law is presented. Moreover, the composition of the European shipping industry today as well as the economic aspects that explains the aims of competition law is accounted for.

Following, in chapter three, are presentations of some of the different forms of cooperation that can be of importance and in chapter four exploitative conducts are demonstrated. The focus lies on the joint fixing of tariffs, limitation of capacity and allocation of markets and customers. In the succeeding chapter the new block exemption, its scope and conditions, is accounted for.

Subsequent to this is the analytical part of the essay where all the previously presented information is weighed against each other and conclusions are drawn. Here I seek to provide answers to what types of horizontal cooperation that can be used in liner shipping companies after the entry into force of the new block exemption. In the end, the conclusions are presented briefly.

2 Initial Overview

“The introduction of power-driven ships was perhaps the single most important nineteenth-century innovation which has since underpinned rising material prosperity in every part of the world. Through a long period of enlightened self-interest, international shipping served well with minimal influence by governments.”

Sir John N. Nicholson⁶

In this chapter a brief introduction to the history of shipping will be given as well as an introduction to the background to EC competition law and examples of how it has affected the shipping industry will be provided for. The purpose of this chapter is to present to the reader a deeper knowledge of the industry at large and thereby enable a more thorough understanding of arguments and information to come.

2.1 The History of Shipping and Maritime Law

Shipping is one of the world’s most international industries and has been for quite some time.⁷ Three quarters of the world is covered by water and according to history as we know it man has at all times travelled by sea in order to trade. In times passed, and to some extent today as well, it was often easier, and faster, to travel by sea.⁸ The transportation of goods was also more rapidly performed if it was completed by ocean.⁹ The first international maritime laws affecting the trade of persons and goods came with the Roman Empire and gained strength from the Pax Romana. After the fall of the Empire the independent states founded their own laws, but new internationally accepted principles soon entered the stage. Amongst these the Lex Mercatoria and the idea of consossement should be mentioned. In spite of, or because of,

⁶ Foreword in Farthing 1987

⁷ In this thesis, the term ”shipping” means ”the business of transporting goods and persons in ships from a dockside point across the sea for commercial purposes” (Power 1992 p. 1)

⁸ Farthing 1987 p. 1

⁹ In this thesis, the term ”transport” means ”the carriage of persons or goods from one place to another” (Power 1992 p. 93)

the increasing international trade, the leading maritime nations Spain and Portugal tried to gain exclusive right to travel the high seas in the 15th century.¹⁰ This led to an increase of protectionist ideas that to some extent still influence shipping. Even though it is evident that the shipping industry has changed since the days of the ancient Mediterranean states there are some old laws and principles that are still having an impact on how the shipping industry is functioning.

The perhaps most influential of these elderly principles is *Mare Liberum* that the Dutch lawyer Hugo Grotius presented in 1609, which came as a result of the above mentioned dividing of the oceans between Spain and Portugal. Grotius declared that the oceans should constitute a safe haven, away from protectionist measures and toll fees, and that all should be allowed to navigate freely upon the high seas.¹¹ Today, *Mare Liberum* can be interpreted as, amongst other things, the freedom to travel the oceans, the freedom to fisheries, the freedom to lay submarine cables and the freedom of the air space above the seas. All of the things mentioned can be considered as necessary for communication between nations and commercial trade.¹² One of the leading advocates for these principles of freedom is the ICC who supports the idea of non-protectionist seas.¹³ This is also promoted by the UNCTAD code of conduct, albeit its primary goal was to enable developing countries to enter the maritime transport scene.¹⁴

Protectionist ideas have always been around within the shipping industries and they are mostly promoted by the one holding the upper hand. An example of this, which has affected the European maritime scene, is the conditions given by the USA when providing the Marshall aid after World War II. It was demanded that 50 per cent of all merchandises delivered to Europe had to be carried by US ships.¹⁵ In spite of the plausible negative effects that this had on the European shipping industry the EU has also engaged in protectionist policy measures in order to limit the competition from rivals. Some of the measures taken have been different forms of taxation and subsidies, manning scales and foreign seamen's

¹⁰ Brodefors, Rinman 1983 p. 9 et seq.

¹¹ Sundin 1981 p. 13

¹² Farthing 1987 p. 11

¹³ <http://www.iccwbo.org/policy/transport/id2498/index.html>

¹⁴ Farthing 1987 p. 132 et seq.

¹⁵ Sundin 1981 p. 47

quota.¹⁶ It was in the 1970's that the EC brought shipping back onto the agenda. Most likely this was a consequence of the enlargement of the EC after which countries with a strong maritime tradition such as the UK, Denmark and Greece were included in the community.¹⁷ This leads to the question of EC competition law and shipping which is ultimately what will be dealt with in the thesis. Moreover the history of EC competition law will be considered below.

2.1.1 The Shipping Industry Today

Today, the shipping industry is a very large and dynamic industry. The major changes that have had a deep impact on the industry are the invention of power-driven ships in the 19th century and the introduction of large scale container shipping in the 1960's. These events have both revolutionised shipping and trade as conducted today would not be possible without it.

There is a large diversity of ship types and they vary vastly not only in size but also in equipment and loading possibilities. However, in large, there are two types of ships operating today. Bulk ships which include both dry and wet bulk and container ships where standardised containers are used internationally. These different types of ships can be operated in two different ways. Either as tramps, i.e. charter based, or as liners, i.e. after regular and advertised time tables.¹⁸ The initial costs of operating a ship are very large since ships are very expensive to attain and after attaining there are two fundamental types of costs, for the technical operation and the commercial operation. The commercial operation includes port and freight charges, daily running costs and the finding of cargo whilst the technical operation includes crew wages, repairs, quality of bulks, insurance and P&I club.¹⁹ Of course there are several unmentioned aspects of shipping costs although these presented are the main ones.

¹⁶ Thanopoulou 1998 p. 366

¹⁷ Power 1992 p. 135

¹⁸ Brodie 2006 p. 250 et seq.

¹⁹ Brodie 2006 p. 250 et seq. A membership in a P&I club enables the shipowner to gain protection against responsibilities which are not included in the insurance.

2.2 The History of EU Competition Law

The EU competition law of today dates back to the establishment of the Treaty of Rome on January 1 1958. In the treaty it was decided that agreements and concerted practices that restrict competition should be outlawed, as should be the abuse of a dominant position. The background to why this was decided can only be speculated in since the negotiation documents have never been published, although it is evident that inspiration has come from US and German competition law.²⁰ These, especially the German competition law, were in their turn influenced by the ordo-liberal school which had some of its most prominent scholars located in Freiburg. Ordo-liberals advocate that the state by legal measures should prevent monopoly from ascending and thus protecting small- and medium-sized companies as well as consumers in the free market.²¹ These thoughts are seen in the EU treaty where in Article 3 it says that the community “*shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy*”. The most important Articles are 101 and 102 EU who deals with cooperation between undertakings which seeks to distort competition and the abuse of a dominant position. The scope of these will be presented further.

EU competition law has developed immensely since the Treaty of Rome with the most prominent change occurring on the 1 of May 2004 when the modernisation reform entered into force. This decentralised the decisions regarding competition law from the Commission to the national authorities while determining the EC competition rules position as primary to national competition law and also established the ECN which is a non-optional cooperation forum for national competition authorities.²² The development of EC competition law is also a result of the vast amount of court cases that can act as guidelines for the interpretation of the legal text. Further in this thesis, legal cases will be much used in order to investigate the meaning of EU competition law.

²⁰ Weitbrecht 2008 p. 81 et seq.

²¹ Korah 2007 p. 103 et seq.

²² Norberg in Fejø (ed.) 2005 p. 13

2.2.1 Exemptions from EU Competition Law

The EU has enabled undertakings and groups of undertakings the possibility to be granted exemptions from the competition rules. Although, to be able to be granted exemptions there are several requirements that undertakings have to fulfil. According to Article 101(3) EU the undertaking in question must either improve the distribution of goods or promote technical or economic progress and provide a fair share of the benefit to consumers.

There are two types of exemptions, individual and group exemptions. Individual exemptions are quite rare and are most often granted by the Commission. Group, or block, exemptions are more common and the Commission grants agreements or categories of agreements exemption on a generic basis. Agreements that fall under a block exemption do not have to be notified to the Commission, although in most block exemptions there can be found policy recitals and market share thresholds which shall be followed and the Commission has the right to withdraw an exemption if this is not the case.²³ Even though the Commission is the most frequent granter of exemptions, today national authorities also have the power to, e.g., accept commitments between undertakings and order interim measures.²⁴ If an undertaking or group of undertakings is thought to act with anti-competitive means, they can be brought to proceedings to either the Commission or in a national court. It is always the plaintiff who bears the burden of proof, which can be considered a problem since smaller companies can lack the financial means to engage in such an activity.²⁵

2.3 Competition Law and Economic Theory

The economic view on the market is of much importance to EC competition law and the protection of the economic interest of the union's consumers is described as an aim of the union in the Treaty of Maastricht as well as in the Treaty of Amsterdam.²⁶ As described above the ordo-liberalists have had an impact on how EC competition law was created and they advocate a market where monopolies are non-existing. According to neo-classical economic

²³ Whish 2005 p. 166 et seq.

