

## Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (1 July 2008)

## 有关海上运输适用欧共同体条约第 81 条的指南

### 1. INTRODUCTION

1. These Guidelines set out the principles that the Commission of the European Communities will follow when defining markets and assessing cooperation agreements in those maritime transport services directly affected by the changes brought about by Council Regulation (EC) No 1419/2006 of 25 September 2006, i.e. liner shipping services, cabotage and international tramp services [1].

2. These Guidelines are intended to help undertakings and associations of undertakings operating those services, mainly if operated to and/or from a port or ports in the European Union, to assess whether their agreements [2] are compatible with Article 81 of the Treaty establishing the European Community (hereinafter "the Treaty"). The Guidelines do not apply to other sectors.

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

### 1、介绍

1、本指南规定了欧共同体委员会对于那些由 2006 年 9 月 25 日理事会第 1419/2006 号条例带来的改变而受到直接影响的海上运输服务（即班轮运输服务、国内沿海航运 (cabotage) 和国际不定期船运输 (tramp services) 服务）在定义市场和评估合作协议时应遵循的原则。<sup>1</sup>

2、本指南致力于帮助提供那些服务的企业和企业协会（主要是向以及/或者从在欧盟内一个港口或多个港口从事运营的企业）评估其协议<sup>2</sup>是否与《建立欧洲共同体条约》（以下称为“条约”）第 81 条相符合。本指南不适用于其他行业。

3、第 1419/2006 条例扩大了 2002 年 12 月 16 日理事会第 1/2003 号条例有关执行条约第 81 条和 82 条规定的竞争规则<sup>3</sup>以及 2004 年 4 月 7 日欧共同体第 773/2004 号条例关于欧委会根据条约第 81 条和 82 条进行案件程序<sup>4</sup>的范围，将国内沿海航运和不定期船服务包括在内。相应的，自 2006 年 10 月 18 日起，所有的海上运输服务领域都受普遍适用的程序性框架约束。

<sup>1</sup> 2006 年 9 月 25 日理事会第 1419/2006 号条例废除了详尽规定对海上运输适用第 85 条和第 86 条（现在为第 81 条和第 82 条）规则的第 4056/86 号条例，并且修改了欧共同体第 1/2003 号条例，扩大其适用范围至国内沿海航运和国际不定期船运输服务，OJ L 269，28.9.2006，第 1 页。

<sup>2</sup> 术语“协议”被用以指协议、企业协会的决定和企业间协调行为。

<sup>3</sup> OJ L 1，2003 年 1 月 4 日，第 1 页。

<sup>4</sup> OJ L 123，2004 年 4 月 27 日，第 18 页。

4. Regulation (EC) No 1419/2006 also repealed Council Regulation (EEC) No 4056/86 of 22 December 1986 on the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport [5] containing the liner conference block exemption which allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage, as the conference system no longer fulfils the criteria of Article 81(3) of the Treaty. The repeal of the block exemption takes effect as of 18 October 2008. Thereafter, liner carriers operating services to and/or from one or more ports in the European Union must cease all liner conference activity contrary to Article 81 of the Treaty. This is the case regardless of whether other jurisdictions allow, explicitly or tacitly, rate fixing by liner conferences or discussion agreements. Moreover, conference members should ensure that any agreement taken under the conference system complies with Article 81 as of 18 October 2008.

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

4、关于对海上运输适用条约第 85 条和第 86 条 ( 现为第 81 条和第 82 条 ) 的 1986 年 12 月 22 日理事会第 4056/86 号条例<sup>5</sup> , 包含班轮公会集体豁免的内容 , 允许船运公司 (shipping lines) 在班轮公会内 (liner conference) 的相议固定费率和其他运输条件。第 1419/2006 条例也废除了上述条例 , 因为班轮公会制度不再能满足第 81 ( 3 ) 条的条件。对集体豁免的废除于 2008 年 10 月 18 日生效。在此之后 , 向以及/或者从欧盟内一个或多个港口进行班轮运输运营服务必须停止所有违反条约第 81 条的班轮公会活动。无论其他司法管辖区域内是否明示的或暗示的允许通过班轮公会或讨论协议的方式固定费率 , 上述规则都适用。此外 , 公会成员应对确保 , 自 2008 年 10 月 18 日起 , 公会体制下的任何协议都符合第 81 条。

5、本指南对欧委会在其他通告中已经发布的指南形成了补充。由于海上运输服务具有相互竞争的承运人之间达成广泛合作协议的特点 , 关于对横向合作协议适用条约第 81 条的指南<sup>6</sup> ( 横向合作指南 ) 和关于适用条约第 81 ( 3 ) 条的指南<sup>7</sup>与此特别相关。

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<sup>5</sup> OJ L 378 , 1986 年 12 月 31 日 , 第 4 页。

<sup>6</sup> OJ C 3 , 2001 年 1 月 6 日 , 第 2 页。

<sup>7</sup> OJ C 101 , 2004 年 4 月 27 日 , 第 97 页。

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

7. These Guidelines are without prejudice to the interpretation of Article 81 of the Treaty which may be given by the Court of Justice or the Court of First Instance of the European Communities. The principles in the Guidelines are to be applied in the light of the circumstances specific to each case.

8. The Commission will apply these Guidelines for a period of five years.

## 2. MARITIME TRANSPORT SERVICES

### 2.1. Scope

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

10. Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user.

6、2000年4月19日关于对班轮运输公司（联合企业(consortia)）之间的特定种类的协议、决定和协同行为适用条约第81(3)条的欧委会第823/2000号条例<sup>8</sup>规定了在班轮运输中关于提供联合服务的横向合作协议的相关内容。该条例根据条约第81(3)条规定了条约第81(1)条的禁止性规定不适用于两个或两个以上船只运营商（联合企业）之间协议的条件。该条例将根据第1419/2006号条例引入的改变进行审查。<sup>9</sup>

7、本指南不损害欧洲共同体法院或初审法院可能作出的针对条约第81条的解释。应根据个案的特定情况适用本指南的原则。

8、欧委会将适用本指南5年。

## 2、海上运输服务

### 2.1. 范围

9、班轮运输服务、国内沿海航运和不定期船运输服务是受欧共体第1419/2006号条例带来的改变直接影响的海上运输行业。

10、班轮运输涉及定期将货物运输至某个特定地理路线上的港口（主要通过集装箱），通常被认为是一种贸易行为。班轮运输的其他一般特点包括：预先发布时刻表和航行日期，任何运输使用人都可以获得服务。

<sup>8</sup> OJ L 100, 2000年4月20日, 第24页, 2004年3月12日欧委会第463/2004号条例(OJ L 77, 2004年3月13日, 第23页)和2005年4月20日欧委会第611/2005号条例(OJ L 101, 2005年4月21日, 第10页)对此作了修改。

<sup>9</sup> 欧委会第611/2005号条例鉴于条款第3段, 见前脚注8。

11. Article 1(3)(a) of Regulation (EEC) No 4056/86 defined tramp vessel services as the transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand. It is mostly the unscheduled transport of one single commodity which fills a vessel [10].

12. Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State [11]. Although these Guidelines do not specifically address cabotage services they nevertheless apply to these services insofar as they are provided either as liner or tramp shipping services.

