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Anti-competitive information exchange in liner shipping

Analysis under Article 101 TFEU

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1 Introduction

1.1 Research question and legal context

Liner shipping companies (hereinafter "carriers")[1] have historically enjoyed an atypical application of European Union (EU) competition law, where cartel-like agreements to fix prices and regulate capacities ("conferences") for long were exempted from the general rules.[2] Such was tolerated since it was claimed that shipping conferences were necessary to avoid aggressive price wars amongst carriers that would stem from the industry's fixed-cost nature and the existence of excess capacity. [3]

Today, competition law has changed the liner shipping industry, making carriers dependent on alliances and other capacity-sharing agreements, meanwhile freight rates may not be fixed. The industry continues to be characterised as capital-intensive with global concentration on the supply side, significant barriers of entry, and multiple links between competing carriers.[4] Consequently, competing carriers must be attentive to how information is exchanged amongst them to avoid infringements of Article 101 (Art. 101) of the Treaty on the Functioning of the European Union (TFEU). Art. 101 governs horizontal competition and prohibits "agreements, decisions by associations or concerted practices" (hereinafter "cooperation") between undertakings which have as their "object or effect" the prevention, restriction, or distortion of competition between Member States.[5] Generally, sharing of information between competing carriers may restrict competition by enabling them to coordinate prices, qualities, or quantities of their services, to the detriment of customers (hereinafter "shippers") and consumers.

This thesis examines *how various forms of information sharing between liner shipping companies potentially can be viewed as pursuing anti-competitive objects under Article 101 (1) TFEU*. Competition law within the maritime sector is no longer regulated specifically, and thus the general rules in principle apply in full.[6]

The question addressed is two-fold circulating Art. 101: when do exchanges of information constitute "agreements, decisions by associations, or concerted practices"? and furthermore, in which situations do such exchanges restrict competition "by object or effect"?

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[1] Liner shipping companies operate scheduled international maritime transport services for carriage of cargo on pre-determined geographic routes, see Pozdnakova (2008) p.3.

[2] OECD (2015a).

[3] OECD (2015b) p.2.

[4] *For capital-intensive container ships and barriers of entry*, see Harambles (2019) pp.18-19 and 48-49; *For market concentration*, see El Kalla et al. (2017) pp.128 and 133-134; Luo et al. (2014) pp.171-172; *For operational and structural links*, see Notice 2008/C245/02 para.49 and footnote 47; *Generally*, see Pozdnakova (2008) pp.70-71.

[5] TFEU art. 101 (1).

[6] Power (2019) p.603.

The topic's relevance was illustrated in the 2016 commitment decision by the European Commission (Commission) in case AT.39850 (hereinafter "*Container Shipping*"), which concerned unilateral public announcements of future price increases by competing carriers.[7] The decision exemplifies and assists in answering when information exchanged between competing carriers can constitute a "concerted practice" restricting competition "by object."

Furthermore, the research question is highly relevant for several reasons. Firstly, digital development and modernization of communication allow for increased information shared through webpages, social media, digital clouds, and algorithms, potentially being deemed "concerted practices." For example, developments since the Covid-19 pandemic has seen container freight rates increase substantially, thus increasing the revenues for liner shipping companies to offset i.e. inflation and increased energy costs.[8] Rate increases are normally commented by carriers in their quarterly reports, for instance when Maersk after record results in Q3 of 2022 announced that "freight rates have peaked and started to normalize."[9] Such public announcements can be deemed "hints" which reduce competitors' uncertainty regarding Maersk's future rate settings, potentially falling under the scope of Art. 101.

Secondly, the Commission has drafted a set of New Horizontal Guidelines (2020) and launched a consultation in March 2022.[10] Although not formally adopted, the draft express how the Commission will enforce information exchange cases going forward, providing interpretive guidance to companies and competition authorities applying Art. 101. The updated guidelines explicitly address information exchanges and price signalling, confirming that the EU recognises this field as particularly challenging.

Thirdly, in 2020 the Commission extended the currently applicable block exemption regulation (BER) which provides a group exemption from Art. 101 for certain agreements on joint operation (Consortia BER) between competing carriers.[11] Upon its expiry in 2024, the Commission has initiated an evaluation and invited feedback from affected parties.[12] Several voices have pointed to the increasing margins of carriers, concentrated supply, and increased transport

[7] Case AT.39850 Container Shipping.

[8] Statistia (2022).

[9] Maersk (2022).

[10] Communication 2022/C164 (New Horizontal Guidelines Draft).

[11] Regulation 2020/436 art. 1.

[12] European Commission (2022a).

prices as reasons not to extend the Consortia BER beyond 2024.[13] Other parties point to improved predictability and transport frequency as reasons to prolong the exemption further.[14]

The liner shipping sector has been, and continues to be, characterised by extensive cooperation between competitors and non-competitors alike. Such cooperation assists in securing efficient import and export of necessary and desirable products from around the globe. Moreover, much industrial development and production is geographically specialised and rely on importing various components. Such considerations add more nuances to the complex choices behind international competition policies and highlight the importance of a balanced legal framework.

1.2 Legal framework

Historically, competition regulation in maritime transport has seen continuous evolvement. Until the implementation of the "1986 Package", the Commission lacked procedural tools to investigate any competition law concerns in the maritime industry.[15] With Regulation 4056/86, the EU competition rules were implemented in maritime transport. Further, through Regulation 1/2003, the procedural provisions of Reg 4056/86 were repealed, resulting in general application of Art. 101 to the sector.[16]

Art. 101 is structured by prohibiting cooperation which restricts competition under Art. 101 (1), by declaring such agreements or practices void under Art. 101 (2), and by exempting certain practices which produce efficiencies under Art. 101 (3). Efficiencies in liner shipping, in addition to facilitating effective global trade, include improved stability, predictability and quality of transport services, benefitting not only shippers sending their cargo, but also individuals and businesses as consumers. These are some of the considerations justifying BERs in liner shipping, as EU regulators assume that certain forms of cooperation produce efficiencies outweighing their restriction on competition, in accordance with Art. 101 (3).

The liner shipping sector has seen two BERs. The first of 1986 (Conference BER) provided the option for carriers to engage in so-called "conference" agreements, fixing freight rates and other conditions of carriage.[17] The regulation reduced competition particularly on prices, and allowed, under certain conditions, competing carriers to allocate cargo and coordinate shipping timetables, carrying capacities, and sailing frequencies.[18]

[13] European Commission (2022b).
[14] Ibid.
[15] Van Bael & Bellis (2021) pp.1451-1452.
[16] Regulation 1/2003 art.32, 38 and 43.
[17] Regulation 4056/86 see particularly art.1 and 3.
[18] Ibid. art.3.

Liner conferences were exempted under the notion that they have a stabilizing effect on the market and thus assure shippers of reliable services. Furthermore, they contribute to efficient scheduled transport services, in the interests of consumers.[19] The Conference BER enabled co-operation on central parameters of competition and was in 2006 repealed with effect from 2008,[20] only to be replaced by the Consortia BER.[21] The current legal framework consists of Art. 101 applying in full, accompanied by the Consortia BER.[22] Accordingly, case law from all industries is relevant when interpreting Art. 101.

Consortia BER exempts sets of agreements having the object of cooperating in joint operations of liner services, provided they improve the services offered and rationalise the operations through technical, operational, or commercial arrangements.[23] Central activities include the joint operation of sailing timetables and port terminals, as well as slot-exchanges between vessels and pooling of vessels. Additionally, capacity adjustments in response to fluctuations in supply and demand are allowed, in addition to other ancillary activities necessary for implementing the joint operations, for instance the use of a computerised data exchange system.[24]

The broad definition of "consortia" in article 2, and the various activities explicitly exempted in article 3, intend to cover a wide range of cooperative arrangements in the sector.[25] The Consortia BER is justified by pointing to improved productivity and quality of liner services, rationalisation of activities, economies of scale, and better utilisation of containers.[26] Upon its date of expiry, the liner consortia BER was extended first in 2014,[27] and again in 2020, making it applicable until 2024.[28]

Despite the Consortia BER, traditional and recent forms of cooperation in liner shipping may be at conflict with EU competition rules. One main objective of the EU is to establish an internal market and ensure a highly competitive social market economy.[29] Within this lies the aim of protecting the competitive structures of the market and competition in general.[30] Additionally,

[19] Ibid. p.1.
[20] Regulation 1419/2006 art.1.
[21] Regulation 906/2009 para.15.
[22] Van Bael & Bellis (2021) p.1453.
[23] Regulation 906/2009 art.2 No 1.
[24] Ibid. art.3.
[25] Van Bael & Bellis (2021) p.1454.
[26] Regulation 936/2009 para.5.
[27] Regulation 697/2014 art.1
[28] Regulation 2020/436 art.1
[29] TEU art.3.
[30] Cases C-501/06 P GlaxoSmithKline Services Unlimited and Others v Commission (GlaxoSmithKline) para.63.

competition rules aim at protecting consumer welfare.[31] In liner shipping, these objectives should ideally ensure a market where different carriers genuinely compete to offer shippers the best terms on price, quality and quantity of their services. Extensive sharing of information between competitors may, however, allow carriers to reduce competition on these parameters, potentially requiring customers, and ultimately consumers, to pay a higher price for a reduced supply of maritime transport services.