²⁴ Reg. 1/2003 Art. 4, Art. 5

²⁵ Reg. 1/2003 Art. 2

²⁶ De Matos 2001 p. 289

theory, social welfare is maximised in perfect competition i.e. when producers' supply and consumers' demand meet. A perfect market would in theory show that competition is advantageous because it generates lower prices, better products, a wider choice and greater efficiency than monopoly or oligopoly would.²⁷ Thus it can be said that the primary aim of competition law is to act beneficial to consumers by hindering monopolistic influences and making the common market more like a perfect market. This is in accordance with article 153 of the EU treaty where it is stated that the Community shall protect the economic interests of its consumers. Here a great difference can be seen between EC competition law and US antitrust law where the EU has a more interventionist approach. For example it has been stated in the US supreme court that "*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.*"²⁸ Even though this difference between EU and US competition law is established, there is some evidence to prove that the Commission is using a more case to case basis approach when deciding what can constitute unlawful behaviour. This will be presented further in the thesis as will some comparisons between US and EU competition law.

²⁷ Whish 2005 p. 2

²⁸ De Smet 2008 p. 359

3 Cooperation in Liner Shipping

“The essence of competition is that each producer should act independently on the market and not co-ordinate its behaviour with that of its rivals”²⁹

Even though the statement above can be seen as a general rule for competition regulations there are some results that follow cooperation that can be beneficial to consumers. To assess whether or not cooperation is unlawful is a difficult task and there are several different ways for shipping companies and others to cooperate. The ways that will be more closely introduced in this thesis are cartels, joint ventures, information agreements and consortia. Some of these are directly illegal, from a competition point of view, through their mere disposition whereas others are more difficult to assess. It can be rather problematic to prove an anticompetitive cooperation, especially when it takes the form of a tacit collusion or concerted practise and it is the accuser of the existence of a law-breaking undertaking who is the one that bears the burden of proof.

3.1 Cartels

A cartel is probably the most secretive form of horizontal cooperation there is because it is prohibited by most jurisdictions.³⁰ Since cartels are very likely to be forbidden the participation in one is often followed by great risk of exposure and the following consequences. Within the shipping industry cartels are quite common, mostly under the name of liner conferences. Liner conferences have been operating since 1875 and the opening of the Calcutta conference.³¹ Even though the EU group exemption for liner conferences was withdrawn in 2008, this form of cooperation is still in force in many parts of the world despite the fact that one of its primary goals is joint price-fixing.

²⁹ Whish 2005 p. 486

³⁰ Whish 2005 p. 453

In large, cartels behave like monopolists, adding the cost of coordinating members' activities, and their goal is to ensure and maximize their profit.³² The most common way to do this is through price-fixing, concerted practices, allocation of activities and market-sharing. Price-fixing can be performed through uniform tariff agreements, joint fixing of discounts, non-binding and recommended tariffs for the transportation of goods and discriminatory tariff rates. Also, concerted practices may include usage of a standard form of shipping documents and joint marketing³³ as well as regulation of capacity, allocation of cargo and distribution of losses and revenues, so called pooling agreements, and also market sharing which within liner shipping means the dividing of routes on a geographical basis.³⁴

Even though this is performed with the aim of maximizing profit, the potential financial gain must be weighed against the risk of getting caught. Thus, the more risk avert a transporter is, the less likely he is to participate in an illegal cartel. To further deter from cartel participation the EU has launched a leniency program which enables cartel members that collaborate with the commission a complete or partly reduction of fines.³⁵ In the EU, fines have increased significantly since the 1990's³⁶ and the commission has stated that "*The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement*".³⁷ Nevertheless, the sanctions for violating competition rules in the EU at large could be considered as not that severe in comparison to the US where a personal responsibility can be bestowed upon a person in the company that can be held responsible for the participating in a cartel with criminal penalties as imprisonment as a result. This is reality in some EU-countries today but it is nevertheless unlikely that it will be accepted as a punishment to be determined by the Commission.³⁸ The consequence that companies possibly thinks to be the most severe is the loss in good will that can come from a dispute with the Commission. A good reputation is difficult to gain and easy to loose and so this aspect is probably of most importance to commercial companies.

³¹ Benachio, Ferrari, Musso 2007 p. 2

³² Townley 2004 p. 123

³³ If not to impose the competition rules, it is important to differentiate the products when using joint marketing.

³⁴ Pozdnakova 2007 p. 45 et seq.

³⁵ C 298/11 para. 5

³⁶ Motto 2008 p. 210

³⁷ C 210/2 para. 19

³⁸ Motto 2008 p. 216

3.2 Joint Ventures

The amount and significance of joint ventures have increased during the past 30 years, much because of the market's demand for more flexibility and also for the companies' need for development, large investments and efficiency gains.³⁹ Even though there are several similarities between the joint ventures and cartels of liner shipping and many of the cooperation conducts are the same, the potential illegalities of joint ventures are more difficult to assess than those of cartels and there is a more case to case basis approach to it.

Joint ventures are more deep-going than pure cooperation agreements but not quite as elaborated as a fusion of companies. In general a joint venture is cooperation between two or more undertakings, the so called parents, who in order to achieve their commercial goals and earn a profit combine some of their operations.⁴⁰ It can be defined as;

*“an integration of operations between two or more separate firms, in which the following conditions are present: [...] (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry in to a new market”.*⁴¹

There are two ways of measuring whether or not a joint venture is restricting competition. First, it is necessary to investigate if the joint venture is likely to restrict competition between the parents, the so called internal competition. It is important to notice that this type of cooperation agreement can restrict competition between the joint venture and one or more of the parents which would give a negative effect on the market. Second, the external competition must be assessed. That is, if the joint venture changes the competitive structure on the market.⁴² The influence on the market may e.g. be a restriction of competition because of a decreased number of competitors or that the market responds to the new challenger by a

³⁹ Dragvoll 2005 p. 16

⁴⁰ Pozdnakova 2007 p. 162 et seq.

⁴¹ Quote by Joseph Brodley, found in Dragvoll 2005 p. 18

⁴² Pozdnakova 2007 p. 164

coordination of conduct or prices or simply that there has been a change in the power balance in the market.⁴³

In accordance with what has been stated above, there are some types of horizontal cooperation that are allowed because of their very nature. These are, for example, joint ventures that are not signified by cooperation between competitors, cooperation that includes an undertaking that could have been performed by one of the parties alone or cooperation that does not influence relevant competition in the market.⁴⁴ Even though these types of cooperation are said to be allowed, there are always exceptions and a joint venture can regard many different aspects that are all reviewed differently. Therefore it is important to, in an agreement or contract of cooperation, clearly notify what cooperation that is intended and be able to justify why it is necessary to enter the agreement and also how it can be beneficial to consumers.

When two or more companies cooperate in the form of a joint venture it is common for them to use ancillary restraints to lessen the risk for deterrence from the agreement. This is not per se illegal even though its aim is to restrict the possibility for competition between the parties. There are two aspects that need to be taken into account when testing the illegality of an ancillary restraint. First it has to be established that the ancillary restraint is necessary for the implementation of the operation. Second, it must be proved that the ancillary restraint is proportionate to the main operation.⁴⁵ It is the individual clauses of each agreement that are assessed and, as stated above, it is therefore necessary to carefully review the ancillary restraint clause.

Many of the types of cooperation within joint ventures are similar to the ones within a cartel and contain amongst others a common use of fleet and equipment which includes a joint scheduling of port calls and sailings. Rationalization agreements are also common with a joint use of e.g. legal, accounting and administrative personnel, a joint commercial policy and a dividing of operational expenses. Most often entrance possibilities and membership,

⁴³ Dragvoll 2005 p. 30

⁴⁴ C 3/02 para. 24

⁴⁵ Pozdnakova p. 175

the possibilities for exit from, and the duration of the participation of the joint venture are regulated to stabilize the cooperation.⁴⁶

Horizontal cooperation in the form of a joint venture can be beneficial to both consumers and the participators of the cooperation since its most common goal is to gain efficiency and at the same time make a profit. Nevertheless it can restrict competition and since it is assessed on a case-by-case basis the possible participants should carefully investigate the potential risks and benefits of the cooperation.