## 2.2. Effect on trade between Member States

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

11、第 4056/86 号条例第 1.3(a)条将不定期船运输服务定义为：在一艘整体或部分的被一个或两个以上托运人(shipper)租用的船只上，以一次航程或时间表或任何其他形式的非定期或非预先公告航程的合同为基础，整装(in bulk)或散装(in break bulk)的货物运输，运费是根据供需条件以个案为基础自由协商确定的。多数情况下是单一货物装满一船非定期的运输。<sup>10</sup>

12、国内沿海航运包括不定期船运输和班轮运输，在同一成员国内连结两个或两个以上港口。<sup>11</sup>虽然本指南并不专门针对国内沿海航运，但只要国内沿海航运服务是以班轮运输或者不定期船运输的形式提供的，本指南即适用。

## 2.2. 对成员国间贸易的影响

13、条约第 81 条适用于所有可能显著影响成员国间贸易的协议。对贸易产生影响，就必须在一套法律或事实的客观因素基础上有足够的可能性预见到协议或行为可能直接或间接地、现实或潜在地影响成员国间的贸易形式。<sup>12</sup>欧委会已经在其关于条约第 81 条和第 82 条包含的对贸易的影响的概念的指南中，颁布了关于其将如何适用对贸易的影响的概念。<sup>13</sup>

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<sup>10</sup> 欧委会已经确认了特殊运输的一系列特点，这些特点使得其区别于班轮服务和不定期船运输。它们包括为一种特别种类的货物提供有规律的服务。提供这种服务通常以租船合同为基础，使用针对特定货物技术改造并/或建造的特定船只。欧委会 1997 年 10 月 19 日在 IV/34.446 案 - *Transatlantic Agreement* 第 94/980/EC，OJ L 376，31.12.1994，第 1 页 (下文称为 *the TAA 裁决*)，第 47-49 段。

<sup>11</sup> 1992 年 12 月 7 日的理事会第 3577/92 号条例第 1 条适用在成员国内沿海航运对海上运输 ( 国内沿海航运海上运输 ) 自由提供服务的原则，OJ L 364，12.12.1992，第 7 页。

<sup>12</sup> 案例 42/84 *Remia BV and others v Commission* [1985] ECR 2545，第 22 段。案例 319/82 *Ciments et Bétons de l'Est v Kerpen & Kerpen* [1983] ECR 4173，第 9 段。

<sup>13</sup> OJ C 101，27.4.2004，第 81 页。

14. Transport services offered by liner shipping and tramp operators are often international in nature linking Community ports with third countries and/or involving exports and imports between two or more Member States (i.e. intra Community trade [14]). In most cases they are likely to affect trade between Member States inter alia on account of the impact they have on the markets for the provision of transport and intermediary services [15].

15. Effect on trade between Member States is of particular relevance to maritime cabotage services since it determines the scope of application of Article 81 of the Treaty and its interaction with national competition law under Article 3 of Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The extent to which such services may affect trade between Member States must be evaluated on a case by case basis [16].

14、班轮运输和不定期船运输船运输经营者提供的运输服务在性质上经常是国际性的，将共同体的港口与第三国的港口连结起来，并且/或者涉及两个或两个以上成员国间的出口和进口（即共同体内贸易）。<sup>14</sup>由于它们对运输和中介市场有影响，因而在多数情况下，它们可能会影响成员国之间的贸易。<sup>15</sup>

15、对成员国间贸易的影响与国内沿海航运服务尤其相关，因为这种相关性决定了条约第 81 条的适用范围及关于执行条约第 81 条和第 82 条规定的竞争规则的欧共体第 1/2003 号条例第 3 条下的 81 条与国内竞争法的关系。此类服务对成员国间贸易可能产生的影响程度必须在个案的基础上进行评估。<sup>16</sup>

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<sup>14</sup> 服务来自或提供给一个非欧盟的港口的事实本身并不排除成员国间的贸易受到影响。需要就在共同体内对依赖于该服务的顾客和其他运营商的影响进行仔细的分析，从而确定共同体是否有司法管辖。见条约第81条和第82条包含的关于对贸易的影响的概念的指南，见脚注13。

<sup>15</sup> 1992年12月23日欧共体第93/82/EEC号裁决(案例IV/32.448和IV/32.450, *CEWAL*), OJ L 34, 10.2.1993, 第1页, 第90段, 得到欧洲初审法院在下列案件中的确认: *Joined Cases T-24/93 to T-26/93 and T-28/93, Compagnie Maritime Belge and others v Commission* [1996] ECR II-1201, 第205段。上文脚注10引用的TAA裁决, 第288-296段, 得到欧洲初审法院在2002年2月28日在T-395/94案判决的确认, *Atlantic Container Line and others v Commission* (以下简称TAA判决), 第72-74段, 1998年9月16日欧委会第1999/243/EC号裁决(第IV/35.134号案- *Trans-Atlantic Conference Agreement*) (以下称为TACA裁决), OJ L 95, 9.4.1999, 第1页, 第386-396段; 2002年11月14日委员会第2003/68/EC号裁决(第COMP/37.396号裁决- 修订版TACA) (以下称为修订后TACA裁决), OJ L 26, 31.1.2003, 第53页, 第73段。

<sup>16</sup> 关于适用对贸易的影响的指南, 见前脚注13所引的欧委会指南。

### 2.3. The relevant market

16. In order to assess the effects on competition of an agreement for the purposes of Article 81 of the Treaty, it is necessary to define the relevant product and geographic market(s). The main purpose of market definition is to identify in a systematic way the competitive constraints faced by an undertaking. Guidance on this issue can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law [17]. This guidance is also relevant to market definition as regards maritime transport services.

17. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas [18]. A carrier (or carriers) cannot have a significant impact on the prevailing conditions of the market if customers are in a position to switch easily to other service providers [19].

### 2.3 . 相关市场

16、为条约第 81 条之目的衡量一个协议对竞争的影响，有必要界定相关的产品市场和地域市场。界定市场的主要目的是以一种系统的方式确定一个企业面临的竞争限制。关于这一问题的指南可以在欧委会关于为欧共同体竞争法之目的界定相关市场的通告中找到。<sup>17</sup>这一指南也与有关海上运输服务的市场界定有关。

17、相关产品市场包括所有那些由于产品的特点、价格和目的用途而被消费者认为是可以相互交换或替代的产品和/或服务。相关地域市场包括涉及相关企业的产品或服务的供需的区域，在此区域内竞争条件足够类似，并且因为竞争条件与相邻区域显著不同而可以做出区分。<sup>18</sup>如果顾客处于一个能轻易转换服务提供者的地位，则一个（或两个以上）承运人就不可能对市场的普遍条件产生重大影响。<sup>19</sup>

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<sup>17</sup> OJ C 372 , 9.12.1997 , 第5页。

<sup>18</sup> 关于市场的定义的通告，见脚注17，第8段。

<sup>19</sup> 关于市场的定义的通告，见脚注17，第13段。

### 2.3.1. Liner shipping

18. Containerised liner shipping services have been identified as the relevant product market for liner shipping in several Commission decisions and Court judgments [20]. Those decisions and judgments related to maritime transport in deep sea trades. Other modes of transport have not been included in the same service market even though in some cases these services may be, to a marginal extent, interchangeable. This was because only an insufficient proportion of the goods carried by container can easily be switched to other modes of transport, such as air transport services [21].

19. It may be appropriate under certain circumstances to define a narrower product market limited to a particular type of product transported by sea. For example, the transport of perishable goods could be limited to reefer containers or include transport in conventional reefer vessels. While it is possible in exceptional circumstances for some substitution to take place between break bulk and container transport [22], there appears to be no lasting change over from container towards bulk. For the vast majority of categories of goods and users of containerised goods, break bulk does not offer a reasonable alternative to containerised liner shipping [23]. Once cargo becomes regularly containerised it is unlikely ever to be transported again as non-containerised cargo [24]. To date containerised liner shipping is therefore mainly subject to one way substitutability [25].