1.3 Sources and methodology

To conduct a proper analysis, this thesis applies EU legal method.[32] The wording of Art. 101 (1) is supplemented by case law of the Court of Justice of the European Union (CJEU), being the main interpretive instrument of the legal text. The case law is comprised by decisions of the General Court (GC), previously the Court of First Instance (CFI), and the European Court of Justice ("CJEU" or "the Court").[33]

Additionally, the Commission has taken an active role in competition law issues and offers important interpretive assistance. The Commission conducts investigations and resolves cases as "decisions", "commitment decisions", and "settlement cases."[34] Also, it publishes guidelines for the application of Art. 101, such as the Horizontal Guidelines (2011) and New Horizontal Guidelines.[35] The practice and guidelines are not legally binding but illustrate how the Commission interprets the law and assess cases. Finally, the Commission also adopts regulations such the Consortia BER, directly regulating competition law issues.[36]

Articles 101 and 102 correspond to Article 53 and 54 of the EEA agreement.[37] These rules are subject to the EFTA Court and EFTA Surveillance Authority (ESA) unless they fall under the EU Courts and Commission.[38] Thus, Article 53 and 54 shall be interpreted in line with EU law and are relevant to the discussion, although majority of case law stems from the EU. Moreover, the application of Art. 101 by national courts and competition authorities supplements the discussions by illustrating how the law is interpreted in different jurisdictions.

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[31] Case 6/72 Europemballage and Continental Can v Commission para.26.

[32] There exists substantial discussion concerning e.g. the scope and impact of internationalisation of legal method, see for instance Arnesen & Stenvik (2015). The topic falls outside the scope of this thesis.

[33] Eurofound (2017).

[34] See Whish & Bailey (2021) pp.54 and 264-277.

[35] See Communication 2011/C11/01 (Horizontal Guidelines) and Communication 2022/C164.

[36] Regulation 936/2009.

[37] EEA Agreement art. 53 and 54.

[38] Sejersted et al. (2011) pp.569-570; See also Whish & Bailey (2021) pp.58-59.

Finally, legal and economic literature contribute to the thesis by taking into account different analyses of Art. 101 and related practice. Literature also systemizes these decisions in light of economic theories, which complement the legal dogmatic method, creating a more holistic understanding of the competition rules. Since the nature of competition law is so heavily linked with economic theories of market structures, the insight provided by literature is decisive when understanding Art. 101. Also the independent opinions of the Court's Advocate Generals (AG) provide valuable insight to the possible reasoning behind the assessments. The variety of sources will be applied throughout the discussions in chapters 2 and 3, securing broad analyses. However, case law concerning the specific research question is scarce. The analysis thus relies on cases concerning the same fundamental questions, applied on different sectors, which can, challenge the validity of the conclusions.

By artificially increasing transparency between competing carriers, the exchange of commercially sensitive information can facilitate coordination of undertakings' competitive behaviour also referred to as "collusion."[39] Potentially resulting in restrictions of competition, information exchanges may enable undertakings to achieve collusive outcome, and to increase the internal stability of collusive outcome already present on the market.[40] The sources are applied to examine how these potentially harmful exchanges affect the current liner shipping market.

1.4 Further discussion and delimitations

This thesis examines complex legal issues being subject to comprehensive debate and uncertainty. Its objective is to review the existing materials on information exchanges in different sectors and apply them to liner shipping. It contributes to the academic debate by uncovering that many forms of cooperation and information sharing in liner shipping arguably restrict competition by object, requiring a regulatory review to ensure real competition in the industry and legal predictability in application.

Several relatable issues will not be discussed. Firstly, Art. 101's conditions that the legal person is an "undertaking" and that the conduct must "affect trade between Member States" are normally unproblematic in liner shipping and are thus presumed to be fulfilled. Secondly, neither the comprehensive 'by effect'-assessment nor the conditions of the exemption rule in Art. 101 (3) are problematised. Lastly, parallel conduct in concentrated markets such as liner shipping may raise issues of collective dominance, regulated by Article 102. Although information exchanges can be subject to both Articles 101 and 102, only the first will be addressed.

[39] Kühn (2001) p.173.

[40] Communication 2022/C164 paras.416-418.

The thesis is structured as follows. Chapter 2 analyses the condition of cooperation, examining when information exchanges constitute "agreements, decisions by associations or concerted practices." It commences by introducing the condition, before presenting different forms of cooperation in liner shipping. Because much of the cooperation is based on formal agreements, Section 2.3 discusses when information exchanges constitute "concerted practices."

Chapter 3 analyses when cooperation in liner shipping may restrict competition "by object." After introducing the alternative conditions and dichotomy of Art. 101, the 'object'-alternative is examined. After providing the legal starting points, Section 3.2 delves into the literature and presents different methodical approaches to the assessment. Presuming the existence of a concerted practice, Section 3.3 addresses when concerted practices in liner shipping restrict competition by object. Pure information exchanges and their characteristics are addressed first, before another layer is added when examining the exchanges within agreements in Section 3.4. Finally, Chapter 4 summarises the findings of the thesis and provides answer to the research question.

2 Information exchanges as agreements, decisions by associations of undertakings, or concerted practices

2.1 Introduction

Many different forms of commercial conduct by companies may be harmful to competition. However, *independent* harmful conduct is not covered by Art. 101, as the provision only regulates different types of cooperation: agreements, decisions by associations, or concerted practices.[41] The objective of the provision is thus to prevent *collusive outcome* between competitors, a distinction which has proven to be challenging. Chapter 2 aims to uncover under which circumstances interactions between competing carriers, as well as unilateral conduct on the liner shipping market, may constitute "agreements" or "concerted practices." The liner shipping industry has traditionally been characterised by multiple links between competitors, which arguably are necessary to ensure safe and efficient maritime transport. Regardless, such links result in many potential cases of "cooperation" falling under the scope of Art. 101.

EU competition law operates with a wide concept of an "agreement." The fundamental condition was specified in the case *Bayer* as a "concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of

[41] TFEU art. 101 (1) covers: "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

conduct on the market."[42] The decisive is not the form of the agreement, but rather its content, illustrated by cases where oral agreements,[43] and "gentleman's agreements"[44] are covered.

However, many forms of cooperation are not captured by the concept of an agreement, and undertakings may easily circumvent it.[45] Thus, to further widen the scope of Art. 101, the concept of "concerted practice" aims at prohibiting

> "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[46]

The criterion of "knowingly substituting" practical cooperation excludes mere "accidental" coordination, where competing carriers independently pursue similar conduct on the market. It requires reciprocal cooperation, a meeting of minds, or a joint intention by the undertakings to conduct themselves in a specific way.[47] Moreover, the condition requires causation between the contact in question and the parties' conduct, and the Court has taken the stance that undertakings are *presumed* to take account of the information exchanged with their competitors.[48]

With complex forms of cooperation developing, the lines between agreements and concerted practices are blurred. This may hold especially true for information exchanged in increasingly concentrated markets, such as the liner shipping market. Although the alternative nature of the condition may imply that regulators must place the relevant cooperation within a "box", the CJEU has rejected such an approach. The case *Anic* concerned a practice of regular meetings between competing producers of polypropylene. The Court confirmed that "a single and complex infringement, corresponding partly to an agreement and partly to a concerted practice"[49] falls under the scope of Art. 101 (1). The decisive question is therefore not whether the information exchange constitutes an "agreement" or "concerted practice", but rather whether the *lower threshold* of "concerted practices" is reached. Thus, it is an "unimportant" classification to define the exact point at which an agreement ends, and concerted practice begins.[50]

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[42] Case T-41/96 Bayer AG v Commission para.173.

[43] Case 28/77 Tepea BV v Commission para.41.

[44] Case T-53/03 BPB plc v Commission para.82.

[45] Albors-Llorens (2006) p.840.

[46] Case 48-69 Imperial Chemical Industries v Commission (ICI) para.64.

[47] Dunne et al. (2019) p.177.

[48] Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur (T-Mobile) paras.52-53.

[49] Case C-49/92 P Commission v Anic Partecipazioni para.114.

[50] Opinion of AG Reischl in Case C-209/78 Van Landewyck v Commission p.3310.

Put simply, one can distinguish between "pure" information exchanges, where the main economic function lies in the exchange itself,[51] and "ancillary" information exchanges, where the information is but a part of a wider arrangement such as an agreement.[52] The former should be analysed concretely, taking into account all its characteristics to determine whether it constitutes a concerted practice. The latter should be analysed in the context of its "channel", for instance a vessel-sharing agreement.[53]

Having in mind the legal concepts of agreements and concerted practices, Section 2.2 introduces different forms of cooperation relevant to liner shipping, before moving on to when information exchanges can constitute concerted practices in Section 2.3.