3.3 Consortia⁴⁷

The cooperation form of consortia has a lot in common with joint ventures and the terms are sometimes used as synonyms. The purpose of consortia is to enable its members to operate a service in the most efficient way by joining together and share some of the service aspects. Cooperation in the form of liner consortia came as a result of the containerisation of shipping and the requirements for technical innovation that followed. While liner conferences were focused on the common freight rate, consortia were focused on the rationalisation of service and many shipping operators were members of both liner conferences and liner consortia.⁴⁸ Since it is most often necessary to make large initial investments in the shipping industry, cooperation is often sought after and also often needed. As in joint ventures the cooperation often concerns the joint use of fleets, equipment, marketing and use of standard documents. Consortia may be defined as:

*“coalitions of several independent shipping lines seeking some form of co-operation in order to maintain profitability through rationalisation in the widest sense and to spread the expense of investment in container operations”.*⁴⁹

In the early days of consortia they resembled liner conferences more in the sense that they often had joint offices that handled the joint operations.⁵⁰ Today this is no longer the case and

⁴⁶ Pozdnakova 2007 p. 176 et seq.

⁴⁷ The source for this chapter has been Power 1992 p. 391 et seq. If another source is referred to, it will be marked in a separate footnote.

⁴⁸ OECD 2002 p. 25

⁴⁹ Power 1992 p. 391

consortia membership takes the form of a contract rather than a more deep-going on all levels cooperation with joint employees working for the consortia.⁵¹

As mentioned earlier, cooperation within the liner shipping industry has been around since at least the Calcutta conference but an increased number of cooperation could also be noticed after the containerisation of shipping. With the containerisation came the ability to handle a larger amount of cargo on bigger ships while at the same time reducing port time. Nevertheless, the amount of cargo that needed to be shipped did not increase at the same pace, thus fewer ships were needed and it became more difficult for shipowners to obtain the available economies of scale. Therefore cooperation increased.

3.4 Information agreements

Agreements to exchange information are quite common within all industries in general and perhaps within the shipping industry in particular since it is now forbidden to set common freight rates within liner conferences in the EU. It can be stated that two types of information agreements exist, the formal and the informal ones. The formal agreements are expressed in e.g. written or oral contracts and through decisions made by trade organisations, while the informal take the form of gentlemen's agreements, benchmarking and tacit collusions.⁵² The information exchanged often involve price information but can also be information about market conditions, methods on accounting, bookkeeping or the use of standardised legal documents as well as the volume of demand, level of capacity and investment plans of rivals. An information agreement is not illegal per se. On the contrary, it can be highly beneficial for consumers since it simplifies for producers to make rational and effective decisions on production and market strategies.⁵³

The illegality follows when the exchange of information has anticompetitive effects. For example when the information exchange is in fact a practise to monitor an illegal price fixing

⁵⁰ Power 1992 p. 391

⁵¹ Interview with Anette Ryde 2009-12-18

⁵² Whish 2005 p. 486

⁵³ Whish 2005 p. 486

within a cartel and reduce the possibility for its members to cheat or simply when the information removes uncertainty and simplifies parallel conduct between competitors.⁵⁴ Whether or not an exchange of information is illegal is determined on a case-by-case basis and depends on the structure of the market, the nature of the information and how the information has been exchanged.

Information agreements should be particularly monitored in markets with oligopoly tendencies, i.e. in a market where competitors are few and the products are homogeneous. This is because it is easier to coordinate behaviour amongst competitors in a market where consumers' options are restricted.⁵⁵ It is also important to look at the nature of the information exchanged and whether or not it can be considered as secret and if purchasers and sellers already have access to it. Information that is normally allowed is e.g. exchanges of opinion or experience, market research and statistical information. The age of the information is key as well is the question if the notification of e.g. a price rise is performed before or after the rise.⁵⁶ This is crucial for the risk of collusive behaviour and the general rule is that post notification of information that is over a year old is always accepted.⁵⁷ Another issue is how the information has been exchanged e.g. if it is done with periodic intervals or through a trade association. A more frequent information exchange performed directly between the players can be more suspicious from a competition point of view.⁵⁸ Thus the older and more public the information is and the more seldom it is exchanged, the less likely it is to infringe competition regulations.

The ELAA, European Liner Affairs Association, is a shipping trade association founded in 2003 to represent the liner shipping industry when the Commission announced that they were to review the block exemption for liner conferences and it was also the shipowners' spokesperson when the new block exemption for liner consortia was to be drafted. Today the ELAA represents liner shipping companies who together hold about 90 per cent of the world's container capacity. Its primary task is to maintain and develop the computer information exchange program it handles. Through it, aggregated data regarding all trades to

⁵⁴ Korah 2007 p. 297

⁵⁵ Whish 2005 p. 487

⁵⁶ Whish 2005 p. 487 et seq.

⁵⁷ Whish 2005 p. 487 et seq.

⁵⁸ Whish 2005 p. 488

and from the EU is made available to its members but also any interested party such as journalists or banks can receive information if they pay a fee and some of the information is available free of charge through the association's website.⁵⁹ Chris Bourne, who is the Executive Director of the ELAA says that the initial attitude from liner shipping companies towards the repeal of the block exemption for conferences was somewhat doubtful. Although he considers that the gain from the repeal, the data exchange system, should be thought of as one of the most important developments in liner shipping lately. Chris Bourne also highlights that the relation with the Commission has improved immeasurably and that the ELAA's members are very eager to comply with competition regulations why they have chosen to use a third party to compile the data and there is a constant dialogue with the Commission. The association's aim for the future is to, in a competition law obeying manner, further develop and intensify the exchange.⁶⁰

3.5 Leniency Programs

The EU leniency program is principally a question of the enforcement of Articles 101 and 102 EU but is nevertheless of most importance when it comes to horizontal cooperation. Competition authorities often have difficulties with finding evidence to break down e.g. hard core cartels since its participants have nothing to gain from revealing sensitive information.⁶¹ The Commission was determined to change this matter when they published a notice in July 1996 regarding the potential reduction or repeal of fines for so called whistle-blowers. This came as a result of the *Cardboard* case where several major companies in Scandinavia and Western Europe met regularly during a period of ten years and unlawfully set common prices which were approximately ten per cent above what the market price would be if there was no cartel. It was the cooperation with one of the cartel members that enabled the Commission to gain evidence and in the end break down the cartel.⁶²

In the published notice there were three levels of cooperation with the Commission that were officially identified. First, if an undertaking was the first to provide evidence of a cartel

⁵⁹ www.elaa.net/

⁶⁰ Interview with Chris Bourne, 2010-01-08

⁶¹ Van den Bergh, Camasesca 2006 p. 309 et seq.

before the Commission had initiated an investigation and immediately ceased participation in the cartel it could get a reduction of fines of between 75 and 100 per cent. Second, if an undertaking acted in this way after the Commission's investigation had begun the undertaking could benefit from a 50 to 75 per cent reduce in fines. Third, it was stated that all other undertakings that provided information and cooperation at a later stage could get a reduction of ten to 15 per cent of the potential fine.⁶³ This constitutes a major difference in comparison to the US leniency legislation where only the first undertaking that provides valuable information can benefit from a reduction in fines, a so called winner takes all-approach.⁶⁴

Since 1996 the notice has been revised twice although the latest, which was issued in 2006, bears great similarities with the first notice that was published. The changes that have been introduced are e.g. a more detailed description of what type of information that can grant a reduction in fines, a marker system which enables applicants for the leniency program to submit only a limited amount of information at first and also the notice defines the protection from disclosure of sensitive corporate information which is of great importance to undertakings.⁶⁵ The Swedish Competition Authority has a detailed web page where it is clearly notified what the leniency program consists of. It states that all initial information that comes to the agency is guaranteed an investigative secrecy and contact can be made on an anonymous basis. All information is available and applications can be written in English which should simplify for foreign applicants and thereby multinational companies.⁶⁶

The most severe and common criticism that is aimed at the leniency program is that there is no one-stop-shop for applicants. There are also no clear rules determining where, i.e. to which member state's competition authority, the application should be made if it is an international undertaking and applications must be made in each state that an undertaking wishes to be able to be granted a reduction in fines. As a consequence of this, high linguistic and legal skills are necessary for applicants who operate on an international basis.⁶⁷ Anette

⁶² Goyder, Albors-Llorens 2009 p. 179

⁶³ Goyder, Albors-Llorens 2009 p. 179

⁶⁴ Van den Bergh, Camesasca 2006 p. 310

⁶⁵ C 298/11 paras. 8-15

⁶⁶ http://www.kkv.se/t/Page_____913.aspx

⁶⁷ Schwab, Steinle 2008 p. 527

Ryde, Head of Group Competition Compliance at A.P Møller-Mærsk, agrees with this critique and advocates that a one-stop-shop for leniency applicants should be initiated as soon as possible. Ryde points out that the lack of a central authority for leniency application not only complicates and elongates the process of application but ultimately it can also deter applicants which should be the opposite of the intention with the program. It also poses a problem when undertakings discuss the content of contracts since it is problematic to determine where a potential leniency application should be done.⁶⁸ Charlotte Landström Axelsson, Head of Division at the legal department of the Swedish Competition Authority and leniency coordinator says that she can relate to this critique given by commercial companies but highlights that there is always the possibility for a central leniency application through the Commission even though uncertainty as to whether or not the application will be accepted follows. According to Charlotte Landström Axelsson there are some, although not that significant, differences between the leniency programs of the different EU member states and the exchanges and cooperation between the different is well functioning even though there is today no possibility for a central leniency application.⁶⁹

As mentioned earlier, the Swedish Competition Authority has the possibility for leniency applications being conducted in English. Even though this removes the language barrier for foreign applicants it does simplify that the application has to be conducted in multiple countries and it is not certain that all EU member states offer the same service with applications in English.