### 2.3.1. 班轮运输

18、在若干欧委会裁决和欧洲法院（指欧洲初审法院和欧洲终审法院）判决中，集装箱班轮运输已经被认定为是班轮运输的相关产品市场。<sup>20</sup>那些裁决和判决与在深海贸易上的海上运输有关。其他类型的运输并没有被包括在同样的服务市场当中，即便在一些案件中这些服务在微不足道的程度上可能会是可相互交换的。这是由于只有很少一部分集装箱运输的货物可以轻易地改用其他类型的运输（如空运服务）。<sup>21</sup>

19、在某些情况下，界定一个限于一个特定类型的海上运输产品的较小产品市场是适当的。例如，易腐烂产品的运输可能被限于冷藏集装箱或包括传统的冷藏船只的运输。在例外的情况下，散装运输和集装箱运输可以相互替代，<sup>22</sup>但集装箱运输似乎不太可能持久的转化为散装运输。对于绝大多数种类的货物和集装箱货物的使用者，散装运输不是集装箱班轮运输的合理替代选择。<sup>23</sup>一旦货物变为规则的集装箱式，就不可能再作为非集装箱货物而被运输。<sup>24</sup>因此，目前集装箱班轮运输主要是单向的可替代。<sup>25</sup>

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<sup>20</sup> 1999年4月30日欧委会第1999/485/EC号裁决（第IV/34.250号案 – *Europe Asia Trades Agreement*），OJ L 193，26.7.1999，第23页；TAA 裁决，见脚注10，以及TACA裁决，见脚注15，第60-84段。在TACA 案有关市场定义的裁决得到欧洲初审法院在其Joined cases T-191/98案的确认，T-212/98 to T-214/98，*Atlantic Container Line AB and others v Commission*，[2003] ECR II-3275（以下称为TACA判决），第781-883段。

<sup>21</sup> TACA裁决第62段，见脚注15和TACA判决第783-789段，见脚注20。

<sup>22</sup> TACA裁决，见脚注15，第71段。

<sup>23</sup> TAA判决，见脚注15，第273段，以及TACA判决，见脚注20，第809段。

<sup>24</sup> TAA 判决，见脚注15，第281段，欧委会在COMP/M.3829 – *MAERSK/PONL* 案中的裁决，2005年7月29日，第13段。

<sup>25</sup> TACA裁决，见脚注15，第62-75段；TACA判决，见脚注20，第795段以及欧委会在*MAERSK/PONL*案中的裁决，见脚注24，第13和第112-117段。

20. The relevant geographic market consists of the area where the services are marketed, generally a range of ports at each end of the service, determined by ports' overlapping catchment areas. As far as the European end of the service is concerned, to date the geographical market in liner cases has been identified as a range of ports in Northern Europe or in the Mediterranean. As liner shipping services from the Mediterranean are only marginally substitutable for those from Northern European ports, these have been identified as separate markets [26].

### 2.3.2. Tramp services

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

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

22. The "main terms" of an individual transport request are a starting point for defining relevant service markets in tramp shipping since they generally identify the essential elements [27] of the transport requirement at issue. Depending on the transport users' specific needs, they will be made up of negotiable and non-negotiable elements. Once identified, a negotiable element of the main terms, for example the vessel type or size, may indicate, for instance, that the relevant market with respect to this specific element is wider than laid down in the initial transport requirement.

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

20、相关地域市场包括提供服务的区域，此类区域通常是一系列位于各服务终端的港口，其大小由港口重叠服务区的范围所决定。就欧洲的服务终端而言，目前班轮运输的地域市场已经被确定为北欧或地中海的一系列港口。由于只有少数的地中海班轮运输服务可以替代北欧港口的班轮运输，因而两者已经被认定为是单独的市场。<sup>26</sup>

### 2.3.2 不定期船运输

欧委会迄今还没有将条约第 81 条适用于不定期船运输。经营者可以在评估时对下述与其提供的不定期船运输服务相关的因素进行考虑。

*从需求方角度定义相关产品市场时考虑的因素 (需求替代)*

22、一个单独运输要求的“主要条款”是界定不定期船运输的相关服务市场的起点，因为它们通常确定了该运输要求的关键因素。<sup>27</sup>根据运输使用者的特定需求，它们由可议因素和不可议因素构成。一旦确定，主要条款的可议因素（例如船只类型或大小）可能显示出就该特定因素而言，相关的市场比最初运输需求中规定的还要宽泛。

23、不定期船运输服务的服务性质可能是不同的，存在不同种类的运输合同。因此，也许有必要确定需求方是否认为定期租船合同、航次租船合同以及包运租船合同 (contracts of affreightment) 是可相互替换的。如果是，则这些不同类型的服务可能就属于同一相关市场。

<sup>26</sup> TACA 裁决，见脚注 15，第 76-83 段和修改后 TACA 裁决，见脚注 15，第 39 段。

<sup>27</sup> 例如，对于航次租船，一个运输要求的实质性因素是货物被装运、货物数量、装运港和卸货港、装载天数或货物最后抵达日期以及有关要求的船只的技术细节。

24. Vessel types are usually subdivided into a number of standard industrial sizes [28]. Due to considerable economies of scale, a service with a significant mismatch between cargo volume and vessel size may not be able to offer a competitive freight rate. Therefore, the substitutability of different vessel sizes needs to be assessed case by case so as to ascertain whether each vessel size constitutes a separate relevant market.

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

25. The physical and technical conditions of the cargo to be carried and the vessel type provide the first indications as to the relevant market from the supply side [29]. If vessels can be adjusted to transport a particular cargo at negligible cost and in a short time-frame [30], different tramp shipping service providers are able to compete for the transport of this cargo. In such circumstances, the relevant market from the supply side will comprise more than one type of vessel.

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

27. In tramp shipping, port calls are made in response to individual demand. Mobility of vessels may however be limited by terminal and draught restrictions or environmental standards for particular vessel types in certain ports or regions.

24、船只类型通常被细分为一些标准的产业尺寸。<sup>28</sup>由于规模经济这个重要原因，若是货物数量和船只尺寸严重不匹配的，服务可能就不能提供一个有竞争力的运费。因此，不同尺寸的船只的替代性需要以个案为基础加以评估，以便确定是否每一个船只尺寸构成一个单独的相关市场。

*从供应方角度确定相关产品市场时考虑的因素（供应替代）*

25、待运货物的物理和技术条件以及船只类型提供了从供应方角度确定相关市场的首要考虑因素。<sup>29</sup>如果船只能被调整，以便以可忽略的成本和在较短的时间内<sup>30</sup>运输特定的货物，则不同的不定期船运输服务提供者就可以为运输这批货物而相互竞争。在这种情况下，从供应方角度而言的相关市场将包括一种以上类型的船只。

26、但是，一些类型的船只是从技术上改装的以及/或者为专门的运输服务而特别建造的。尽管特制的船只也可以承载其他类型的货物，但是这将使其处于一种竞争劣势。专门服务提供者运输其他货物的竞争能力因而是有限的。

27、在不定期船运输中，沿途靠港是应个别需求而定的。但是，船只的移动性可能受限于码头以及吃水限制、或特定港口或地区对特定类型船只的环境标准。

<sup>28</sup> 该行业的看法似乎是船只尺寸构成单独的市场。有关行业刊物和波罗的海交易所为每一个标准船只尺寸发布价格指数。咨询师报告根据船只尺寸划分市场。

<sup>29</sup> 例如，干整货船只不能承运液体整货，载车船不能承运冷藏货物。许多油轮能够承运脏的和干净的石油产品。但是，一个油轮在运输脏的产品之后不能立即承运干净的产品。

<sup>30</sup> 将一个干整货船只从运输煤炭改为运输谷物可能只需要一天的清理过程，这可以在一个压舱航程中得以完成。在其他不定期船运输市场，这个清理过程可能需要更长时间。

*Additional considerations to take into account when determining the relevant product market*

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

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

30. Additional factors such as the reliability of the service provider, security, safety and regulatory requirements may influence supply and demand-side substitutability, for example the double hull requirement for tankers in Community waters [31].

*Geographic dimension*

31. Transport requirements usually contain geographic elements such as the loading and discharging ports or regions. These ports provide the first orientation for the definition of the relevant geographic market from the demand-side, without prejudice to the final definition of the relevant geographic market.

32. Certain geographic markets may be defined on a directional basis or may occur only temporarily for instance when climatic conditions or harvest periods periodically affect the demand for transport of particular cargos. In this context, repositioning of vessels, ballast voyages and trade imbalances should be considered for the delineation of relevant geographic markets.