2.2 Different forms of cooperation in liner shipping

2.2.1 Introduction

Different forms of cooperation and variations of interactions can give rise to several platforms for sharing information between liner shipping companies. Since an exchange is either considered isolated (pure) or in the context of its agreement (ancillary), the type of cooperation is important for the further assessment. Consequently, to effectively assess whether information exchanges between competing carriers restrict competition by object, the features of the different cooperation must first be established.

2.2.2 Liner conferences

Liner conference was defined in Regulation 4056/86 as an agreement or arrangement between two or more vessel-operating carriers in liner shipping which "operate under uniform or common freight rates and any other agreed conditions" relating to international liner services.[54] One condition is thus that the agreement sets a common rate charged for the transport services offered, hereunder fixing prices. The *East Asia Trades Agreement (EATA) decision* exemplifies that the conditions are to be interpreted strictly. That agreement's express purpose was to allow the parties to increase their freight rates.[55] However, the Commission found it to fall outside the "liner conference" definition in the BER, as it had "no direct mechanism for agreeing on the implementation of freight-rate increases."[56] Arguably, members of liner conferences must explicitly set one common freight rate, obligating the parties to adhere to it. Regardless of whether they are deemed "conferences" such agreements fulfil the "cooperation" condition in Art. 101.

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[51] Camesasca and Schmidt (2011) pp.227-228.

[52] Bennett & Collins (2010) p.328.

[53] Communication 2011/C11/01 para.56.

[54] Regulation 4056/86 art.1 (3)b).

[55] Case 1999/485/EC Europe Asia Trades Agreement (EATA) para.9.

[56] Ibid. para.82.

2.2.3 Liner consortia

Unlike conferences, a liner consortium encapsulates agreements between two or more vessel-operating carriers in international liner shipping having the objective of joint operations "in order to rationalise their operations by means of technical, operational and/or commercial arrangements."[57] One simplified distinction between conferences and consortia is that the prior agreements concern prices, while the latter concern capacities.[58] Consortia enable operational cooperation such as joint operation centres and slot-sharing between ships. However, the content and extent of different consortia varies according to their degree of integration.[59] Such agreements remove the competition between participants with regard to offering their capacities to shippers which is generally regarded as anti-competitive "control" of the service production in a market. However, they also increase the capacity-utilisation of each ship, improving the transport services offered in the market.

2.2.4 Shipping pools

Shipping pools are in essence operational agreements creating one common fleet of ships under different ownerships.[60] Pooling is particularly normal on the tramp shipping market, where vessels operate on the spot market, namely through contracts on irregular schedule and over varying routes.[61] However, pooling also occurs in liner shipping, for instance by pooling cargo, revenues or losses between the participants.[62] One consideration is that a larger fleet can serve larger regular shipments on each route, enabling companies to offer transport to demands exceeding the individual carrier's capacity. Additionally, pooling of cargo may decrease issues of excess capacity in the market, since coordination is expected to improve the utilisation of the ships carrying capacities.

Shipping pools are traditionally organised in different ways. However, as a starting point, pooling agreements will include clauses on rights and obligations of the parties and of one designated pool manager. The pool manager will often be responsible for collecting and redistributing revenues achieved in the pool, as well as keeping financial records and continuously inform pool participants of developments. Normally, the participants are bound to place all or some of its ships under the commercial control of the pool, serving the contracts entered into by the pool. Consequently, each participant has right to a proportionate share of the pool's revenues, as well as right to compensation in different scenarios. Such clauses often include the right of each party to review and control the correctness of the participants' results and their

[57] Regulation 906/2009 art.2 nb.1.

[58] Case 1999/485/EC EATA para.132.

[59] Regulation 906/2009 para.3

[60] Wen et al. (2019) p.737.

[61] Power (2019) p.686.

[62] Pozdnakova (2008) pp.63-67.

underlying documentation (full disclosure). Pooling agreements can, subject to its conditions, enjoy the exemption in the Consortia BER, but they can also remove the incentive to compete on prices and capacity between the members, resulting in a decreased supply for shippers.

2.2.5 Liner shipping alliances

The formation of alliances between competing carriers is a more extensive form of horizontal cooperation in liner shipping. The "strategic alliance" for instance, provides a framework for different agreements and governs coordination of the service capabilities of the participants.[63] An alliance may regulate the terms of container utilization for several routes and often exceeds the scope of a single vessel-sharing agreement optimising capacities on one particular route.[64]

Three liner shipping alliances define the current global market: 2M (Maersk Line, MSC, and Hyundai), The Alliance (ONE, Hapag, and Yang Ming) and OCEAN ALLIANCE (CMA-CGM, COSCO/CSCL, Evergreen, and OOCL).[65] The combined global market share of these 10 currently exceed 80 %.[66] Although their geographic coverage varies in different regions, the alliances undoubtedly have significant impact on competition in liner shipping markets.

The strategic alliance is distinct from pooling agreements, as the former aims at co-operation in the employment and utilization of ships, including e.g. sailing schedules, itineraries (route programmes) and container co-ordination.[67] Also, alliances may consist of a combination of vessel sharing, slot exchange and slot chartering.[68] Put simply, one may regard a strategic alliance as a vessel-sharing agreement covering many services and routes.[69] Accordingly, alliances can in principle be exempted via the Consortia BER, provided that the agreements within the alliance fulfil its conditions. Due to the alliances' sizes, however, they may exceed the market share thresholds in the Consortia BER, making the exemption inapplicable. The extensive framework for cooperation supplied through alliances, combined with their substantial market coverage, makes them particularly suited to potentially restrict competition.

The agreement types evaluated involve some degree of ancillary information exchanged, for instance related to the competing vessel's capacity and cargo management. Since they constitute "agreements" within Art. 101 (1), they will not be discussed further in this chapter. The final

[63] Slack et al. (2011) pp.65-66.
[64] Panayides & Wiedmer (2011) p.26.
[65] Ghorbani et al. (2022) p.449 Fig 4.
[66] Alphaliner (16. November 2022).
[67] Panayides & Wiedmer (2011) p.26.
[68] Van Bael & Bellis (2021) p.1458.
[69] OECD (2015b) p.3.

form of cooperation concerns pure information exchanges, which potentially fall under the scope of "concerted practices."

2.2.6 Cooperation through pure information exchanges

Information shared outside the forum of for instance a pooling agreement or shipping association will not be addressed under Art. 101 unless it is deemed a "concerted practice." Simply put, a concerted practice is a common understanding between competitors to act in a certain manner, without formalising the mutual understanding as an agreement or decision.[70] In liner shipping, information can for instance be exchanged orally in a meeting,[71] via messages,[72] in databases or algorithms[73], or through public announcements.[74] The question is when such sharing of information amounts to a "concerted practice" under Art. 101 (1).

Container Shipping provides but one example of how public unilateral announcements from independent competitors can constitute a concerted practice.[75] In that case, 14 competing carriers had developed a common practice of publishing their respective intentions of future price increases. Such General Rate Increases ("GRI's") were published several times each year through different medias such as websites and press-releases. The Commission's investigations caused the preliminary concern that the carriers were able to coordinate their prices, constituting a concerted practice restricting competition by object.[76]

Accordingly, much cooperation between liner shipping companies has traditionally taken the form of agreements, either regarding prices (conferences), capacities (consortia), or pooling of ships and revenues, or as larger structures of alliances. Information exchanged within these agreements is to be assessed within the context of the agreement. Next section analyses the legal borders between independent conduct and concerted practices in relation to information exchanges on their own, i.e. not as part of an agreement.

[70] See e.g. Case 48-69 ICI para.64.

[71] Case T-279/02 Degussa v Commission (Degussa).

[72] Cases C-40/73 Suiker Unie and Others v Commission (Suiker Unie).

[73] Communication 2022/C164 para.435.

[74] Cases T-191/98 Atlantic Container Line and others v Commission para.1154.

[75] The case is also referred to by the Commission in Communication 2022/C164 in relation to public announcements, see para.434 footnote 236.

[76] Case AT.39850 Container Shipping.

2.3 Information exchanges between liner shipping companies as concerted practices

2.3.1 Introduction

Determining when information exchanges reach the lower threshold of a concerted practice raises complicated issues. Naturally, not all types of information are suited to take part of a collusion, nor is information announced autonomically regarded as *exchanged*. Furthermore, the extent of exchanges necessary to constitute a concerted *practice* is not obvious. The concept of a concerted practice requires a concrete assessment of the information exchange, where these factors are highly relevant.

A concerted practice essentially marks the distinction between independent conduct, which is not captured by Art. 101 (1), and collusive conduct, which is. Since information can be disclosed in a variety of forums and manners, a broad approach is required to uncover the legal test. Principles from fundamental case law provide some starting points.