⁶⁸ Interview with Anette Ryde, 2009-12-18

⁶⁹ Interview with Charlotte Landström Axelsson, 2010-01-08

4 Exploitative Conducts

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”

Adam Smith, The Wealth of Nations⁷⁰

There are several ways in which a company or group of undertakings can break the competition rules of the EU. The three perhaps most obvious ones, and also the ones mentioned as hard core restrictions in the group exemption for liner consortia which is the main focus of this thesis, are presented below. In this chapter it is necessary to include Article 101 as well as 102 EU since the regulations mentioned in both is of importance to the assessment of whether or not an exploitative conduct is at hand. It is also of most importance to notice that EU competition law bans behaviours that *“have as their object or effect the prevention, restriction or distortion of competition”*.⁷¹ Thus not only the result of the undertaking but also its purpose is evaluated. By referring to case law an effort is made to define what guidelines that can be set from the rulings of the Commission and the ECJ which is of great importance when assessing what types of horizontal cooperation that can be allowed.

4.1 Definitions of Relevant Markets

To enable assessment of a possible exploitative conduct it is necessary to define the relevant market in which an undertaking operates and thereby determine if the undertaking is in a dominant position and has real market power. The Commission has stated that the purpose of defining the relevant markets is to identify the competitive constraints that operate on an undertaking.⁷² E.g. if an undertaking or group of undertakings is thought to act independently from the market, their impact on the market must be assessed in order to determine whether

⁷⁰ Quote taken from Van den Bergh, Camesasca 2006 p. 60

⁷¹ Article 101(1) EU

⁷² C 372/5

or not their conduct is unlawful. According to the ECJ market power in terms of independence from the market should be defined as:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and, ultimately, consumers.”⁷³

Consequently the definition of the relevant market is crucial when determining whether or not the undertaking in question has significant market power. Albeit this can be assessed in various ways which is presented below, and case law is used to highlight the different limitations regarding this.

4.1.1 Relevant Geographic Market

A natural limit for that which should constitute a relevant geographic market are the borders of the individual member states since this has normally been the commercial area in which competition is taking place. In early cases it was assumed that the relevant geographic market should consist of if not the entire area of the Community, at least no less than the area of an individual member state.⁷⁴ This assumption was first challenged in the early 1990's with the *Sugar Cartel* case when it was determined that a part of or a region in a member state can also constitute a relevant geographic market.⁷⁵

There are several aspects that have to be weighed against each other when determining if a relevant geographic market can consist only of a part of the member state. Ultimately, the barriers to enter the market are what have to be assessed. This can be done in several ways but there is some evidence that the Commission considers to be of great importance when determining the relevant market. These are the past evidence of diversion of orders to other areas, basic demand characteristics such as preferences for national brands, views of customers and competitors, the current geographic patterns of purchases, the trade flows along with patterns of shipment and the barriers and switching costs associated with the diversion of orders to companies located in other areas such as barriers that isolate national

⁷³ Quote taken from Van den Bergh, Camesasca 2006 p. 106

⁷⁴ Goyder, Albors-Llorens 2009 p. 303

markets.⁷⁶ Normally, the undertakings try to provide evidence for an extension of the market to include the entire Union since this would diminish their market share whilst the Commission makes effort to narrow it down often with the argument that undertakings organize their distribution arrangements on a national level and thus sees the individual member state as a market of its own.⁷⁷ This was proved in the case *French West-African Shipowners Committees*⁷⁸ and *United Brands*⁷⁹ where it was determined that individual member states constituted a significant geographic part within the common market. Nevertheless, a relevant geographic market can be determined as a significantly smaller area as was the case in *Sealink*⁸⁰ where the Commission decided that the port of Holyhead in the UK should constitute a substantial part of the common market since it provides one of the main links between two member states.

This view of the Commission where individual member states constitute relevant geographic markets has received some critique. It is considered unfair for the undertakings that operate in smaller member states since their market shares can never be as large as the market shares of the undertakings in larger member states merely as a consequence of their size. An example of this is when the Commission forbade Volvo and Scania⁸¹ to join together since they would hold a significant part of the market in Sweden and Scandinavia. It is suggested that the Commission should see the entire Community as the relevant market and thereafter determine whether or not the undertaking holds a significant market share in order to disable inequalities for undertakings in the Union.⁸² This view is partly shared by the Commission who has stated that they seek to enlarge the geographic market as a result of the approach of the realisation of the single common market, even though an individual assessment is still necessary.⁸³ As the Commission states in their *Notice on Market Definitions*:

⁷⁵ Goyder, Albors-Llorens 2009 p. 303

⁷⁶ Whish 2005 p. 42

⁷⁷ Goyder, Albors-Llorens 2009 p. 303

⁷⁸ Commission Decision IV/32.450

⁷⁹ Case 27/76

⁸⁰ Commission Decision IV/34.689

⁸¹ Even though this is a matter concerning the ECMR it is worth mentioning because of its relations with the definition of a relevant geographic market.

⁸² Bernitz, Gutu 2008 p. 20

⁸³ C372/5 para. 32

“it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission’s enquiries for the purposes of arriving at a precise geographic market definition.”⁸⁴

The conclusions that can be drawn from this are that the relevant geographic market is assessed on a case-to-case basis where several different aspects regarding the commercial area and the level of competition therein are of importance.

4.1.2 Relevant Product or Service Market

The relevant product market is possibly more difficult to define than the relevant geographic market since it is more consumer based and thus more subjective. Ultimately what has to be assessed is the interchangeability of the product which poses difficulties since there are few products that have no substitutes of any kind and the relationship between consumer demand, quality, price and availability is hard to analyse.⁸⁵ Even though interchangeability is most often examined from the consumer’s point of view, the demand-side substitutability⁸⁶, the supply-side substitutability is of importance as well. E.g. if suppliers are able to switch their production to other products and to market them in short-term without significant additional costs then the market may be broadened to include the products that those suppliers are already producing.⁸⁷

As when determining the relevant geographic market, the Commission has suggested that some evidence should be presented and available when making a case. These are the evidence of substitution in the recent past, quantitative tests such as those estimating own-price elasticities and cross-price elasticities⁸⁸, the views of customers and competitors,

⁸⁴ C372/5 para. 28

⁸⁵ Goyder, Albors-Llorens 2009 p. 304

⁸⁶ Key here is the SSNIP-test where SSNIP stands for ”small but significant non-transitory increase in price” which investigates customers’ reaction to an increase in prices. Goyder, Albors-Llorens 2009 p. 309

⁸⁷ C372/5 para. 20

⁸⁸ Own-price elasticities measure the change in demand for a product in relation to a change of its price while cross-price elasticities measures the difference in demand for a product in relation to a change of the price of some other product.

marketing studies and consumer surveys, identifying the barriers and costs associated with switching demand to potential substitutes and also recognizing different categories of customers and price discrimination i.e. the extent of a product market can be narrowed if a distinct groups of customers for a particular product can be distinguished.⁸⁹

There are several cases where focus is on the definition of the relevant product market. Some of the most famous are *Continental Can*, *United Brands* and *Michelin I*. These confirm what has been stated above concerning the demand- and supply-side substitutability and the presumption that the definition of the market is a matter of interchangeability. In *Continental Can* the ECJ ordered the Commission to examine “*those characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.*”⁹⁰ Similar to this, in *United Brands*, the ECJ stated that the matter if bananas could constitute a part of the market of other fruits depended on whether or not the banana could be “*singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible*”⁹¹. The ECJ later found that bananas constituted their own market, much because of the lack of interchangeability for it amongst elders and toddlers.

In both these cases the demand-side substitutability was key, although in *Michelin*⁹² the supply-side substitutability was considered primarily. After the Commission had decided that tyres for trucks and lorries were not interchangeable with tyres for light vehicles from a consumer point of view, they investigated whether a producer of tyres for heavy vehicles could easily change production and also produce tyres for lightweight vehicles. This was not the case and no cross-elasticity of supply was established.

To assess what constitutes a relevant product market consideration must be given to demand substitutability which is regarded as the most crucial but also supply substitutability and potential competition must be accounted for. Thus the evaluation of this is also made on a

⁸⁹ Whish 2005 p. 34

⁹⁰ Case 6-72 para. 14

⁹¹ Case 27/76 para. 1

⁹² Case 203/01

case-to-case basis and strict guidelines are relatively hard to interpret from the existing case law.