**确定相关产品市场要考虑的其他因素**

28、在不定期船运输中船只尺寸之间存在系列的替换性也应予考虑。在特定的不定期船运输市场，有极端尺寸的船只是不能直接替换的。但是，系列替代效应可能会限制极端尺寸船只的定价，并导致市场界定范围的扩大。

29、在特定的不定期船运输市场，必须考虑船只是否为固有专用船只(captive capacity)，以便在以个案为基础评估相关市场时不将其考虑进去。

30、额外的因素，例如服务提供者的可靠性、安全性、安全和规制要求，可能影响供求替代性，例如共同体水域内对油轮的双层外壳要求。<sup>31</sup>

**地域范围**

31、运输要求通常包括地域因素，例如装运和卸货港口或地区。这些港口提供了从需求方角度界定相关地域市场的最初方向，但并不妨害相关地域市场的最终定义。

32、特定地域市场可能以方向为基础加以界定，也可能是暂时性的，例如气候条件或收获时期周期性影响特定货物的运输需求。在此框架下，船只重新定位、空放航次(ballast voyages)以及贸易不平衡应当在界定相关地域市场时予以考虑。

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<sup>31</sup> 2002年2月18日欧洲议会和欧盟理事会的关于为单层外壳的油轮加速购进双层外壳或同等设计要求的油轮并废除理事会第2978/94号条例的第417/2002号条例，L 64，2002年3月7日。

## 2.4. Market shares

33. Market shares provide useful first indications of the market structure and of the competitive importance of the parties and their competitors. The Commission interprets market shares in the light of the market conditions on a case-by-case basis. In liner shipping, volume and/or capacity data have been identified as the basis for calculating market shares in several Commission decisions and Court judgments [32].

34. In tramp shipping markets, service providers compete for the award of transport contracts, that is to say, they sell voyages or transport capacity. Depending on the specific services in question, various data may allow operators to calculate their annual market shares [33], for instance:

- (a) the number of voyages;
- (b) the parties' volume or value share in the overall transport of a specific cargo (between port pairs or port ranges);
- (c) the parties' share in the market for time charter contracts;
- (d) the parties' capacity shares in the relevant fleet (by vessel type and size).

## 2.4 市场份额

33、市场份额为确定市场结构和当事方及其竞争对手的竞争重要性提供了很有用的指示。欧委会在个案中按照市场条件来解释市场份额。在班轮运输中，若干欧委会裁决和欧洲法院的判决中将容积以及/或者运载能力数据作为计算市场份额的基础。<sup>32</sup>

34、在不定期船运输市场，服务提供者相互竞争以赢得运输合同，这就是说，他们出售航程或运输能力。取决于争议中的特定服务种类，运营商可以使用多种数据来计算每年的市场份额，<sup>33</sup>例如：

- ( a ) 航程的数量；
- ( b ) 当事方在一个特定货物的整体运输中所占的数量或价值比例（来往港口或港口范围之内）；
- ( c ) 当事方在定期租船合同市场中所占的份额；
- ( d ) 当事方在相关船队中的承载量比例（按船只类型和尺寸）。

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<sup>32</sup> TACA裁决，见脚注15，第85段；修改后的TACA 裁决，见脚注15，第85和86段，以及TACA判决，见脚注20，第924，925和927段。

<sup>33</sup> 取决于相关不定期船运输市场的具体特点，可以预期更短的时间，例如在包运租船合同市场提出的要约是少于一年的时间。

### 3. HORIZONTAL AGREEMENTS IN THE MARITIME TRANSPORT SECTOR

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

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

#### 3.1. Technical agreements

37. Certain types of technical agreements may not fall under the prohibition set out in Article 81 of the Treaty on the ground that they do not restrict competition. This is the case, for instance, of horizontal agreements the sole object and effect of which is to implement technical improvements or to achieve technical cooperation. Agreements relating to the implementation of environmental standards can also be considered to fall into this category. Agreements between competitors relating to price, capacity, or other parameters of competition will, in principle, not fall into this category [34].

#### 3.2. Information exchanges between competitors in liner shipping

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

### 3、海上运输行业的横向协议

35、合作协议是海上运输市场上的一个通常特点。考虑到这些协议可能是在实际的或潜在的竞争者之间达成的，并可能对竞争要素造成负面影响，因而经营者必须格外谨慎，以确保符合竞争规则。在服务市场（如海上运输），下列因素在评估一个协议对相关市场可能造成的影响时是特别相关的：服务价格、成本、质量、频率和差异性，服务创新、营销和商业化。

36、三个问题与本指南涵盖的服务特别相关：技术协议、信息交换协议和联营协议。

#### 3.1. 技术协议

37、特定类型的技术协议因未对竞争构成限制可能不属于条约第 81 条的禁止性规定。例如，以改进技术或实现技术合作为唯一目的和效果的横向协议就属于此种类型。有关执行环境标准的协议也可能被认为属于此种类型。竞争者之间有关价格、承载力或者其他竞争要素的协议原则上不属于此种类型。<sup>34</sup>

#### 3.2. 班轮运输竞争者之间的信息交换

38、信息交换系统需要达成一项协议，经营者以此协议为基础进行信息交换，或者将信息提供给一共同机构，而该机构以商定的形式和频率负责集中、编辑和处理信息，然后再反馈给参与者。

<sup>34</sup> 2000年5月16日欧委会第2000/627/EC号裁决，(第 IV/34.018号案 – *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)*)，OJ L 268，2000年10月20日，第1页，第153页。欧洲初审法院在第 T-229/94号判决，*Deutsche Bahn AG v Commission*，[1997] ECR II-1689，第37段。

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

40. In the liner shipping sector, exchanges of information between shipping lines taking part in liner consortia which otherwise would fall under Article 81(1) of the Treaty are permitted to the extent that they are ancillary to the joint operation of liner transport services and the other forms of co-operation covered by the block exemption in Regulation (EC) No 823/2000 [35]. The present Guidelines do not deal with these information exchanges.

### 3.2.1. In general

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

42. The exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel; where an exchange of information is ancillary to such an anti-competitive practice its assessment must be carried out in combination with an assessment of that practice. An exchange of information may even have in itself the object of restricting competition [36]. These Guidelines do not address such exchanges of information.

39、在许多行业，搜集、交换并发布整体统计和一般市场信息是一种通常做法。这些发布的市场信息是提高市场透明度和增加顾客认知的好方法，因而可以提高效率。但是，交换商业敏感信息和个性化的市场数据在特定情况下会违反条约第 81 条。本指南致力于协助班轮运输服务提供者评估信息交换在何种情况下违反竞争规则。

40、在班轮运输行业，在参加联合企业的航运公司之间交换信息原本应适用条约第 81 ( 1 ) 条，但如果该信息交换附属于班轮运输服务的联合运营和属于欧共体第 823/2000 号条例<sup>35</sup>的集体豁免范围之内其他形式的合作，则是被允许的。本指南并不涉及此种信息交换。

### 3.2.1. 一般规定

41、在根据共同体竞争法评估信息交换系统时，必须对下述问题加以区分。

42、信息交换可能是为执行一个反竞争行为提供便利的机制，例如监控执行一个卡特尔协议；有时信息交换是附属于此类反竞争行为的，对其的评估就必须结合对反竞争行为的评估来进行。一个信息交换甚至可能本身就是以限制竞争为目的的。<sup>36</sup>本指南并不针对此种信息交换。

<sup>35</sup> 欧共体第823/2000条例，见上述脚注8，适用于往来于一个或多个共同体内专门为集装箱货物而建的港口的国际班轮运输服务—见第1，2和第3(2)(g)条。

<sup>36</sup> 欧洲法院在C-49/92 P案的判决，*Commission v Anic Partecipazioni*，[1999] ECRI-4125，第121至126段。

43. However, an exchange of information, in its own right, might constitute an infringement of Article 81 of the Treaty by reason of its effect. This situation arises when the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted [37]. Every economic operator must determine autonomously the policy which it intends to pursue on the market. The Court further considered that undertakings are, therefore, precluded from direct or indirect contacts with other operators which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to restrict competition, i.e. to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and the volume of the market [38]. By contrast, in the wood pulp market, the Court has found that unilateral quarterly price announcements made independently by producers to users constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors and hence, in the absence of any preliminary concerted practice between producers, do not constitute in themselves an infringement of Article 81(1) of the Treaty [39].