The existence of an "exchange" has been heavily discussed since the case *Suiker Unie* (1975), which concerned the exchange of information between sugar producers via letters and messages. Although not amounting to an agreement, it was deemed a concerted practice. The Court specified that the condition extends to any "direct or indirect *contact*" having the object or effect

> "to *influence the conduct* on the market of an actual or potential competitor or to *disclose* to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"[77] (emphasis added).

Although the case is old, the principle has been consistently affirmed and remains fundamental to the assessment. The broad definition requires only that the exchange consists of "direct or indirect contact." Regarding what kind of information may be captured, the standard is broad, requiring only to "influence the conduct on the market" of one's competitor or to disclose information regarding its conduct. Information regarding commercial operations is thus relevant, and exchanges regarding competitors' freight rates, capacities, or strategies in different regions and routes may be adequate to influence the conduct of competing carriers.

In the same case, the critical distinction between independent conduct and collusive conduct was set out. The Court ruled the principle as "inherent" that "each economic operator must determine independently the policy which he intends to adopt."[78]

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[77] Cases C-40/73 Suiker Unie para.174.

[78] Ibid. para.173.

The principle of independence was an important precedent in *Suiker Unie*. However, the Court added an important nuance that complicates the assessment further, namely the right for undertakings to adapt to the changing nature of the market. Should for instance one liner carrier suddenly change its pricing strategy, the competitors may suffer losses of customers or revenue if they do not alter their own strategies. Therefore, the provision "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors."[79] The aligned conduct of competitors is thus only prohibited if it stems for "direct or indirect contact."[80]

In summary, the way liner shipping companies receive and send information is important. Since the provision's objective is to restrict collusive outcomes, the decisive assessment concerns the border between independent adaptation to competitors' conduct and indirect contact having the object or effect to influence a competitor. Where that line is drawn is not self-evident.

2.3.2 The borderline between independent conduct and collusion

The borderline between independent conduct and collusion is generally unclear, also in the liner shipping services market. For instance, a concentrated market where the carriers operate on several of the same trading routes, uses the same ports, and are part of the same trade associations, can arguably facilitate more "points of contact" than would be the case in a highly fragmented and diversified market. It may also be easier to coordinate conduct according to competing carriers' public announcements if competitors are few and each hold a substantial market share.[81] The liner shipping market may therefore facilitate "contact", due to its concentration on the supply side, significant barriers of entry and homogeneous services offered. Different understandings of the scope of "contact" are evident also in national cases.

The combined cases of *Replica Kit & Toys and Games* before the British Court of Appeal illustrate the complex 'contact'-consideration. Addressing indirect information exchanges via third parties, the court's reasoning was based on the fact that if retailer A disclosed information to supplier B and was "taken to intend" that B would pass that information to another retailer C, then all three parties would be regarded as parties to a concerted practice.[82]

[79] Ibid. para.174.

[80] Ibid.

[81] Case C-455/11 P Solvay v Commission para.39.

[82] Case No: 2005/1071, 1074 and 1623 Argos and Littlewood v OFT & JJB Sports v OFT para.141.

In the case *Esso and Others* before the Paris Court of Appeal, the court found that competing motorway service stations' exchange of fuel prices did *not* amount to cooperation, assuming that the exchange was deemed not to affect the companies' individual pricing decisions.[83]

The European Courts have been somewhat more general when interpreting the scope of "contact." Although each information exchange case is assessed concretely, it is, as a starting point

> "sufficient that, through its declaration of intention, the competitor has eliminated or, at the very least, substantially *reduced the uncertainty as to the conduct to be expected* from it on the market"[84] (emphasis added).

Consequently, there is no requirement that the competing carrier has undertaken, nor planned to adopt, a particular course of conduct. The decisive is whether the information reduces competing carriers' uncertainty.

Having in mind that undertakings remaining active on the market are presumed to make use of the information disclosed by competitors, the Court has chosen a standard where the competitor must actively distance itself from the information disclosed.[85] Accordingly, a "clear and express objection" may be capable of rebutting the presumption.[86] However, this must be considered in light of the Court's threshold for reciprocal contact being "met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."[87] This solution arguably blurs the lines further and places considerable responsibility on undertakings, somewhat shifting the burden of proof to undertakings required to show that they do not "accept" the information announced by competitors.

The theoretical starting points can be summarised as requiring three criteria. First, a form of contact must be established, separating the practice from independent conduct. Secondly, the information exchanged must result in subsequent conduct. Thirdly, causation must exist between the information exchanged and the subsequent conduct.[88]

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[83] Case BOCCRF 2004-02 Esso and Others (Summary).

[84] Case T-279/02 Degussa para.133.

[85] Ibid. para.134.

[86] Case C-74/14 Eturas and Others para.48.

[87] Joined Cases T-25/95 Cimenteries CBR v Commission (Cimenteries) para.1849.

[88] Whish & Bailey (2021) pp.118-119.

2.3.3 Public announcements as concerted practices in *Container Shipping*

Container Shipping provides an example of how seemingly independent announcements, which when "genuinely public" typically do not constitute concerted practices,[89] falls under the scope of Art. 101 (1). A genuinely public announcement is presumed to be equally accessible to all customers and competitors in terms of costs of access.[90] Arguably, there is also a requirement of genuine relevance for customers, as it is held that announcements "directed at users" usually evade Art 101.[91] Figure 1 presented in *Container Shipping* is illustrative. It shows that the parties announced their respective GRIs within a short period, with similar amounts of increase, intended for the exact same implementation date.[92]

Party	**Announcement date**	**Implementation date**	**The Announced amount of the increase (in USD)**
OOCL	26.9.2012	1.11.2012	525
UASC	26.9.2012	1.11.2012	505
CSCL	27.9.2012	1.11.2012	525
ZIM	27.9.2012	1.11.2012	500
Coscon	28.9.2012	1.11.2012	550
Hapag	28.9.2012	1.11.2012	500
MSC	29.9.2012	1.11.2012	500
NYK	1.10.2012	1.11.2012	550
Evergreen	2.10.2012	1.11.2012	525
HMM	2.10.2012	1.11.2012	500
Maersk	2.10.2012	1.11.2012	500
CMA CGM	10.10.2012	1.11.2012	500
Hanjin	12.10.2012	1.11.2012	500
MOL	25.10.2012	1.11.2012	500

Figure 1

Although the GRIs were unilateral, the condition of reciprocal contact was deemed fulfilled as the competitors "responded" to each other's announcements.[93] Such practice falls under the scope of requesting or, at the very least, accepting the information disclosed.[94]

[89] Communication 2011/C11/01 para.63.

[90] Communication 2022/C164 para.425.

[91] Case C-89/85 Ahlström Osakeyhtiö and Others v Commission para.64

[92] Case AT.39850 Container Shipping para.28.

[93] Ibid. para.38.

[94] Joined Cases T-25/95 Cimenteries para.1849.

Regarding the content of the information, this is clearly relevant when assessing whether a carrier has eliminated or substantially reduced the uncertainty of its future conduct. This requires a concrete assessment,[95] where relevant factors include whether the exchange is "likely to influence the commercial strategy of competitors"[96] and whether it "reduces or removes the degree of uncertainty as to the operation of the market in question."[97]

Announcing one's intended future price increase, as in *Container Shipping*, falls directly under the scope of eliminating or reducing the uncertainty regarding future conduct. The Commission briefly held that an information exchange can constitute a concerted practice if it "reduces strategic uncertainty in the market thereby facilitating collusion - that is to say, if the data exchanged is strategic" and further, that future pricing information constitutes "the most sensitive commercial information."[98]

The importance of "strategic data" has been apparent in the practice of the Commission. In the Horizontal Guidelines (2011) the Commission presumed that sharing

> "strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete."[99]

Agreements or practices involving information exchanged regarding capacity-sharing, and cargo-sharing may diminish competing carriers' incentive to compete when offering shippers liner shipping transport.

In the New Horizontal Guidelines, the Commission somewhat shifts its focus, and does not repeat the notion that exchange of strategic data facilitates collusion. Rather, the Commission points to the concern that the exchange of "commercially sensitive information" can create mutually consistent expectations, thus resulting in a collusive outcome.[100]

Within the liner shipping sector, the difference between "sensitive" and "strategic" data is arguably modest. Information concerning each company's fleet capacity, operational costs,

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[95] Case T-279/02 Degussa paras.133-135.

[96] Communication 2022/C164 para.423.

[97] Case T-588/08 Dole Food and Dole Germany v Commission (Dole (GC)) para. 62; See also Case C-7/95 P John Deere v Commission para.90.

[98] Case AT.39850 Container Shipping para.35.

[99] Communication 2011/C11/01 para.61.

[100] Communication 2022/C164 para.417.

performance, and pricing policies are likely to fall within both categories. However, the category "strategic data" may be interpreted more widely, as most information concerning a carrier's operations, to some extent, can be deemed strategic. Consequently, the shift towards focusing on commercially *sensitive* information may imply a somewhat stricter approach.