4.2 Joint Fixing of Prices

The joint fixing of prices is probably seen as the most obvious and undesired result of concerted practices between companies. In Article 101(1) EU it is stated that it is forbidden for agreements between undertakings to fix purchase or selling prices. Despite this, joint price fixing has been allowed within certain industries through group exemptions since it is sometimes thought to bring stability to markets which in the end will benefit the consumer. The most common ways to violate this rule is by fixing prices above or below the market value or by granting different consumers different prices.

4.2.1 Excessive Tariff Rates

Excessive tariff rates is perhaps what most would consider as the general consequence of a prohibited concerted practice and a common result of a monopolistic market structure. In accordance with Article 102(a) EU it is illegal to impose unfair purchase or selling prices when in a dominant position. Although it has not always been clear that excessive pricing should be unfair and therefore abusive. For example, in *United Brands*⁹³ the Commission issued a fine because of excessive pricing which was withdrawn by the ECJ. Nevertheless, this was because of an insufficient economic analysis by the Commission rather than an expression of tolerance for excessive pricing. It was considered that the mere fact that United Brands charged significantly different prices for their Chiquita bananas in Germany than Ireland did not constitute an abuse. The ECJ stated that a detailed cost analysis was essential and that there had to be an investigation of the difference between the cost and price for the product before excessive pricing and potentially an abuse could be determined. It was also reflected that a comparison should be made with the competitors pricing for the same merchandise, the so called yardstick competition.⁹⁴ One of the more remarkable results of

⁹³ Case 27/76

⁹⁴ Whish 2005 p. 691

United Brands is that the burden of proof was reversed like in the *SACEM* case where the ECJ declared that:

*“where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the member state concerned and the situation prevailing all the other member states”.*⁹⁵

Even though *United Brands* is one of the most famous competition law cases the results regarding excessive pricing are not that numerous with the most significant one being that excessive pricing can constitute an abuse and that it lies upon the undertaking to justify their pricing when it is high enough to indicate an abuse. This proves the difficulties that exist when assessing unlawful pricing which will be further discussed below.

4.2.2 Predatory Pricing

Predatory pricing is an unlawful behaviour which is signified by the object to eliminate, intimidate or punish competitors or to deter competitors from entering a market and where there is a lack of a genuine business interest.⁹⁶ At a first glance, predatory pricing can be considered as beneficial for consumers since it generates lower prices. Nevertheless, the prices are typically so low that the competition itself is threatened which in the long run could cause great damage to the market and thereby the consumers. The most common procedure of predatory pricing is when a firm that is dominant in several markets, the so called predator, decides to enter a new market. To be able to gain a significant part of this new market, the predator sets its prices below its competitors which ultimately lead the competitor to suffer losses in the short run and exit the market in the long run. Through this the predator finds itself in a dominant or monopoly situation in the new market and can restrict output and raise prices.⁹⁷ There are a vast amount of difficulties in assessing whether or not an undertaking is performing predatory pricing. This is because it has to be determined

⁹⁵ Case 242/88 para. 25

⁹⁶ Van den Bergh, Camesasca 2006 p. 280 et seq.

⁹⁷ Van den Bergh, Camesasca 2006 p. 280 et seq.

if there is an elimination of inefficient firms through a natural form of Darwinian process or if efficient firms are also eliminated because of an unlawful pricing.

*AKZO*⁹⁸ is the leading case when it comes to predatory pricing and it has set the standard for how unlawful pricing should be calculated. In the case the ECJ uses a version of the Areeda and Turner test which is a cost-price analysis and implies that unlawful prices should be presumed if prices are below SRMC⁹⁹ while prices above SRMC are always allowed. There are several problems with this. Amongst others the use of AVC¹⁰⁰ as a substitute for SRMC¹⁰¹ can be questioned, there is no difference made between fixed and variable costs and the time frame is not set. Despite this the use of AVC to determine unlawful pricing can now be accounted for and the Commission has stated that:

*“prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as a part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”*¹⁰²

A difference between EU and US competition law on predation can be identified since a necessity in the US but not in the EU is the possibility for the predator to recoup from its short-term losses. It is considered that a rational undertaker will not engage in predation in the absence of recoupment.¹⁰³ There has been some critique towards the EU regarding this and amongst others the OECD has declared that *“disregard of recoupment issues would risk wrongly condemning some pro-competitive and pro-consumer pricing as predatory”*.¹⁰⁴ To further develop this idea two opposing economic schools will be presented below. These are

⁹⁸ *AKZO* was an enterprise that had as its main focus was on trade with chemicals on the European market, including Great Britain and Ireland. When a smaller competitor from Great Britain and Ireland decided to enter the European market, *AKZO* tried to prevent this through interim measures and threats. They were later imposed to pay a major fine by the ECJ.

⁹⁹ Short Run Marginal Cost

¹⁰⁰ Average Variable Cost

¹⁰¹ Which was the case in *AKZO*

¹⁰² Case 62/86 para. 72

¹⁰³ Ezrachi 2008 p. 135 f.,

¹⁰⁴ Whish 2005 p. 691

the Chicago school economists who consider predation to be irrational and the advocates of Game Theory who thinks that predatory pricing is a rational strategy.

According to Chicago School there are three reasons as to why predatory pricing should not be sought after by dominant firms. First, since prizes are cut, short-run losses are evident even though the total loss will vary depending on how long it takes for the prey to exit the market. Second, even though the prey exits the market, the predator has to keep the low prices to unable new competitors from entering the market. Thus in the absence of barriers to entry, the new found monopoly position will not enable the predator to earn super-competitive profits. Third, predatory pricing can never be profit-maximising since mergers are always better from this point of view.¹⁰⁵ As far as Game Theorists are concerned, predation can be a rational strategy as long as it is not widespread. Although for this to occur it takes capital market imperfections such as lack of perfect information or an extensive reputation that the predator prefers to fight for market-entry or that the predator holds more information than its prey and is therefore able to influence the prey's expectations about future profits.¹⁰⁶

4.2.3 Price Discrimination

Price discrimination is closely related to predatory pricing and the essence of price discrimination is to sell identical products with identical costs at different prices or to sell similar products which are in different ratios to their marginal costs.¹⁰⁷ This is in direct conflict with Article 102(c) which states that abuse may consist in “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”. The mere charging of different prices is not necessary unlawful since administrative costs, costs of transportation and other handling costs must all be accounted for when assessing whether or not illegal pricing is in progress. This further emphasizes the need for an accurate evaluation of the relevant market. It is also not the potential random price discriminations that are primary but the systematic price discriminations that are conducted by dominant firms. According to economic theory there

¹⁰⁵ Van den Bergh, Camesasca 2006 p. 281 et seq.

¹⁰⁶ Van den Bergh, Camesasca 2006 p. 281 et seq.

¹⁰⁷ Van den Bergh, Camesasca 2006 p. 254

are three conditions that have to be fulfilled in order for a firm to enable making price discrimination a profitable strategy. First, the firm must possess some market power. Second, the firm must have information about the consumers' reservation prices, i.e. how much they are willing to pay for a product. Third, there can be no possibilities for arbitrage, i.e. competitors should not be able to buy the product to a lower price elsewhere, transport it to the market, sell the product below the established price and make a profit. This gives an explanation to why price discrimination most often occurs for services or goods that cannot be stored.¹⁰⁸ There are several types of price discriminations of which geographic price discrimination and rebates and discount systems will be mentioned further.

In *United Brands* the enterprise was accused of charging discriminatory prices on a geographic basis, e.g. the Danish customers paid 2.38 times the price for bananas in comparison to the Irish customers. According to United Brands this depended on a commercial decision based on an analysis of what each market could bear although the ECJ was of the opinion that this was not a justification for the different prices.¹⁰⁹ It is not very clear to what extent an undertaking may set prices on a supply and demand basis but it seems that this would be more allowed the more risk the undertaking takes at the local or national scene and since United Brands handled their selling centrally from Rotterdam this was not the case. The conclusions drawn by the ECJ in this case have received substantial criticism much because of the vague definition of the involvement in local markets that has to be achieved.¹¹⁰

The granting of rebates or discounts is a form of price discrimination which has as its aim to encourage customers to do business with a supplier on a regular basis. This enables the supplier to plan its profit in a long-term perspective which is often sought after and it is a practice that is most commonly used legitimately, especially in markets where there is active price competition. A discount is normally a percentage reduction of the price of a good or service whilst a rebate is an aggregation of discounts which often offers retrospective cash payments based on the quantity purchased throughout the year or other fixed time period.¹¹¹ The most obvious negative consequence of rebate systems is the exclusion of rival suppliers

¹⁰⁸ Van den Bergh, Camesasca 2006 p. 254-55

¹⁰⁹ Case 27/76

¹¹⁰ Goyder, Albors-Lorens 2009 p. 324-25

and there are three types of exclusionary effects that can be identified. First, rebates offered to consumers who would consider changing their supplier can lead to exclusion in one market. Second, rebates offered to a consumer if buying products from a neighbouring market together with the products from the mail market can lead to exclusion on a horizontal level. Third, rebates offered to retailers in order to discourage them from selling the products of a competitor can lead to exclusion on a vertical level.¹¹² The assessing of illegal rebate systems is done on a case-by-case basis. In the *Hoffman-La Roche* case the ECJ made a clear distinction between quantity rebates, i.e. those related to the volume of the products purchased, and loyalty or fidelity rebates, i.e. those rebates that aim to discourage customers from using a rival supplier. It was established that loyalty rebates were per se illegal whilst quantity rebates would per se be allowed.¹¹³ Although this was later rebutted in *Michelin II* when the CFI ruled that a quantity rebate should be unlawful since it was functioning as a loyalty rebate system and Michelin failed to prove that the system was based on objective economic reasoning.¹¹⁴ Another famous case regarding rebates is *British Airways* whose goal related discounts were ruled unlawful by the CFI since it was probable to have a fidelity-building and exclusionary effect.¹¹⁵ To summarize, it can be stated that the conclusions from the Hoffman-La Roche case are still valid, although there must always be an unambiguous economic justification even behind quantity rebates.