43、但是，交换信息从其自身而言，仅由于其效果就可能构成对条约第 81 条的违反。如果信息交换降低或取消有关相关市场运行方面的不确定性程度，从而产生限制经营者间竞争的后果，上述情形就会发生。<sup>37</sup> 每一个经济运行者都必须自主决定其准备在市场上采取的策略。因此，欧洲法院进一步认为，经营者不得与其他经营者进行影响竞争对手行为或展示其自身意欲做出的市场行为、具有限制竞争目的或效果的直接或间接接触。即考虑到提供的产品或服务的性质、经营者的规模和数量以及市场的大小，会导致竞争条件不符合相应市场的正常情况。<sup>38</sup> 与此形成对比的是，在木浆市场上，欧洲法院裁决认为，生产商对使用者独立制作的单边季度价格公告的行为并没有减少每个经营者对其竞争对手的未来态度的不确定性，因此，如果生产者之间没有任何事先的协同行为，则其本身不构成对条约第 81(1)条的违反。<sup>39</sup>

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<sup>37</sup> 欧洲法院在C-7/95 P案中的判决，*John Deere v Commission*，[1998] ECR I-3111，第90和欧洲法院在C-194/99 P案中的判决，*Thyssen Stahl v Commission*，[2003] ECR I-10821，第81段。

<sup>38</sup> 2006年11月23日欧洲法院在C-238/05案中的判决，*Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*，[2006] ECR I-11125，第52段和欧洲法院在Case C-49/92 P案中的判决，*Commission v Anic Partecipazioni*，见脚注36，第116和第117段。

<sup>39</sup> 欧洲法院在Joined Cases C-89/85，C-104/85，C-114/85，C-116/85，C-117/85和C-125/85 to C-129/85案中的判决，*A. Ahlström Osakeyhtiö and others v Commission*，[1993] ECR I-1307，第59至65段。

44. The case law of the Community Courts provides some general guidance in examining the likely effects of an information exchange. The Court has found that where there is a truly competitive market, transparency is likely to lead to intensification of competition between suppliers [40]. However, on a highly concentrated oligopolistic market, on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and of consumers, are likely to impair substantially the competition that exists between suppliers. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors [41]. The Court has also found that an information exchange system may constitute a breach of the competition rules even when the market is not highly concentrated but there is a reduction of the undertakings' decision-making autonomy resulting from pressure during subsequent discussions with competitors [42].

45. It follows that the actual or potential effects of an information exchange must be considered on a case-by-case basis as the results of the assessment depend on a combination of factors, each specific to an individual case. The structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange. The assessment must consider the actual or potential effects of the information exchange compared to the competitive situation that would result in the absence of the information exchange agreement [43]. To be caught by Article 81(1) of the Treaty, the exchange must have an appreciable adverse impact on the parameters of competition [44].

44、共同体法院的判例法对审查信息交换的可能效果提供了一些概括性的指南。法院判决认为，如果存在一个真正竞争性的市场，市场透明性可能将导致供应商之间的竞争变得更为激烈。<sup>40</sup>但是，在一个高度集中的寡头垄断市场，竞争已经被极大降低，如果主要竞争者（但不包括其他供应商和消费者）频繁交换单个销售的精确信息，就有可能严重损害供应商之间的竞争。在这种情况下，定期的、频繁地分享有关市场运行的信息将导致定期地向所有竞争者披露各种单独竞争者的市场处境和策略。<sup>41</sup>法院还判决认为，如果竞争者之间的讨论产生的压力导致经营者决策自主性降低，即便市场集中度不高，信息交换系统也可能违反竞争规定。<sup>42</sup>

45、因此，一个信息交换的实际的或潜在的效果必须以个案为基础加以考虑，综合考虑个案各种具体因素的共同作用。信息交换所发生的市场的结构和信息交换的特点是欧委会对信息交换进行评估时审查的两个关键因素。评估必须考虑到信息交换实际或潜在效果，与没有信息交换协议时的竞争形势相比较。<sup>43</sup>信息交换对竞争参数产生显著负面影响的，才构成对条约第 81 ( 1 ) 条的违反。

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<sup>40</sup> 在 *John Deere v Commission* 中的判决，Case C-7/95 P，见脚注37，第88段。

<sup>41</sup> 欧洲初审法院在 T-35/92 案中的判决 *John Deere Ltd v Commission*，[1994] ECR II-957，第51段，在上诉中得到欧洲法院的支持，*John Deere Ltd v Commission*，C-7/95 P 案，见脚注37，第89段；以及最近的在 *Asnef-Equifax v Ausbanc* 案中的判决，见脚注38。

<sup>42</sup> 欧洲初审法院在 T-141/94 判决，*Thyssen Stahl AG v Commission* [1999] ECR II-347，第402和第403段。

<sup>43</sup> 在 *John Deere Ltd v Commission* 中的判决，C-7/95 P 案，见脚注37，第75-77段。

<sup>44</sup> 关于适用第81(3)条的指南，见脚注7，第16段。

46. The guidance below mainly relates to the analysis of a restriction of competition under Article 81(1) of the Treaty. Guidance on the application of Article 81(3) of the Treaty is to be found in paragraph 58 below and in the general notice on the subject [45].

### 3.2.2. Market structure

47. The level of concentration and the structure of supply and demand on a given market are key issues in considering whether an exchange falls within the scope of Article 81(1) of the Treaty [46].

48. The level of concentration is particularly relevant since, on highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Greater transparency in a concentrated market may strengthen the interdependence of firms and reduce the intensity of competition.

49. The structure of supply and demand is also important, notably the number of competing operators and the symmetry and stability of their market shares and the existence of any structural links between competitors [47]. The Commission may also analyse other factors such as the homogeneity of services and the overall transparency in the market.

### 3.2.3. Characteristics of the information exchanged

50. The exchange of commercially sensitive data relating to the parameters of competition, such as price, capacity or costs, between competitors, is more likely to be caught by Article 81(1) of the Treaty than other exchanges of information. The commercial sensitivity of information should be assessed taking into account the criteria set out below.

46、下述指南主要涉及对条约第 81 ( 1 ) 条所指的限制竞争的分析。有关对条约第 81 ( 3 ) 条的适用的指南见下文第 58 段以及有关此主题的一般通告。<sup>45</sup>

### 3.2.2. 市场结构

47、在考虑一个信息交换是否属于条约第 81 ( 1 ) 条的规制范围时，关键问题是一个特定市场的集中程度和供需结构。<sup>46</sup>

48、市场的集中程度尤其相关，因为相对于一个较不集中的市场，在一个高度集中的寡头垄断市场，限制竞争效果的效果更有可能发生，并且也更为持久。在一个集中的市场上更大的透明度可能会加强企业间的依赖性，并降低竞争强度。

49、供需结构也很重要，特别是相互竞争的经营者数量，以及其市场份额的对称性和稳定性、竞争者之间存在的任何结构性联系。<sup>47</sup> 欧委会可能还会分析其他因素，例如服务的同质性，市场的总体透明度。

### 3.2.3. 信息交换的特点

50、竞争者之间交换商业上敏感的、涉及竞争因素的资料（例如价格、生产能力或成本）比交换其他信息更有可能违反条约第 81 ( 1 ) 条。对信息的商业敏感性的评估应当考虑以下标准。

<sup>45</sup> 关于适用第 81(3)条的指南，见脚注 7。

<sup>46</sup> 关于适用第 81(3)条的指南，见脚注 7，第 25 段。

<sup>47</sup> 在班轮运输中，竞争者之间存在运营上的和/或结构上的联系，例如为了提供共同服务联合企业协议成员允许航运公司分享信息。在评估一个另外的信息交换对该市场的影响时，任何此类联系的存在必须在个案基础上予以考虑。

51. The exchange of information already in the public domain does not in principle constitute an infringement of Article 81(1) of the Treaty [48]. However, it is important to establish the level of transparency of the market and whether the exchange enhances information by making it more accessible and/or combines publicly available information with other information. The resulting information may become commercially sensitive and its exchange potentially restrictive of competition.