Conversely, the new guidelines leave little room for the condition of reciprocal contact or coordination between the parties. The guidelines clearly state that when only one undertaking unilaterally discloses commercially sensitive information, such as its future pricing policies, this will constitute a concerted practice. Since competitors are presumed to take account of information disclosed unilaterally, competitors must actively report the disclosure to the authorities or respond with a clear statement that it does not wish to receive such information.

The statements above indicate a modest threshold for information exchanges to amount to concerted practices, particularly in liner shipping, as several parameters concerning e.g. capacities, vessel performances, and sailing routes can be deemed "strategic" or "commercially sensitive." Even though the practice in *Container Shipping* resembled "responses" between the competitors, statements in case law may imply that also "purely" unilateral announcements, depending on its degree of sensitivity, are likely to constitute concerted practices when another requests or accepts it. This choice of interpretation may be justified as a way of capturing the increasingly complex forms of information exchanges, but it simultaneously reduces legal predictability since the lines between independent conduct and collusion are increasingly blurred.

Chapter 2 has examined when information exchanges between competing carriers amount to agreements, decisions by associations or concerted practices under Art. 101 (1). The analysis has uncovered that much cooperation in liner shipping is based on formal written agreements such as pooling agreements, consortia, and alliances. However, information exchanged outside of such forums can amount to concerted practices, as in *Container Shipping*.

Although the lines between independent conduct and collusion remain blurred, the existence of a concerted practice presumes contact between competing carriers, subsequent conduct by the carriers on the relevant market, and causation between the two. Interpretations by the enforcers have resulted in a situation where undertakings are presumed to make use of information announced by competitors, and even public announcements are included should they reduce the strategic uncertainty in the market. Exchanges of information, either privately or publicly, concerning strategic parameters such as freight rates, carrying capacities, and vessel performances, may therefore be deemed concerted practices, should the competing carriers remain active on the market and not distance themselves from the information. The next chapter presumes the existence of a concerted practice and addresses the condition requiring the cooperation to restrict competition "by object or effect."

3 Information exchanges between liner shipping companies restricting competition by object

3.1 Introduction

3.1.1 The alternatives object v effect

No cooperation between liner shipping companies, neither as agreements, decisions of associations, nor concerted practices, are deemed contrary to Art. 101 unless they cause the prevention, restriction, or distortion of competition.[101] One may either establish anti-competitive conduct based on the cooperation itself, or by examining its actual effects on the liner shipping market. This chapter introduces both alternatives and their relationship, before examining when information exchanges between competing carriers can restrict competition by object.

Information may be shared "purely" through direct exchanges, or "ancillary" via an agreement or a third-party. *Container Shipping* provides an example of the former, while consortia, pools, and alliances exemplify the latter. The information exchanged ancillary should be assessed in the context of its "channel."[102] This adds another nuance, namely whether the cooperation, and the information exchanged accordingly, restrict competition by object or effect.

Art. 101 (1)'s wording reveals that these are alternative conditions. However, they are not mutually exclusive.[103] The CJEU has consistently held that 'object or effect' implies it necessary to consider the effects *only* if one cannot establish an anti-competitive object. In the case *S.T.M.* (1966), the Court determined "first the need to consider the precise purpose of the agreement" (its object) and further, where that analysis "does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement" should be considered (its effects).[104] This approach has been continuously affirmed, also in *Container Shipping*.[105]

Although these procedural steps seem straight-forward in theory, the interpretations remain inconsistent, and legal scholars continue to debate the distinction between the concepts.[106] *Container Shipping*, for instance, illustrates how this division may allow competition authorities to "avoid" the normally complex assessment of showing anti-competitive effects by prematurely

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[101] TFEU art. 101 (1). The provision lists certain conduct which "in particular" restricts competition, including, among others, direct or indirect price fixing (a), limiting or controlling production (b), sharing markets (c), discriminatory treatment (d) and excessive contractual obligations (e).

[102] Communication 2011/C11/01 para.56.

[103] Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others (Budapest bank) para.44.

[104] Case 56/65 Société Technique Minière v Maschinenbau Ulm p.249; See also Case C-67/13 P Groupement des cartes bancaires v Commission (CB) paras.49-52.

[105] Case AT.39850 Container Shipping para.48.

[106] Whish & Bailey (2021) pp.126-127.

conclude on the existence of a restriction by object. Consequently, one may risk that excessively wide interpretation of the object-alternative can intercept cooperation with potentially pro-competitive *effects*.[107] Such a practice has been rejected by the Court, emphasising that there is nothing preventing the competent authority from examining the effects where it is considered appropriate.[108] The development of how widely the 'object'-alternative has been interpreted is further commented under Section 3.1.2 *infra*.

Recent case law offers some clarification of the required assessment of 'object' before 'effect.' In *Generics*, which concerned a settlement agreement in a patent dispute, the Court held that the existence of an infringement by object may be assumed if it is "plain from the analysis" of the conduct, that it "cannot have any explanation other than the commercial interests [… of the parties] to not engage in competition."[109] Thus, the analysis should stop at the object-alternative only when there is little doubt about the cooperation's anti-competitive object.

Besides the dichotomy, both alternatives have since the case *Völk* (1969) been interpreted to also require an appreciable impact on competition (*de minimis*). *Völk* concerned an agreement granting territorial exclusivity of sales, which normally falls under the 'object'-alternative. Co-operation evades the provision "when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question."[110] Following this, even the most serious anti-competitive conduct such as price-fixing falls short of Art. 101, provided it only has an insignificant impact on the market.[111]

Accordingly, minimal cooperation between competing carriers, such as a pools, conferences, or consortia consisting of only a few ships, may be perfectly legal. However, in the case *Expedia* (2012) the Court held that an infringement by object which may affect intra-Member State trade "constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."[112] From this it seems only necessary to consider the appreciable impact in the case of infringements 'by effect.' Some scholars have contested that *Expedia* does not overturn *Völk*, continuously debating whether the *de minimis*-doctrine is appropriate for the 'object'-assessment.[113] When preparing *Expedia,* AG Kokott took the view that the *de minimis*-doctrine in principle is applicable both to 'object' and 'effect'-infringements, but the

[107] Hjelmeng & Østerud (2022) p.81.

[108] Case C-228/18 Budapest Bank para.40.

[109] Case C-307/18 Generics (UK) and Others v Competition and Markets Authority (Generics) para.87.

[110] Case 5/69 Völk v Vervaecke para.7 p.302.

[111] Whish & Bailey (2021) p.145.

[112] Case C-226/11 Expedia v Autorité de la concurrence and Others (Expedia) para.37.

[113] King (2015) p.223.

required proof of appreciable impact differs.[114] Such an approach may resonate with the fundamental idea that the more obvious restriction, the less rigorous assessment is required.

Arguably, such a reasoning provides a sufficient basis for examining the cooperation's impact on the market. However, the Commission's guide to how it will apply the doctrine (De Minimis Notice) does not apply to 'by object'-infringements,[115] and the Consortia BER does not exempt cooperation which has "as its object" the fixing of prices, limitation of capacity of allocation of markets.[116] Thus, depending on the *categorisation* of the cooperation, one may face different thresholds regarding its impact.

In sum, the 'object'-alternative should be reserved for the clearer infringements of competition where it is "plain from the analysis"[117] that there is little need for further examination of the information exchange's effects. This is likely to be the case where an agreement regarding sailing routes is followed by a practice where carriers share the relevant routes and ports between them. Another example is where competing carriers meet to discuss future freight rates, followed by stable rate levels across the market. Should the cooperation be more sophisticated and not resemble an apparent cartel, the decisive question under Art. 101 (1) becomes whether it has anti-competitive effects. The remainder of Chapter 3 analyses the 'object'-alternative and whether cooperation in liner shipping can constitute such infringements.

3.1.2 Restriction by object

Restrictions to competition by object are deemed the most explicit forms of anti-competitive conduct. The general perception has been that such types of coordination "can be regarded, by their very nature, as being harmful to the proper functioning of normal competition"[118] One may argue that such restrictions pose the most severe threat to normal competition in a market, and the CJEU has elaborated that

> "certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered *so likely to have negative effects*, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market"[119] (emphasis added).

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[114] Opinion of Advocate General Kokott in Case C-226/11 Expedia paras.47-48.

[115] Communication 2014/C291/01 para.8.

[116] Regulation 936/2009 art.4.

[117] Case C-307/18 Generics para.87.

[118] Case C-32/11 Allianz Hungária Biztosító and Others v Gazdasági Versenyhivatal (Allianz Hungária) para.35

[119] Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission (Dole (CJEU)) para.115.

For instance, competing carriers agreeing to set common sales prices of liner transport services may heavily distort or completely remove normal competition on prices. Such conduct poses, in itself, a risk to normal competition.