4.3 Limitation of Capacity or Sales

Refusal to supply is often used interchangeably with the limitation of capacity or sales and it can be that this refusal to supply or e.g. granting of use of an essential facility is held as an abuse. It is in conflict with article 102(b) which states that “*limiting production, markets or technical development to the prejudice of consumers*” can be unlawful. Even though the refusal to deal has several plausible negative effects, it is nevertheless a controversial and difficult topic within competition law. First because it is a general rule in most legislations that companies should be able to conduct business with whom they choose and second

¹¹¹ Goyder, Albors-Lorens 2009 p. 327

¹¹² Van den Bergh, Camesasca 2006 p. 262 et seq.

¹¹³ Case 85/76

¹¹⁴ Case 203/01

¹¹⁵ Case 95/04

because there can be several legitimate reasons for choosing not to supply to a certain consumer. E.g. the consumer might be a bad debtor, that there is a shortage of stocks or that production has been disrupted. Third, forcing a dominant undertaking to supply can be economically disadvantageous since so called free riders can benefit from large investments that have been initiated by others.¹¹⁶

The first case regarding refusal to deal was *Commercial Solvents*. This was a dominant producer of a chemical product and even though the relevant patents had expired, it was still very difficult for other companies to enter the market, much because of the high costs for research and development and manufacturing installations. After merger talks between the company and a smaller firm had broken down, Commercial Solvents significantly raised its prices on its product. This was ruled as unlawful by the ECJ since the behaviour had no commercial reason and the object was to eliminate competition which would have a negative impact on the competitive structure of the market.¹¹⁷

Also regarding this matter *United Brands* is a leading case where refusal to supply was used as a disciplinary measure. Here United Brands tried to prevent a Danish distributor from taking part in a rival's advertising campaign and ultimately selling its products, i.e. the company sought after single branding. Even though the ECJ found that it was in order for a dominant company to meet competition it considered that United Brand's behaviour was an excessive response and thereby established a general rule that undertaking's response to competitive pressures should be appropriate and consist of no more than what is necessary with regard to the circumstances.¹¹⁸

There is a so called essential facilities¹¹⁹ doctrine which was established through the Commissions ruling in *Sealink*. Sealink was the owner of the port of Holyhead and because of their beneficial role, they operated so that their competitor was given sailing schedules which significantly caused the company and its customers inconveniences. The Commission then stated that the owner of an essential facility can not refuse to grant access to the facility

¹¹⁶ Whish 2005 p. 663

¹¹⁷ Case 7/73

¹¹⁸ Case 27/76

¹¹⁹ An essential facility is a facility or an infrastructure without which companies can not provide service to its customers.

or grant access on less favourable terms to competitors in order to improve its own position.¹²⁰ There are several different ways in which a company can limit its capacity or sales. Mentioned above is the refusal to supply used a disciplinary method and as a method to try and restrict competition. It is established that a refusal to supply is allowed if there are sustainable commercial reasons for it, although these have to be legitimate and justified by the undertaking restricting access to products or services. Although, this tends to be more problematic when the limitation of service regards an essential facility.

4.4 Allocation of Markets or Customers

The allocation of markets and customers is not necessarily negative from the perspective of competition. On the contrary, this could be considered as a benefit to consumers since one of the basic economic theories is based on the using of allocative efficiency. Simplified this means that the producer that can supply a good to the lowest marginal cost will produce it.¹²¹ This would be beneficial to consumers since the most eligible producer will provide the good and thus the prices will be kept at a lower price level. Nevertheless, it is not this type of allocation that is prohibited according to EU Competition Law. Article 101(1)(c) EU states that it is forbidden to “*share markets or sources of supply*”. Market sharing agreements are often more scrutinized by the Commission than other types of agreements since they tend to result in barriers being created between member states, which to a high degree affect trade within the Union.¹²² The European Commissioner for Competition, Neelie Kroes, has also stated that “*market sharing is one of the worst types of antitrust infringement*” which clearly shows how the Commission regards these types of agreements.¹²³

One of the most recent cases regarding illegal market sharing is *E.ON/GDF*¹²⁴ which started with a German and a French electric gas company jointly building a pipeline to import Russian gas to their respective home countries in 1975. The parties agreed not to sell gas transported through this pipeline on each others home markets in two letters. The parties also

¹²⁰ Commission Decision IV/34.689

¹²¹ Goyder, Albors-Llorens 2009 p. 9

¹²² Pozdnakova 2007 p. 86

¹²³ IP/09/1099

¹²⁴ Commission Decision COMP/39.401

kept implementing this agreement after the European gas markets were liberalised in 2000 and at least until 2005 even though they according to the Commission were aware of the illegality of the letters. The parties meant that they since long had considered the letters as null and void but nevertheless failed to prove this to the Commission who judged that their market sharing agreement had helped them keep a dominant position which had worked in detriment of consumers. The Commission imposed major fines on all companies involved.

Even though market sharing, as mentioned earlier, is a natural part of liner consortia and conferences competition can still exist with e.g. consortiums providing different routes for transport of goods to the same port. Because of the existence, or potential existence, of competition within the shipping sector market sharing agreements can be held illegal even though these types of agreements operate under a group exemption. In *CEWAL*¹²⁵ three liner conferences agreed that their members should not act as outsiders and thus compete with the conferences on their respective routes. The commission decided that this agreement had as its aim to restrict competition within the Union and thereby ruled it to be unlawful. It was contravening with article 101(1)(c) since the undertakings were dividing the European Atlantic coast into several areas and thus dividing the market between them in a manner that worked against the consumers. This case shows that market sharing can be ruled to be unlawful even though it is normally considered to be allowed through e.g. a group exemption. If one or more undertakings are to divide markets or customers between them it is of most importance to justify this division from a consumer benefit point of view since it otherwise is thought to be merely a measure to solidify ones own market position.

¹²⁵ IV/32.448, IV/32.450, IV/32.448, IV/32.450

5 Block Exemption for Liner Consortia

“Having discounted the possibility that consortia would be either technical agreements or conferences and thus outside any exempting provisions, the Commission decided that it was necessary to specifically exempt consortia agreements”¹²⁶

Already when the first block exemption for liner conferences entered into force in 1986 discussions regarding consortiums need for a specific exemption came to be.¹²⁷ It was generally thought that liner shipping consortiums provided stability to the market and that it was mainly acting beneficial to customers. On February 25th 1992 the Council of Ministers adopted regulation 479/92 which provided a block exemption for liner consortia. This was later amended through regulation 870/95 which was repealed when regulation 823/2000 entered into force in April 2000. The new block exemption for liner consortia, regulation 906/2009 will enter into force on the 26th of April 2010 and is the main focus of this thesis. The scopes and aims as well as the conditions that have to be fulfilled in order to be granted an exemption are presented below.¹²⁸

5.1 Scope and Aim of the Exemption

The scope of the exemption is found in Art. 1 which states that the exemption is only applicable to consortia if they provide shipping services *“from or to one or more Community ports”*. As far as the aims and purposes of the exemption are concerned, there are several reasons given in the regulation with one of them being that a quite vast modification of the previous regulation 823/2000 was needed. The most obvious reason for this is because all references to the former block exemption for liner consortia must be removed since it is no longer in force. Also a modification was necessary to enable to unify it more with other block

¹²⁶ Power 1992 p. 396

¹²⁷ Power 1992 p. 396

¹²⁸ When further referring to articles and paragraphs in this chapter it is the articles and paragraphs from regulation 906/2009 that are intended.

exemptions for horizontal cooperation.¹²⁹ It is also stated that consortia are most often beneficial to consumers since they “*generally help to improve the productivity and quality of available liner shipping services*”. The improvements that amongst others are mentioned are improvements in the frequency of sailings and port calls, improvements in scheduling, being able to offer better quality and personalised services as well as more modern vessels and port facilities much because of the possibilities to make use of economies of scale.¹³⁰ These are thoughts that can be traced a long way back in the history of EU competition law and ultimately what grants consortia its group exemption since the main thought is that it in the end should benefit the consumers of the Union which is also noted in the regulation.¹³¹