52. Information may be individual or aggregated. Individual data relates to a designated or identifiable undertaking. Aggregate data combines the data from a sufficient number of independent undertakings so that the recognition of individual data is impossible. The exchange of individual information between competitors is more likely to be caught by Article 81(1) of the Treaty [49] than the exchange of aggregated information which, in principle, does not fall within Article 81(1) of the Treaty. The Commission will pay particular attention to the level of aggregation. It should be such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors.

53. However, in liner shipping caution should be used when assessing exchanges of capacity forecasts even in aggregate form, especially when they take place in concentrated markets. In liner markets, capacity data is the key parameter to coordinate competitive conduct and it has a direct effect on prices. Exchanges of aggregated capacity forecasts indicating in which trades capacity will be deployed may be anticompetitive to the extent that they may lead to the adoption of a common policy by several or all carriers and result in the provision of services at above competitive prices. Additionally, there is a risk of disaggregation of the data as it can be combined with individual announcements by liner carriers. This would enable undertakings to identify the market positions and strategies of competitors.

51、交换已经属于公共领域的信息在原则上不构成对条约第 81 ( 1 ) 条的违反。<sup>48</sup>但是，重要的是要验证市场的透明程度以及该交换是否通过使信息更易获得而加强了信息、并且/或者公开可获得的信息是否与其他信息相结合。符合上述条件的信息可能就变成了商业上敏感的信息，其交换可能也潜在地限制了竞争。

52、信息可能是单独的或集合的。单独的资料涉及一个指定的或可辨别的企业。集合的资料结合了来自足够多数数量的独立企业的资料，从而使特别辨别出单独资料变为不可能。竞争者之间交换单独资料<sup>49</sup>比交换集合资料更容易违反条约第 81 ( 1 ) 条，后者在原则上不违反条约第 81 ( 1 ) 条。欧委会将特别关注信息集合的程度。信息应当达到不可拆解的程度，从而使企业无法直接或间接的辨别其竞争者的竞争策略。

53、但是，对于班轮运输，在评估交换有关预测载货量的信息时，即便该信息是集合性质的，也应特别注意，尤其当信息交换发生于一个集中的市场上时。在班轮市场，载货量资料是协调竞争行为的关键因素，并对价格有直接影响。如果交换集合载货量预测信息可能导致若干或所有的承运人采取一个共同的政策，并致使以高于竞争性的价格提供服务，交换集合的载货量预测信息以表明载货量将被用于哪些交易则可能是反竞争的。此外，对资料进行拆解的风险也存在，因为该资料可以与班轮承运人所做的单独声明相结合。这将使得企业有能力辨别竞争者的市场处境和策略。

<sup>48</sup> TACA判决，见脚注20，第1154段。

<sup>49</sup> 欧委会第78/252/EEC号裁决，1977年12月23日在IV/29.176案— *Vegetable Parchment*，OJ L 70，1978年3月13日。

54. The age of the data and the period to which it relates are also important factors. Data can be historic, recent or future. Exchange of historic information is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertakings' future behaviour. In past cases, the Commission has considered information which was more than one year old as historic [50] whereas information less than one year old has been viewed as recent [51]. The historic or recent nature of the information should be assessed with some flexibility taking into account the extent to which data becomes obsolete in the relevant market. The time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual. Exchanges of recent data on volume and capacity are similarly unlikely to be restrictive of competition if the data is aggregated to an appropriate level such that individual shippers' or carriers' transactions cannot be identified either directly or indirectly. Future data relates to an undertaking's view of how the market will develop or to the strategy it intends to follow in that market. The exchange of future data is particularly likely to be problematic, especially when it relates to prices or output. It may reveal the commercial strategy an undertaking intends to adopt in the market. In so doing, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition.

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

54、资料的历史长短及其涉及的年代也是重要因素。资料可能是历史性的、最近的或未来的。交换历史信息通常不会被认为违反了条约第 81 ( 1 ) 条，因为它不可能对企业的未来行为有任何真实的影响。在过去的案例中，欧委会认为超过一年时间的信息是历史信息，<sup>50</sup>不足一年时间的信息是最近的信息。<sup>51</sup>评估信息的性质是历史性的还是最近的应对有一定程度的灵活性，需考虑何种资料在相关市场上会被认为已经陈旧。如果资料是集合性的而非单独的，则该资料变为历史性的资料所需的时间可能就会短一些。如果资料被集合到适当的程度，以至于单独的托运人或承运人的交易不可能直接的或间接的被辨别，则交换有关容积和载货量的最近的资料类似地也不可能对竞争构成限制。未来数据涉及一个企业有关市场将如何发展的观点或其倾向于在那个市场上采取的策略。交换未来资料特别可能出问题，尤其当其涉及价格或产量时更是如此。它可能披露一个企业在一个市场上拟采取的商业策略。若如此，它可能将显著减少交换信息的当事方之间的敌对性，并进而潜在对竞争构成限制。

55、信息交换的频率也应予以考虑。资料交换的越频繁，竞争者就能反应的更迅速。这为报复行为提供了便利，并最终降低了在市场上启动竞争性行为的动力。所谓的隐性竞争可能会受到限制。

<sup>50</sup> 欧委会第92/157/EEC号裁决，1992年2月17日，在IV/31.370案中— *UK Agricultural Tractor Registration Exchange*，OJ L 68，1992年3月13日，第19页，第50页。

<sup>51</sup> 欧委会第98/4/ECSC号裁决，1997年11月26日，IV/36.069案— *Wirtschaftsvereinigung Stahl*，OJ L 1，1998年1月3日，第10页，第17段。

56. How data is released should also be looked into to assess the effect(s) it may have on the market(s). The more the information is shared with customers, the less likely it is to be problematic. Conversely, if market transparency is improved for the benefit of suppliers only, it may deprive customers of the possibility of getting the advantage of increased "hidden competition".

57. In liner shipping, price indexes are used to show average price movements for the transport of a sea container. A price index based on appropriately aggregated price data is unlikely to infringe Article 81(1) of the Treaty, provided that the level of aggregation is such that the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors. If a price index reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted, it would violate Article 81(1) of the Treaty. In assessing the likely effect of such a price index on a given relevant market, account should be given to the level of aggregation of the data and its historical or recent nature and the frequency at which the index is published. In general it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other.

58. An exchange of information between carriers that restricts competition may nonetheless create efficiencies, such as better planning of investments and more efficient use of capacity. Such efficiencies will have to be substantiated and passed on to customers and weighed against the anti-competitive effects of the information exchange in the framework of Article 81(3) of the Treaty. In this context, it is important to note that one of the conditions of Article 81(3) is that consumers should receive a fair share of the benefits generated by the restrictive agreement. If all four cumulative conditions set out in Article 81(3) are fulfilled, the prohibition of Article 81(1) does not apply [52].

56、资料的发布方式也应当予以审查，以评估其对市场可能产生的效果。信息越多地与顾客分享，其就越不可能产生问题。相反地，如果市场透明度的提高仅仅使供应商获益，则它可能会剥夺顾客获得增强的“隐性竞争”好处的可能性。

57、在班轮运输业，价格指数被用于显示一个海上集装箱运输的平均价格变动。建立在适当集合基础上的价格资料只要使信息集合到一定程度以至于不可能被拆解而使企业直接或间接的辨别其竞争者的竞争策略，就不可能违反条约第 81 ( 1 ) 条。如果价格指数降低或取消了有关市场运行的不确定性，导致企业间竞争受到限制，则会违反条约第 81 ( 1 ) 条。在一个给定的相关市场上评估一个此类价格指数可能产生的效果时，应当考虑资料的集合程度、其时间性以及指数被公开的频率。通常，将任何信息交换计划的所有单独因素一起加以评估是重要的，目的是将潜在的互动影响（例如运载量和容积资料的信息交换和价格指数信息交换之间的互动影响）考虑在内。

58、但是，承运人之间限制竞争的信息交换可能会产生效率，如更好的规划投资以及更有效的使用承载量。此类效率必须是在条约第 81 ( 3 ) 条的框架下可以实现的和传递给顾客的，而且其正面效果大于信息交换所产生的反竞争效果。特别应注意到第 81 ( 3 ) 条的条件之一是消费者应当获得限制竞争协议产生的好处的公平的比例。如果第 81 ( 3 ) 条规定的所有四个累计性条件都得到了满足，第 81 ( 1 ) 条的禁止性规定就不适用。<sup>52</sup>

<sup>52</sup> 关于适用第 81(3)条的指南，见脚注 7。

### 3.2.4. Trade associations

59. In liner shipping, as in any other sector, discussions and exchanges of information can take place in a trade association provided the association is not used as (a) a forum for cartel meetings [53]; (b) a structure that issues anti-competitive decisions or recommendations to its members [54]; or (c) a means of exchanging information that reduces or removes the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted while not fulfilling the Article 81(3) conditions [55]. This should be distinguished from the discussions that are legitimately conducted within trade associations, for example on technical and environmental standards.