The Court's formulations suggest a substantial threshold to conclude on a restriction by object. This assumption has been challenged through gradually widening interpretations by the Court, criticised by authors as expanding the "object box."[120] Formulations in the case *T-Mobile* (2009) illustrate the "high tide,"[121] where the Court held that

> "it is sufficient that it has *the potential to have a negative impact* on competition. In other words, the concerted practice must *simply be capable* in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition"[122] (emphasis added).

This standard was repeated in the case *Allianz Hungaria* (2013).[123] However, the Court quickly corrected these statements in the case *CB* (2014). The Court recognized the limits to the scope of the 'object'-alternative, most prominent by holding that the GC (the judgement under appeal) *erred in law* when stating that "the concept of restriction of competition by object must not be interpreted restrictively."[124] Subsequent case law has explicitly required a restrictive interpretation of the 'object'-alternative, and the substantial threshold is now clearly confirmed. The case *Generics* is illustrative, as the Court held that "the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to some concerted practices."[125]

It remains debatable whether the 'object'-alternative requires documenting an appreciable negative impact on competition (see Section 3.1.1 *supra*). Regardless of views, it is arguably in practice easier to establish an appreciable impact having already confirmed that the conduct reaches the 'object'-threshold. This is because the alternative requires that the conduct, after a restrictive interpretation, by its very nature is harmful to normal competition.

Whether information exchanges restrict competition require a case-by-case approach.[126] The Court has stated that an exchange which is

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[120] Whish & Bailey (2021) p.127; See also Jones, Sufrin and Dunne. (2019) pp.226-228.
[121] Hjelmeng & Østerud (2022) p.71.
[122] Case C-8/08 T-Mobile para.31.
[123] Case C-32/11 Allianz Hungária para.38.
[124] Case C-67/13 P CB para.58.
[125] Case C-307/18 Generics para.67.
[126] Capobianco (2004) p.1250.

"*capable of removing uncertainty* between participants as regards the *timing, extent and details* of the *modifications to be adopted* by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object"[127] (emphasis added).

In sum, the 'object'-alternative must be interpreted strictly and is reserved to the most serious forms of anti-competitive cooperation between carriers. Information exchanges which facilitate price cartels, or sharing of liner shipping markets will normally be captured. Such cooperation will, in itself, be likely to have an appreciable adverse impact on competition in liner shipping.

However, case law has seen different formulations when conducting the 'by object'-assessment, leaving legal scholars debating whether the practice points toward a specific methodical approach. Analysing the legal application of the Courts can provide guidance to competition authorities and companies when evaluating potential infringements. However, analyses of different statements have given rise to particularly two different approaches.

3.2 Different theoretical approaches

3.2.1 Introduction

Establishing one common methodical approach can help liner shipping companies and authorities when considering new and complex ways to share information. It may also assist in harmonising the application throughout Member States and provide legal certainty. However, the existence of several approaches may contribute to unclarity and legal uncertainty. Different views on assessing infringements by object could affect the outcome of specific cases of information exchanges between competing carriers, making it a potentially essential division.

3.2.2 The orthodox approach

The first approach, referred to as the "orthodox approach",[128] separates obvious infringements from the complex, less obvious ones.[129] By categorizing certain forms of cooperation as infringements by object, one presumes that these practices are so likely to have negative impact on competition that further examination is unnecessary.[130] Practices evading this category must be examined in detail to uncover their effects. Whish & Bailey provides an example of how to categorise different types of agreements and place them outside or within the "object box."[131]

[127] Case C-286/13 P Dole (CJEU) para.122.
[128] King (2015) pp.29-30.
[129] Bergqvist (2020) pp.107-109.
[130] Case C-286/13 P Dole (CJEU) para.115.
[131] Whish & Bailey (2021) p.127.

One starting point has ever since the case *Consten and Grundig* (1966) been to examine the conduct's "nature." Concerning supply contracts with exclusivity clauses, the Court held that

> "Grundig undertook not to deliver even indirectly to third parties products intended for the area covered by the contract. *The restrictive nature* of that undertaking is obvious if it is considered in the light of the prohibition on exporting which was imposed"[132] (emphasis added).

The "nature" of agreements can illustrate if they "in themselves pursue an object restrictive of competition." If so, that object "cannot be justified by an analysis of the economic context."[133] The Commission arguably endorses this approach by categorising certain conduct at "hardcore restrictions" in guidelines and BERs,[134] in addition to stating that the CJEU and CFI have "always qualified agreements containing export bans dual-pricing systems or other limitations of parallel trade as restricting competition 'by object'."[135]

One case which clearly advocates the orthodox approach is *European Night Services*. The CFI stated that an agreement should be assessed by considering its actual conditions and economic context "unless it is an agreement containing *obvious restrictions* of competition such as price-fixing, market-sharing or the control of outlets"[136] (emphasis added). The CFI categorised price-fixing, market-sharing, and control of outlets as 'object'-infringements without having to place them within their context.

The three examples provided for in *European Night Services* are all relevant in liner shipping. Conference agreements which agree on common freight rates and pooling agreements concerning revenues, both have elements of price-fixing. Cargo pooling and liner consortia, due to coordination of sailing routes and operations, involve elements of market sharing. Large shipping alliances can resemble control of services, as large combined market shares on certain routes may allow the members to control and reduce the services offered. Following a strict orthodox approach, several such agreements may fall under the object-alternative if their restrictive nature is "obvious." Pure information exchanges may be more discrete, and public announcements are likely to escape the object-box, unless the exchange clearly aims at coordinating prices, allocating markets or reducing the transport services offered.

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[132] Cases C-56/64 Consten and Grundig v Commission p.343.

[133] Case C-403/04 P Sumitomo Metal Industries v Commission para.43.

[134] See Regulation 906/2009 art.4 and Communication 2004/C101/08 para.23.

[135] Cases 2001/791/EC Glaxo Wellcome and Others para.124.

[136] Joined cases T-374/94 European Night Services and Others v Commission (ENS) para.136.

On one hand, the orthodox approach offers legal predictability, as one may examine the conduct and attain substantial guidance by asking how the Court previously has categorised this type of infringement. Moreover, it offers procedural predictability, as it will be sufficient for competition authorities to evaluate the cooperation and demonstrate that it "fits into the object category and hence breaches"[137] Art. 101 (1). If not, the competition authority must assess the cooperation's effects. On the other hand, the orthodox approach is arguably less suited to address modern and more sophisticated forms of cooperation. It can be criticised for over-simplifying the law and not taking into account the economic and legal context of the conduct.[138] Thus, one may argue that complex information sharing and operational agreements in liner shipping may be ineffectively assessed through such rigid categorisation.

3.2.3 The analytical approach

The second approach is based on a "two-step analysis"[139] of the specific case, also referred to as the "analytical approach."[140] The first step is to evaluate the content of the practice, asking what the conduct involve and if its harmful nature is commonly accepted and easily identifiable.[141] The second step is to place this content within the factual, economic, and legal context, thus widening the perspective and examining the cooperation in light of its circumstances.[142]

The two-step analysis may be derived from the Court referring to that "regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part."[143] Also the EFTA Court has referred to the "specific legal and economic context" in its assessments.[144] Such formulations may point to a concluding contextual analysis, after considering the conduct isolated.[145] The approach is explicitly supported by AG Bobek when preparing the case *Budapest Bank* (2019).[146] Regarding the border between the second contextual step and a full effects-analysis, Bobek regards the difference more of degree than of kind. He argues that the second step requires competition authorities to check on a general level "whether there are any legal or factual circumstances that preclude the agreement or practice in question from restricting competition", thus carrying out a "basic reality check."[147]

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[137] Bennett & Collins (2010) p.314.

[138] King (2015) pp.48-49.

[139] Bergqvist (2020) pp.107-109.

[140] King (2015) p.55.

[141] Opinion of AG Wahl in Case C-67/13 P CB paras.55-56.

[142] Bergqvist (2020) p.107.

[143] Cases C-501/06 P GlaxoSmithKline para.58; See also Case C-67/13 P CB para.53.

[144] Case E-3/16 Ski Taxi SA and Others v The Norwegian Government, paras.60 and 64-65.

[145] Hjelmeng & Østerud (2022) p.76 footnote 43.

[146] Opinion of AG Bobek in Case C-228/18 Budapest Bank paras.41-43.

[147] Ibid. paras.49-50.

If the content of the conduct reveals sufficient harm to competition, it may still be justifiable or proven to be pursuing pro-competitive objectives when placed within its context. Of particular relevance would be the parties' ability to refer to other, legitimate explanations for the cooperation.[148] Within liner shipping, this approach would first consider the actual information exchange between carriers, for instance to discuss coordination of transport on a specific route (potentially resembling market-sharing) before interpreting the exchange within the liner shipping market and competitive circumstances, e.g. examining how many ships are part of the coordination, the companies' market shares, and the saturation of the demand on that route.