One of the most noteworthy aspects of the regulation is how it acknowledges that “*the legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service*”.¹³² Thus the Commission has not only the mission to try and distinguish the role of the different consortia participants legally but also financially. This can pose major problems if there is a discord between the responsible in the legal document, the agreement or contract, and the de facto situation regarding investments and dividing of operational costs. This can also act as evidence that the Commission, notably in questions regarding competition, is taking a step towards a more economic based approach. Anette Ryde at A.P Møller-Mærsk and also Chris Bourne at the ELAA agrees with this and believes that the Commission in the future will take, what can be seen as, a more US-like attitude and seeing more to what the economic damages or profits are rather than what potential or actual distortions in competition may appear, even though they will always play a central role.¹³³

¹²⁹ Para. 2

¹³⁰ Para. 5, 6

¹³¹ Para. 5, 6

¹³² Para. 3

¹³³ Interview with Anette Ryde 2009-12-18, Interview with Chris Bourne 2010-01-08

5.2 Exempted Agreements and Conditions

Agreements that can benefit from this exemption must first of all work as consortia. In the regulation this is defined as:

*“an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements”.*¹³⁴

Thus to be able to benefit from the group exemption, a consortia must be international, improve the services that would have been offered in the absence of the consortia and also operate in the manner of the defined liner shipping. The services that are allowed are first joint operations such as coordination of time tables, exchanging of slots or space on vessels, pooling of vessels, use of joint operation offices and provision of containers, chassis and other equipment or the rental, leasing or purchase contracts for such equipment. Second, capacity adjustments as a response to fluctuations in supply and demand are allowed. Third, joint use of port terminal and fourth other activities such as the joint use of computerised data exchange system and to some extent the exclusion of third parties are also exempted.¹³⁵ Nevertheless there are some hard core restrictions which consortia cannot have as object. One of these is of course the fixing of prices. The others are allocation of markets or customers and the limitation of capacity or sales although the capacity adjustments in response to fluctuations in supply and demand is as mentioned allowed.¹³⁶ It is here worth noting that, as stated above, it is allowed, if it is necessary to implement the consortia, to use different forms of exclusions of third parties. This could account for a limitation of sales which according to art. 4 should not be allowed.

¹³⁴ Art. 2

¹³⁵ Art. 3

¹³⁶ Art. 4

Another condition that has to be fulfilled is that there is an absence of penalties for members who wish to withdraw from the consortia. Thus the ancillary restraints cannot consist of e.g. an obligation to stop all transport activities on the routes travelled by the consortia. There are though time frames for notice periods that should be respected by the exiting party and these differ from six to 34 months depending on whether it is a highly integrated consortium or not.¹³⁷ This could constitute a problem if a dispute is to rise since there is no definition as to what a highly integrated consortium is. Although it can be assumed that it is a consortium which has operated for a longer period of time and cooperates on many different levels.

The one major thing that differentiates 823/2000 from the new regulation is the conditions relating to market share. In the previous the market share of the consortium should not exceed 35 per cent, whereas in the new regulation the *combined market share* of the *consortium members* should not exceed 30 per cent. This is a stricter calculating of market shares and it includes not only the market shares within the consortium in question but also within other consortia to which members are a party and outside consortia if members on some routes act as independents. This is also to be calculated within the relevant market which has been accounted for in the previous chapter and can cause severe problems when trying to define it.

That which can be interpreted as the crucial point of the regulation can be seen in the initiating paragraphs where it is stated that only necessary restrictions are allowed. It is said that “*this regulation should not exempt agreements containing restrictions of competition which are not indispensable to the attainment of the objectives justifying the grant of the exemptions*”.¹³⁸ Ultimately this should mean that if the restriction can be justified as beneficial to the consumer then it is allowed. Even though this is the demand that has to be fulfilled in order to be granted an exemption under 101(3) EU it should nevertheless be easier for a consortia member to follow the exemption regulation in order to avoid a potential dispute with the Commission.

¹³⁷ Art. 6

¹³⁸ Para. 8

6 Summary

The aim of this thesis was to investigate under which forms of horizontal cooperation liner shipping companies can function after the new block exemption for liner consortia enters into force on the 26th of April 2010. To be able to provide an answer to this, it is necessary to examine the relation between on the one hand the new group exemption, and on the other hand the previous decisions regarding what constitutes an illegality when it comes to competition law. An introduction to shipping and competition law was made initially to ensure the readers basic knowledge of the subject. This showed that economics play a significant role in the world of competition law since many of its theories and core thoughts are represented within that part of the law.

Throughout the thesis economic theory is presented as a way of arguing for why the law is formed the way it is and how unlawful behaviour can or cannot be rationally explained. The importance of economic factors has traditionally been more of a US phenomenon although its significance has gradually increased in the EU and in the new group exemption the Commission states that *“the legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service”*.¹³⁹ Thus the conclusion can be drawn that economic factors will be of most importance when assessing whether or not unlawful behaviour is being conducted and liner shipping companies should see to that they have the necessary expertise to regard these aspects. This is also important when being able to evaluate the liner shipping companies’ market share which cannot exceed 30 per cent according to the new group exemption.

The type of cooperation that is the most significant for this thesis is liner consortia. This form of cooperation has a lot in common with both joint ventures and cartels, or liner conferences, as it is called within the shipping industry. Although, to be able to benefit from the exemption the consortia has to operate on an international level to or from one or more

¹³⁹ Reg. 906/2009

community ports whilst improving services that would otherwise be offered individually by its members. Nevertheless, there are some hardcore restrictions that cannot be the object of the agreement.

First, price fixing is forbidden, although case law has proven that the types of price fixings mentioned should in theory sometimes be allowed as long as they are justifiable. Excessive pricing should be the hardest to justify if it is not proven that transportation costs are remarkably high which is rarely the case. Predatory pricing on the other hand, can be economically justified for an undertaking if the predator has more information than its prey and it must be proven that it is the predator's intention to eliminate competition. When it comes to price discrimination geographic discrimination can be justified in the same way as excessive pricing. Loyalty rebates are per se illegal whilst quantitative rebates can be illegal if its intent is to function as a loyalty inducing rebate. Even though illegal price fixing can be alluring in a short term perspective, the risks are probably larger than the potential benefits, not the least because the burden of proof, which is normally the Commission's, can be reversed and laid upon the undertaking.¹⁴⁰

Second, the limitation of capacity or sales, that can also be called a refusal to deal, with the exemption for capacity adjustments as a result of fluctuations in demand and supply is unlawful. Especially if refusal to deal is used as a method for eliminating competition, as a disciplinary method or if an undertaking is the sole provider of an essential facility. Although it can be allowed if the undertaking can prove that there are sustainable commercial reasons for refusing to deal. Nevertheless, in accordance with the block exemption for liner consortia, the exclusion of a third party can be allowed since "*to refrain from chartering space on vessels belonging to third parties*"¹⁴¹ and "*not to assign or charter space to other vessel-operating carriers in the relevant market*"¹⁴² is used as examples of exempted agreements even if it is also required to prove that the measures taken are necessary for implementing the agreement. Thus limitation of capacity or sales can be allowed if there are sufficient commercial reasons for it, although the burden of proof is on the undertaking.

¹⁴⁰ See e.g. *United Brands*

¹⁴¹ Reg. 906/2009 Art. 3(4)(b)

¹⁴² Reg. 906/2009 Art. 3(4)(c)

Third, the final hardcore restriction mentioned in the group exemption is the allocation of markets or customers. This is together with price fixing the most scrutinized behaviour since it in such an obvious way creates barriers between regions or member states. In a liner consortium this could be justified if it is beneficial for the consumers, although it is rather difficult to imagine how this could be in such an internationalised world and industry as shipping since it is not that dependant to a certain geographical location.

Another important aspect that has to be addressed is the conditions relating to market share. Consortia members cannot together or independently carry more than 30 per cent of the relevant market share. This highlights the problem with the definition of the relevant market. There are two types of markets, the geographic market and the product or service market. The natural limit for what constitutes a geographic market are the state borders even though regions covering more nations and even much smaller geographical spaces have been considered relevant. This makes it very hard to on beforehand assess what constitutes a relevant geographic market but a guideline could be that national markets, distinct, isolated or essential regions could constitute a relevant geographic market. The relevant product market should be harder to investigate since it depends on the interchangeability of the product or service for consumers. Although this also simplifies the undertakings ability to itself assess this matter since they only have to perform a customer directed market survey. Both of the relevant markets are examined on a case to case basis and it is therefore problematic to foresee the outcome of a potential investigation. Nevertheless there are some guidelines to follow and measures that can be taken in order to verify or not that a product, service or geographical area constitutes a relevant market.