### 3.3. Pool agreements in tramp shipping

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

### 3.2.4. 行业协会

59、如同其他任何行业一样，对于班轮运输而言，在一个行业协会中讨论和交换信息是被允许的，前提是协会不被用于 (a)卡特尔会议的论坛，<sup>53</sup>(b)向其成员发布反竞争决策或建议的组织，<sup>54</sup>或者(c)交换降低或取消有关市场运行的不确定性程度的信息从而导致企业间的竞争受到限制但同时又不满足第 81 ( 3 ) 条规定的条件。<sup>55</sup>这应当与在行业协会中可以合法进行的讨论相区别，例如有关技术和环境标准的讨论。

### 3.3. 不定期船运输的联营协议 (pool agreements)

60、在不定期船运输行业横向合作最经常采取的形式是联营运输(shipping pool)。联营并没有一种普遍模式。但是，在不同的局部市场多数联营确实呈现出下述一些共同特点。

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<sup>53</sup> 欧委会第2004/421/EC号裁决，2003年12月16日，COMP/38.240案— *Industrial tubes*，OJ L 125，2004年4月28日，第50页。

<sup>54</sup> 欧委会第82/896/EEC号裁决，1982年12月15日，IV/29.883案— *AROW/BNIC*，OJ L379，1982年12月31日，第1页；欧委会第96/438/EC号裁决，1996年6月5日，IV/34.983案— *Fenex*，OJ L 181，1996年7月20日，第28页。

<sup>55</sup> 欧委会第92/157/EEC号裁决(*UK Agricultural Tractor Registration Exchange*)，见脚注50。

61. A standard shipping pool brings together a number of similar vessels [56] under different ownership and operated under a single administration. A pool manager is normally responsible for the commercial management (for example, joint marketing [57], negotiation of freight rates and centralization of incomes and voyage costs [58]) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices, ordering bunkers, collecting the vessels' earnings and distributing them under a pre-arranged weighting system etc.). The pool manager often acts under the supervision of a general executive committee representing the vessel owners. The technical operation of vessels is usually the responsibility of each owner (safety, crew, repairs, maintenance etc.). Although they market their services jointly, the pool members often perform the services individually.

62. It follows from this description that the key feature of standard shipping pools is joint selling, coupled with features of joint production. The guidance on both joint selling, as a variant of a joint commercialisation agreement, and joint production in the Commission Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements [59] is therefore relevant. Given the variation in pools' characteristics, each pool must be analysed on a case-by-case basis to determine, by reference to its centre of gravity [60], whether it is caught by Article 81(1) and, in the affirmative, if it fulfils the four cumulative conditions of Article 81(3).

61、一个标准的联营运输将一定数量的不同所有权的类似船只<sup>56</sup>聚集起来进行统一管理。一个联营经理通常负责商务管理（例如，共同营销<sup>57</sup>，议定运费并将收入和航次成本<sup>58</sup>集中化）和商务运营（计划船只移动和指示船只，指定港口代理人，提供顾客随时更新的信息，开具运费发票，订购燃料，收集船只收入并按照预先安排的权重系统分配收入，等等）。联营经理的行为经常受代表船只所有人的总执行委员会的监督。船只的技术操作通常由每个所有人负责（安全、船员、维修、维护等）。尽管联营运输成员共同推销其服务，但是它们经常单独提供服务。

62、从上述描述中可以看出，标准联营运输的关键特点是共同销售，附加共同生产的特点。因此，欧委会关于对横向合作协议适用条约第 81 条的指南<sup>59</sup>中对共同销售（作为一个联合商业化协议的变体）和共同生产的规定是相关的。鉴于联营特点的变化诸多，必须参考联营的重心<sup>60</sup>并以个案为基础来确定其是否违反第 81（1）条，如果确实违反第 81（1）条，则进一步判断其是否满足第 81（3）条的四个累积性条件。

<sup>56</sup> 这使得联营运输能够吸引很多包运租船合同，结合各种包运租船合同并通过仔细的船队计划降低空放航程。

<sup>57</sup> 例如，作为一个商业单位来营销联营运输的船只，提供运输解决方案，而不管哪一只船履行实际的航次。

<sup>58</sup> 例如，由中央管理机构来收集联营运输的收入，收入按照复杂的权重制度分配给参与者。

<sup>59</sup> 分别见指南第5和第3部分，见脚注6。

<sup>60</sup> 关于横向合作协议的指南，见脚注6，第12段。

63. Pools that fall within the scope of Council Regulation (EC) No 139/2004 [61] because they are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures, see Article 3(4) of Regulation (EC) No 139/2004) are not directly affected by the changes brought about by Regulation (EC) No 1419/2006 and are not dealt with in these Guidelines. Guidance on full-functionality can be found, inter alia, in the Commission Consolidated Jurisdictional Notice under Regulation (EC) No 139/2004 on the control of concentrations between undertakings [62]. Insofar as such pools have as their object or effect the coordination of the competitive behaviour of their parents, the coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the EC Treaty with a view to establishing whether or not the operation is compatible with the common market [63].

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

64. Pool agreements do not fall under the prohibition of Article 81(1) of the Treaty if the participants to the pool are not actual or potential competitors. This would be the case, for instance, when two or more ship-owners set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry out on their own. This conclusion is not invalidated in cases where such pools occasionally carry other cargo representing a small part of the overall volume.

65. Pools whose activity does not influence the relevant parameters of competition because they are of minor importance and/or do not appreciably affect trade between Member States [64], are not caught by Article 81(1) of the Treaty.

63、由于联营运输以合营企业形式成立并持久运行自主经济体的所有功能（所谓的全能合营企业，见欧共体理事会第 139/2004 号条例第 3（4）条）而属于欧共体理事会第 139/2004 号条例<sup>61</sup>所规制，则该联营运输不直接受欧共体第 1419/2006 号条例带来的变化的影响，本条例对此并不涉及。除了别处以外，可以在根据欧共体理事会关于企业集中控制的第 139/2004 号条例的欧委会统一司法通告中找到有关全功能的指南。<sup>62</sup>如该联营运输将协调其母公司竞争性行为作为其目标或有此效果，则应当按照欧共体条约第 81（1）和（3）条规定的标准来对进行评估，以确认该行为是否与共同市场相容。<sup>63</sup>

### 3.3.1. 不属于条约第 81（1）规制的联营运输

64、如果联营的参与者不是实际的或潜在的竞争者，则联营协议不受条约第 81（1）条的规制。例如，两个或多个船只所有人为了竞标和履行一个包运租船合同（它们当中的每一个单独运营都无法成功竞标或无法履行合同）而建立的联营运输就属于这种情况。如果上述联营运输偶尔承运其他代表总量中的一小部分的货物，上述结论仍适用。

65、如果联营运输由于其重要性微不足道且/或没有显著影响成员国间的贸易而没有影响相关竞争参数<sup>64</sup>，则其不受条约第 81（1）条的规制。

<sup>61</sup> 关于控制企业间集中的理事会第139/2004号条例（欧共体集中条例），OJ L 24，29.1.2004，第1页。

<sup>62</sup> OJ C 95，16.4.2008，第1页。

<sup>63</sup> 理事会第 139/2004 号条例第 2（4）条。

<sup>64</sup> 欧委会关于无关紧要的协议（不显著限制条约第81（1）条意义上的竞争）的通告，OJ C 368，2001年12月22日，第13页，以及关于对贸易的影响的指南，见脚注13。

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

66. Pool agreements between competitors limited to joint selling have as a rule the object and effect of coordinating the pricing policy of these competitors [65].