Applying the analytical approach could lead to traditionally "clear"[149] infringements such as horizontal price fixing falling outside the object-alternative, while normally benign agreements being included.[150] Arguably, the conduct itself cannot be sufficiently analysed without regarding its circumstances. However, once the market characteristics are examined, the evaluation resembles a 'by effect'-assessment, and the analytical approach appears to operate with blurred lines. To consider the economic and legal context requires an examination of the services affected and the relevant market conditions, which in large amounts to an 'effects'-analysis.

3.2.4 Main differences

In short, the orthodox approach considers "certain collusive behaviour",[151] for instance price fixing, as being so likely to have negative impact on competition that it is appropriate to place them within the "object box."[152] It offers predictability and bright lines between the object and effect assessments but may be insufficient to correctly categorise modern and complex infringements. The analytical approach considers the actual content of the cooperation, before placing it within its "economic and legal context."[153] This approach may provide accuracy, but also requires a circumstantial analysis which in principle has been reserved the 'by effect'-assessment. Theoretically, one may also regard this approach as "a way out" of the object box for cooperation types which traditionally are deemed obvious threats to competition, but which in the specific context of the market are less harmful or even justified.

It is not obvious which one of the two approaches, if any, is feasible. One may view the public policy choice being between administrative advantages of predictable bright lines, and legal

[148] Case C-591/16 P Lundbeck v Commission paras.112-114.

[149] See TFEU art. 101 (1) and footnote 99 *supra* for the list of particularly restrictive conduct, which can be permitted when applying the analytical approach.

[150] Bergqvist (2020) p.107.

[151] Case C-286/13 P Dole (CJEU) para.115.

[152] Whish & Bailey (2021) p.125.

[153] Cases C-501/06 P GlaxoSmithKline para.58.

accuracy capturing the underlying economic structures of the conduct.[154] When considering the legality of information exchanges within liner shipping, the chosen approach may affect the outcome. Having the legal starting points and theoretical approaches in mind, the paper now turns to discussing when information exchanges constitute restrictions by object.

3.3 Information exchanges as concerted practices restricting competition by object

3.3.1 Introduction

When assessing the information exchange, determining the *type* of exchange initially provides a framework for the evaluation. This section examines pure information exchanges, where the economic function lies in the exchange of information itself.[155] The question examined is under which circumstances pure information exchanges, as concerted practices, between liner shipping companies restrict competition by object.

Pure information exchanges can occur both directly between competitors, for instance through a meeting, and indirectly, through a third-party such as a trade association, or through public announcements ("signalling"). *Container Shipping* provides a recent example of pure information exchanges through signalling. All 14 liner shipping companies publicly announced their intended price increases.[156] The main economic function, and commercial value, was the announcements themselves.

The legal test when considering 'object-infringements' is whether the information exchange is "capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted" by competitors.[157] One may identify certain *characteristics* highly relevant to that assessment. Theoretically, these may be categorised in an "inner" and "outer" layer. The former relates to the internal "nature" of the information exchange such as its degree of commercial sensitivity, its level of detail, its age, and whether the data is private or public. The latter concerns its external circumstances such as its frequency, public availability, and market coverage.[158] Since each exchange must be analysed concretely, the totality of these characteristics is decisive.

[154] Smith, Ridyard & Petrescu (2015) p.35.

[155] Camesasca and Schmidt (2011) pp.227-228.

[156] Case AT.39850 Container Shipping paras.26-27.

[157] Case C-286/13 P Dole (CJEU) para.122; See also Case AT.39850 Container Shipping para.50

[158] Gassler (2021) pp.11-14.

3.3.2 Characteristics of the exchange

Most of the characteristics' impact on competition depends to some extent on the market structure, which affects the premises for the functioning of competition.[159] For example, in oligopolistic markets one may expect that less frequent exchanges of less detailed information are required to facilitate collusion. Oligopolies are characterised by a small number of sellers and many buyers,[160] as well as homogenous products, transparent markets, significant barriers of entry, and interdependence between producers.[161] The liner shipping market has certain oligopolistic features such as concentration on the supply side, considerable barriers of entry, multiple links between competitors and homogenous services. Such markets, with few competing carriers in a transparent market, potentially facilitates relatively better use of competitors' information than in a fragmented and diversified market. Depending on the market structures, the difference between private and public exchanges can be critical.

Private communication

Generally, information exchanged privately is likely to pose greater risk than public exchanges. One obvious concern is that private exchanges between competitors may have the objective of colluding and restricting competition. Conversely, public exchanges tend to promote the interest of parties unaffiliated with the information exchange system, making them less alarming.[162]

Several cases finding a restriction by object concerned information exchanged privately. In the case *Tate & Lyle*, the GC assessed meetings between the competitors British Sugar and Tate & Lyle, where the former unilaterally disclosed its future prices on industrial sugar.[163] The GC concluded that the meetings' purpose to coordinate pricing policies, restricting competition by object.[164] A similar approach was taken in *T-Mobile*, which concerned one meeting between the only five operators in the Dutch mobile telecom market. The competitors discussed reduction in a standard commission and the Court stated that conduct "such as that in the present case" pursued an anti-competitive object.[165] The case *Bananas* concerned bilateral information exchanges via telephone between two large banana producers. The exchanges included "pre-

[159] Communication 2022/C164 paras.443-446.

[160] Van Gerven and Varona (1994) p.576 footnote 5.

[161] Albors-Llorens (2006) p.852.

[162] Camesasca, Schmidt and Clancy (2010) pp.412-413.

[163] Case T-202/98 Tate & Lyle and Others v Commission (Tate & Lyle) paras.9-11.

[164] Ibid. paras.53 and 72.

[165] Case C-8/08 T-Mobile paras.10 and 41-42.

fixing information" of future quotation prices and were deemed to restrict competition by object,[166] upheld on appeal by both the GC,[167] and the CJEU (referred to as "*Dole*").[168]

Points of private contact between liner shipping companies, via meetings or shipping associations, are thus likely to spark the interest of competition authorities. Depending on the exchange's context, authorities may be concerned that the parties pursue an anti-competitive agenda. For instance, when competitors meet in relation to a pooling agreement, the expressed objective may be to discuss and evaluate the cargo-pooling, but the meeting does provide a forum for them to discuss and collude on other competitive issues. However, safeguards such as independent brokers or lawyers present in the meeting, or by isolating the parts of the business involved in the cooperation, can mitigate such risks.

Public signalling

Although public communication traditionally causes less competition concerns, recent development of signalling-cases illustrate that also unilateral announcements can be regarded as restrictions by object. Signalling on parameters of competition, be it prices, capacities, or operations, can inform both shippers and competing carriers. It may offer shippers predictability as to when, from where, and at what price they can send their cargo. Simultaneously, it enables competing carriers to track operations and developments of one's commercial strategies, potentially facilitating collusion in an increasingly transparent market.[169] In a competitive market, one may expect price transparency to increase the competition on prices.[170] However, the liner shipping market is far from perfectly competitive, so signalling must be examined with caution.

Commitment decisions such as the Dutch case *KPN*, the British case *Cement* and *Container Shipping* illustrate that also public announcements can restrict competition by object. *KPN* concerned three competing mobile operators' announcements and interviews introducing "connecting fees" and increased prices. The competition authority referred to the "anti-competitive risks" of such announcements, namely collusion on increased prices.[171]

Cement concerned open letters concerning future prices from cement producers to their customers. The British Competition Commission ordered the parties to refrain from the conduct, as the likely effects of the generic announcements were increased prices for cement.[172]

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[166] Summary of Case COMP/39.188 Bananas paras.7-9.

[167] Case T-588/08 Dole (GC) paras.54 and 683.

[168] Case C-286/13 P Dole (CJEU) para.160.

[169] Foros & Hjelmeng (2021) pp.186-188.

[170] Case C-238/05 Asnef-Equifax v Ausbanc (Asnef-Equifax) para.58.

[171] Case 13.0612.53 KPN paras.37-38 and 45.

[172] The Price Announcement Order 2016 paras.2 and 12.

Thus, public announcements, particularly concerning prices, can restrict competition by object. *Container shipping* illustrates that the assessment depends on the other characteristics of the exchange. Of particular interest is the temporal aspect of the shared information.

Past, present, and future data

The most obvious way to reveal one's future commercial strategies is by exchanging data concerning future intentions. One may also assume that exchanges regarding future intentions are more likely to "by their very nature […] being harmful to the proper functioning of normal competition"[173] than for instance information on current or historic strategies.

In *Container Shipping*, the liner shipping companies announced their respective GRIs, intended to be implemented within the next 3 to 5 weeks.[174] Similarly, *Tate & Lyle* concerned unilateral disclosure of *future* price intentions,[175] *T-Mobile* concerned *future* intentions to reduce a standard commission,[176] and *Dole* concerned pre-pricing information exchange regarding *future* quotations.[177] Additionally, the case *E-Books*, information exchanges between competing publishers of e-books was treated as an 'object'-infringement. The information involved the publishers' *future* conduct and was aimed at raising retail prices of e-books.[178]

Still, one cannot exclude that announcements of current and past conduct may fulfil the criterion, especially if the competing carriers can establish patterns or cycles at a competing carrier, which again can provide insight to its future conduct. Arguably, more recent information is more likely to reveal such future intentions. For example, a liner shipping company which announce its previous quarter's price increases and costs, may reduce competitors' uncertainty regarding its conduct in the next quarter.