The leniency program that exists in most EU member states aims to break down hard core cartels and restrict unlawful behaviour by allowing reductions in fines to those who provide essential information. There is no one stop shop for leniency applicants which has received some critique since it elongates the application and contract negotiation process. In order to simplify this liner shipping companies should on their own or through a trade association lobby for a one stop leniency shop. If this is not likely to happen then a type of first blow approach should be introduced so that the different competition authorities could alert one another, possibly through a central system, of who has been giving information and what information that has been provided. Then there would be no need for discussing in a contract

to which national authority the parties should turn to and there is also no need to apply for leniency in several different nations.

There are several different aspects that have to be regarded when initiating or participating in an information exchange program. It has to be assessed whether the information is formal or informal where informal information has a tendency to be more likely to infringe competition rules. The exchange of information can be highly beneficial to consumers since it simplifies for undertakings to compare prices and lowering their prices in order to gain customers although it can also restrict competition since it can also simplify parallel conduct. Most often the information regards prices but it can also regard market conditions and the use of standardised documents. The guideline is that the older, more public and seldom exchanged information is, the less likely it is to infringe competition regulations. The ELAA has developed an information exchange program in accordance with the Commission and it could be of interest for liner shipping companies to investigate if a more thorough cooperation through this organisation is possible.

The one thing that all of the possible infringements that are stated above have in common is the need for justification. It needs always to be proved that these conducts are necessary for the implementation of the consortium agreement and thereby also beneficial to consumers. This can be problematic since the assessing of these aspects is done on a case-by-case basis and a more economic approach has been introduced. Nevertheless, with the proper guidelines and appropriate legal and economic skills not infringing EU competition rules should be relatively easy.

6.1 Conclusions

The aim of this thesis has been to investigate under what forms of horizontal cooperation liner shipping companies can operate after the new group exemption enters into force. There are several important aspects of this but the most important conclusions that have been drawn are in my opinion:

A consortia agreement should not seek to fix prices or allocate markets or customers since this is unlikely to be accepted by the Commission.

A limitation of capacity for liner consortia can be allowed if it is necessary for the implementation of the contract.

A liner consortia and its members can never hold more than 30 per cent of the relevant market if they want to benefit from the new group exemption, thus an investigation regarding a definition of this should always be conducted.

Liner shipping companies should seek to employ more economic skilled work force when dealing with competition law since the Commission has moved in a more economic based direction.

Liner shipping companies and consortia should seek to introduce a one stop shop for leniency applicants or advocate a system which allows national authorities to report potential leniency applications centrally.

Liner shipping companies and consortia should seek to further cooperate through information agreements, notably through trade associations such as the ELAA.

The most important is that liner shipping companies and consortia should always be able to justify its different forms of cooperation from a consumer perspective and prove its necessity for the implementation of the contract. If this can not be done, it is better to pass on the cooperation since the risks of fines and losses in good will probably exceed the possible benefits. Thus I recommend that liner shipping companies and consortia should work after the saying *better safe than sorry*.

7 References

Literature

- Benachio, Marco
Ferrari, Claudio
Musso, Enrico: *The Liner Shipping Industry and EU Competition Law* Transport Policy vol. 14. issue 1 pp. 1-10. 2007
- Bernitz, Ulf
Gutu, Irina: *The Effect of EU Merger Policy on Large Multinationals Based in Sweden and Other Smaller EU Member States: Is the Policy Discriminatory?* European Competition Law Review vol. 24 issue 1 pp. 19-29. 2003
- Brodefors, Rigmor
Rinman, Thorsten: *The Commercial History of Shipping* Rinman & Lindén AB: Göteborg 1983
- Brodie, Peter: *Commercial shipping handbook* Second edition, Informa: London 2006
- De Matos, Anne-Marie: *Les Contrats Transfrontières Conclus pas les Consommateurs au Sein de l'Union Européenne*. PresseUniversitaire d'Aix-Marseille: Marseille. 2001
- De Smet, Dieter: *The Diametrically Opposed Principles of US and EU Antitrust policy* European Competition Law Review vol 29 issue 6 pp. 356-362. 2008
- Dragvoll, Linda: *Den rettslige plasseringen av joint ventures under EF-konkurrenseretten*, Fagbokforlaget: Bergen. 2005
- Ezrachi, Ariel: *EC Competition Law, An Analytical Guide to the Leading Cases*, Hart Publishing: Portland. 2008
- Farhing, Bruce: *International Shipping*, Lloyd's of London Press Ltd: London. 1987

- Goyder, Joanna
Albors-Llorens, Albertina *Goyder's EC Competition Law* Fifth Edition
Oxford University Press: Oxford 2009
- Korah, Valentine: *An Introductory Guide to EC Competition Law
and Practice*, Ninth edition, Hart Publishing:
Portland. 2007
- Motto, Massimo *On Cartel Deterrence and Fines in the
European Union* *European Competition Law
Review* vol. 29 issue 4. pp. 209-220. 2008
- Norberg, Sven: *Moderniseringsreformen av EU:s
antitrustpolitik* in Fejø, Jens (ed.) *Den nye EU-
konkurrenceret i nordisk perspektiv*, Jurist- og
økonomforbundets forlag: Copenhagen. 2005
- OECD, Division of Transport: *Competition Policy in Liner Shipping – Final
Report 2002*
- Power, Vincent: *EC Shipping Law*, Lloyd's of London Press
Ltd: London. 1992
- Pozdnakova, Alla: *Liner Shipping and EU Competition Law*
Monograph based on a doctors thesis, Kluwer
Law International: Oslo 2008
- Sandgren, Claes: *Rättsvetenskap för uppsatsförfattare: ämne,
material, metod och argumentation* Norstedts
Juridik: Stockholm. 2007
- Schwab, Andreas
Steinle, Christian: *Pitfalls of the European Competition Network–
Why Better Protection of Leniency Applicants
and Legal Regulation of Case Allocation is
Needed* *European Competition Law Review*
vol. 29 issue 9 pp. 523-531. 2008
- Sundin, Krister: *Protektionism och bilaterala sjöfartsavtal – En
studie om konkurrensbegränsande åtgärder
inom handelsjöfarten*, Sjörettsföreningen i
Göteborg: Göteborg. 1981
- Thanopoulou, Helen, A: *What price the flag? The terms of
competitiveness in shipping* *Marine Policy* vol.
22 issue 4-5 pp. 359-374. 1998

- Townley, Chris: *The Liner Shipping Block-Exemption in European Law: Has the Tide Turned?* World Competition vol. 27 issue 1 pp. 107-153. 2004
- Van den Bergh, Roger J
Camesasca, Peter D: *European Competition Law and Economics: A Comparative Perspective*, Second edition, Thomson, Sweet & Maxwell: London. 2006
- Weitbrecht, Andreas: *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition* European Competition Law Review vol. 29 issue 2 pp. 81-88. 2008
- Whish, Richard: *Competition Law*, Fifth edition, Oxford University Press: Oxford. 2005

EU Legislation

Consolidated versions of the Treaty of the European Union and the Treaty of the Functioning of the European Union OJ 2008 C 115/01

EU Documents

Commission Notice C 372/5 of 9 December 1997 on the definition of relevant market for the purposes of Community competition law

Commission Notice C 3/02 of 6 January 2001 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements

Commission Notice C 210/2 of 1 September 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

Commission Notice C 298/11 of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases

Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92

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)

Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

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

Press release IP/08/760, 19/05/2008 *Maritime Transport: blue horizons of commitment. The European Commission is preparing a strategic reflection on the future of EU Maritime Transport in the horizon 2008-2018*

Press release IP/09/1099, 08/07/2009 *Antitrust: Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets*

Internet Sources

Website of the European Liner Affairs Association
www.elaa.net/ Last visited on 2010-01-07, 18:54

Website of the International Chamber of Commerce
<http://www.iccwbo.org/policy/transport/id2498/index.html>
Last visited on 2009-11-20, 10:41

Website of the Swedish Competition Authority
http://www.kkv.se/t/Page____913.aspx Last visited on 2010-01-08, 15.33

Table of Cases

Case 6/72 *Continental Can v Commission* [1973]

Case 7/73 *Commercial Solvents v Commission* [1973]

Case 27/76 *United Brands v Commission* [1978]

Case 85/76 *Hoffmann-La Roche v Commission* [1979]

Case 242/88 *Lucazeau v SACEM* [1989]

Case 62/86 *AKZO v Commission* [1991]

Case 203/01 *Michelin v. Commission* [2004]

Case 95/04 *British Airways v Commission* [2007]

Commission Decision of 1 April 1992 relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty (IV/32.450: French-West African shipowners' committees)

Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty

Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689: Sea Containers v. Stena Sealink - Interim measures)

Commission Decision of 8 July 2009 relating to a proceeding under article 81 of the EC Treaty (COMP/39.401: E.ON/GDF)

Interviews

2009-12-18 Interview with Anette Ryde at the A.P. Møller-Mærsk headquarters in Copenhagen.

2010-01-08 Telephone interview with Chris Bourne

2010-01-08 Telephone interview with Charlotte Landström Axelsson