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

67. If the pool does not have as its object a restriction of competition, an analysis of its effects in the market concerned is necessary. An agreement is caught by Article 81(1) of the Treaty when it is likely to have an appreciable adverse impact on the parameters of competition on the market such as prices, costs, service differentiation, service quality, and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties [66].

68. Some tramp shipping pools do not involve joint selling but nevertheless entail some degree of coordination on the parameters of competition (e.g. joint scheduling or joint purchasing). Such cases are only subject to Article 81(1) of the Treaty if the parties to the agreement have some degree of market power [67].

### 3.3.2. 通常受条约第 81 ( 1 ) 条规制的联营运输

66、竞争者之间限于共同销售的联营运输协议一般来说具有协调这些竞争者的定价政策的目的以及效果。<sup>65</sup>

### 3.3.3. 可能受条约第 81 ( 1 ) 条规制的联营运输

67、如果联营运输不以限制竞争为目的，就需要分析其对有关市场的影响。如果一个协议有可能对市场上竞争的参数（如价格、成本、服务差异性、服务质量和创新）产生显著的负面影响，则该协议受条约第 81 ( 1 ) 条规制。协议显著地降低协议当事方之间的或当事方与第三方之间的敌对性，就会产生上述效果。<sup>66</sup>

68、一些不定期船运输联营不涉及共同销售，但是需要对竞争参数进行一定程度的协调（例如制定共同时间表或共同采购）。只有在协议当事方具有一定程度的市场力量时，此种情况才受制于条约第 81 ( 1 ) 条。

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<sup>65</sup> 关于横向合作协议的指南，见脚注6，第5部分。一个独立的船只经纪人“固定一个船只”时的活动不属于这种类型。

<sup>66</sup> 关于适用第81 ( 3 ) 条的指南，见脚注7。

<sup>67</sup> 关于横向合作协议的指南，见脚注 6，第 149 段。

69. The pool's ability to cause appreciable negative market effects depends on the economic context, taking into account the parties' combined market power and the nature of the agreement together with other structural factors in the relevant market. It must also be considered whether the pool agreement affects the behaviour of the parties in neighbouring markets closely related to the market directly affected by the cooperation [68]. This may be the case for example where the pool's market is that for the transport of forest products in specialised box shaped vessels (market A) and the pool's members also operate ships in the dry bulk market (market B).

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

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

69、联营运输对市场产生显著负面影响的能力取决于经济背景情况，以及当事方联合起来的市场力量、协议的性质和相关市场上的其他结构性因素。还必须考虑，联营运输协议是否影响了与受合作直接影响的市场紧密相邻的市场上当事人的行为。<sup>68</sup>例如，联营运输的市场是以特制的箱形船只运输林木产品（A 市场），而联营的成员在干整货市场（B 市场）上也在经营，就可能属于这种情况。

70、关于相关市场上的结构因素，如果联营运输的市场份额较低，其就不可能产生限制竞争的效果。在评估一个特定的联营运输对相关市场的影响时，还应考虑的因素包括市场集中度、竞争者市场位置和数量、一段时间以来市场份额的稳定性、对不同联营运输的参与、市场进入障碍和进入的可能性、市场透明度，运输使用者的购买力和服务的性质（如同质的还是差异性的服务）。

71、就协议的性质而言，应考虑影响联营运输或其成员在市场上竞争行为的条款，例如禁止成员在联营运输以外在同一市场上营运的条款（不竞争条款），锁定期和通告期（退出条款）以及交换商业敏感信息。联营运输间的任何联系，无论以经营管理还是成员以及成本和收入分配的方式，也应当予以考虑。

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<sup>68</sup> 关于横向合作协议的指南，见脚注 6，第 142 段。

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

72. Where pools are caught by Article 81(1) of the Treaty, the undertakings involved need to ensure that they fulfil the four cumulative conditions of Article 81(3) [69]. Article 81(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule. This analysis incorporates a sliding scale. The greater the restriction of competition found under Article 81(1), the greater the efficiencies and the pass-on to consumers must be.

73. It is up to the undertakings involved to demonstrate that the pool improves the transport services or promotes technical or economic progress in the form of efficiency gains. The efficiencies generated cannot be cost savings that are an inherent part of the reduction of competition but must result from the integration of economic activities.

74. Efficiency gains of pools may for instance result from obtaining better utilisation rates and economies of scale. Tramp shipping pools typically jointly plan vessel movements in order to spread their fleets geographically. Spreading vessels may reduce the number of ballast voyages which may increase the overall capacity utilisation of the pool and eventually lead to economies of scale.

75. Consumers must receive a fair share of the efficiencies generated. Under Article 81(3) of the Treaty, it is the beneficial effects on all consumers in the relevant market that must be taken into consideration, not the effect on each individual consumer [70]. The pass-on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition under Article 81(1) [71]. To assess the likelihood of a pass-on the structure of tramp shipping markets and the elasticity of demand should also be considered in this context.

### 3.3.4. 条约第 81 ( 3 ) 条的适用

72、如联营运输违反了条约第 81 ( 1 ) 条，涉及的企业需要确保其满足第 81 ( 3 ) 条的四个累计性条件。<sup>69</sup>第 81 ( 3 ) 条没有将特定类型的协议预先排除在外。理论上讲，所有满足第 81 ( 3 ) 条规定的四个条件的限制性协议都包含在例外规则中。这其中存在滑动分析：第 81 ( 1 ) 条下对竞争的限制越大，则需要越多的效率和越多的向消费者的获益传递。

73、所涉企业需自己证明，联营改善了运输服务或以获得更高效率的形式促进了技术或经济进步。产生的效率不能是因竞争减少而自然发生的成本的节约，而必须是经济活动整合的结果。

74、例如，联营运输提高效率可以是获得更好的使用率和规模经济的结果。典型的不定期船运输联营共同计划船只移动，目的是在地理上分散船只。分散船只可以减少空放航次，这样就可以增加联营运输总体承载量的使用率并最终产生规模经济。

75、消费者必须取得产生的效率中的公平的份额。根据条约第 81 ( 3 ) 条，必须考虑的是在相关市场上对所有消费者的获益效果，而非对每一个单独的消费者的效果。<sup>70</sup>传递的获益必须至少补偿了消费者由于条约第 81 ( 1 ) 条所指的竞争的限制而承受的任何实际的或潜在的负面影响。<sup>71</sup>为评估传递获益的可能性，不定期船运输市场的结构和需求弹性也应在此加以考虑。

<sup>69</sup> 关于适用第 81 ( 3 ) 条的指南，见脚注 7。

<sup>70</sup> *Asnef-Equifax v Ausbanc* 案判决，见脚注 38，第 70 段。

76. A pool must not impose restrictions that are not indispensable to the attainment of the efficiencies. In this respect it is necessary to examine whether the parties could have achieved the efficiencies on their own. In making this assessment it is relevant to consider, inter alia, what is the minimum efficient scale to provide various types of services in tramp shipping. In addition, each restrictive clause contained in a pool agreement must be reasonably necessary to attain the claimed efficiencies. Restrictive clauses may be justified for a longer period or the whole life of the pool or for a transitional period only.

77. Lastly, the pool must not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question.

76、联营运输不得施加对所获效率而言并非必不可少的竞争限制。在此方面，有必要审查当事方是否能够以自己的能力提高效率。在作此评估时，除其他因素以外，在不定期船运输中提供各种类型服务的最低效率水平应当加以考虑。此外，联营运输协议中的每一个限制性条款必须是为获得所声称的效率合理必需的。限制性条款的存在可能在较长期限内合理，或全部联营运输期间内合理，或仅在一个过度期内合理。

77、最后，联营运输不得给当事方提供在相关服务的实质部分消除竞争的可能性。

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<sup>71</sup> 关于适用第 81 ( 3 ) 条的指南，见脚注 7，第 24 段。