One recent case, *Forex – Sterling Lads*, concerned a cartel of information exchanged in private and multilateral chatroom between 4 major banks which traded on the FX spot market. The information concerned the parties' trading activities, current positions, and future intentions, and was meant to affect the competitive parameters of price and expert risk management. The practice was labelled as a cartel, restricting competition by object, and the Commission held

[173] Case C-32/11 Allianz Hungária para.35.
[174] Case AT.39850 Container Shipping para.27.
[175] Case T-202/98 Tate & Lyle para.10.
[176] Case C-8/08 T-Mobile para.12.
[177] Case C-286/13 P - Dole (CJEU) para.14.
[178] Case AT.39847 E-Books paras.77 and 92.

that the exchange of "sensitive current and forward-looking information" was used to coordinate the competing traders' conduct to their benefit.[179]

The decision's summary does not distinguish between past and future information exchanged, which can support that also past and present information may restrict competition by object. Similarly, in the recent case *Sony*, the GC stated that under those circumstances "knowledge of past results was highly relevant information for competitors, both for monitoring purposes and with a view to future contracts."[180] The New Horizontal Guidelines also acknowledge that whether information is considered "historic" and less likely to restrict competition

> "depends on the specific characteristics of the relevant market, the frequency of purchase and sales negotiations in the industry, and the age of the information typically relied on in the industry."[181]

Thus, one cannot exclude that the exchange of past and current information may, under specific circumstances, restrict competition by object.

However, one may argue that the reasoning in *Sony* and the guidelines often requires in-depth analyses of the effects to uncover whether the historic and current data reveals competitors' future conduct. Exchanges of current information is for instance recognised to potentially have restrictive effects on competition.[182] The system of Art. 101 captures such conduct in the 'by effect'-assessment, and when interpreting the 'object'-alternative restrictively, present and historic information is arguably not covered.

Strategic/sensitive data

Exchanging "strategic" information is essential to establish a concerted practice (see Section 2.3.3 *supra*). Naturally, these strategic aspects are relevant also when assessing whether the exchange restricts competition, as strategic and sensitive information is usually more "capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted" by competitors on the market.[183] Although *Container Shipping* limited the discussion to price increases, Section 2.3.3 *supra* illustrated that information regarding a variety of parameters in liner shipping may be viewed as "strategic." Case law reveals that several of these parameters can restrict competition by object.

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[179] Summary of Case AT.40135 Forex – Sterling Lads paras.11-15.

[180] Case T-762/15 Sony and Sony Electronics v Commission para.127.

[181] Communication 2022/C164 paras.430-431.

[182] Ibid. para.431.

[183] Case C-286/13 P Dole (CJEU) para.122; See also Case AT.39850 Container Shipping para.50.

The case *Cobelpa* concerned information exchanges between competing manufacturers of printing paper and stationery. Involving mutual notification of price increases and reductions, discounts, rebates, and general terms of sales, supply and payment, the Commission held that

> "the only possible explanation for the exchange of this information is again the desire to coordinate market strategies and to create conditions of competition diverging from normal market conditions, by replacing the risks of pricing competition by practical cooperation."[184]

Cobelpa illustrates a broad approach to the price parameter, supporting that most aspects of the pricing policies can constitute an 'object'-infringement.

The case *Infineon Technologies* concerned a cartel between sellers of smart card chips based on the exchange of commercially sensitive information. The GC found that in light of

> "the economic factors characterising the market [the] exchange of sensitive information concerning their competitors' strategic policies in terms of prices, capacity and technological development" constituted an infringement by object.[185]

Accordingly, a variety of strategic parameters may restrict competition by object, particularly exchanges concerning "strategic policies."[186] For the services provided in liner shipping, pricing policies (both freight rates and operational prices), transport capacities, and vessel performances are relevant examples. Depending on the other characteristics of the exchange, these parameters may provide insight to competitors' future market conduct.

However, since the concept of "strategic policies" must be considered in light of "the economic factors characterising the market",[187] a contextual analysis is arguably required. Consequently, one must look to the liner shipping market for guidance, and it becomes essential how one defines the "relevant market" in each case. Arguably then, the analytical approach is necessary when considering cases of information exchanges. Although certain parameters such as sales prices and quality and quantity of services are generally deemed "strategic", other parameters are sector-specific and may fall outside the scope if applying the orthodox approach, even if the exchange, by its nature, is deemed harmful to normal competition.

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[184] Case 77/592/EEC Cobelpa para.29.

[185] Case T-758/14 Infineon Technologies v Commission (Infineon Technologies (GC)) paras.173-175. Upheld on appeal by the CJEU in Case C-99/17 P paras.157-158.

[186] Case T-758/14 Infineon Technologies (GC) para.174.

[187] Ibid. para.173.

Individualised v aggregated data

Generally, it is easier to reach a common understanding and to monitor the competitors' potential deviations from the cooperation when the information exchanged is individualised, namely when the prices, capacities and geographic coverage by each competitor is identified.[188] When data is sufficiently aggregated, it may be less useful in collusion, even though it can provide insight to the market conditions.[189]

Arguably, the level of detail is a characteristic more relevant for the 'by effect'-assessments.[190] However, the level of detail has been a central element also in 'object'-infringements. *Forex – Sterling Lads* concerned individualised information as each trader's recent activities, current positions, and future intentions were revealed.[191] In the case *Fatty Acids* (see Section 3.4.1 *infra*), a key aspect to the information sharing agreement was the quarterly exchange of each competitors' respective quantities sold in the market.[192] Also in *Container Shipping*, each liner shipping company's GRIs provided individualised data of the intended price increases.[193]

The degree of aggregation required to restrict competition depends on the market structure. For instance, in a tight oligopoly, competitors may not need to know exactly which company deviated from the collusion in order to respond.[194] Although the liner shipping market in general cannot be categorised as an oligopoly, it has certain elements which lead to that even aggregated data under specific circumstances can be useful, particularly when only a few pools or alliances compete with each other on a route.

Although characteristics in the "inner layer" can provide substantial guidance as to whether the information is adequate to restrict competition by object, the external features of the exchange are equally important to facilitate collusion.

Frequency

More frequent exchanges of information can increase the risks of collusion, facilitating that competitors more easily reach collusive outcomes, and enable them to better monitor each other.[195] In *Container Shipping*, the Commission resonated that the concerted practice

[188] Communication 2022/C164 para.429.

[189] Ibid.

[190] Gassler (2021) pp.205-206.

[191] Summary of Case AT.40135 Forex – Sterling Lads paras.13-14.

[192] Case IV/31.128 - Fatty Acids para.12.

[193] Case AT.39850 Container Shipping para.51.

[194] Communication 2022/C164 para.429.

[195] Ibid. para.439.

constitutes an object-infringement when it occurs "on a regular basis and over a long period."[196] The risk to competition must, however, be evaluated in light of the other characteristics and the structure of the market. In *T-Mobile*, for instance, the Court held that depending on the market structure, just one meeting exchanging information can be sufficient for competitors to align their conduct to the detriment of competition.[197]

Generally, less frequent exchanges are necessary to restrict competition in stable markets than in unstable markets.[198] Similarly, markets with oligopolistic features may require less frequent exchanges. The information exchanged in such environments may provide substantial insight to parameters of competition even if exchanged infrequently. The liner container market arguably has certain oligopolistic features, depending on the definition of the relevant market and the number of competitors on specific routes. For instance, markets where only two or three of the major liner alliances compete, likely require less frequent exchanges to attain collusion.

Thus, competing carriers arguably require less frequent exchanges of information to collude. The discussion highlights the importance of defining the relevant market, which, if not obviously restrictive, presumes some contextual considerations in line with the analytical approach. Regardless, exchanges occurring on a regular basis over a long period of time are more likely to restrict competition by object, as seen in *Container Shipping*.

Lack of efficiencies produced

One final consideration is whether the information exchanges, considering all its characteristics, are likely to produce efficiencies externally, to the benefit of customers and consumers. Case law often considers the participants' (in)ability to show plausible efficiencies arising from the exchange. In *Generics*, it was held that the conduct "cannot have any explanation other than the commercial interests [… of the parties] to not engage in competition."[199]

In *Tate & Lyle* and *T-Mobile*, there were no apparent reasons for why future pricing information or production costs would increase effective production nor produce efficiencies. In *Dole*, it was unclear whether the exchange of price-related information would improve the competitors' predictions of future demand. In *E-Books*, negotiations between the publishers lead to a higher-price distribution model rather than a lower-price model, clearly not benefiting customers.[200]

[196] Case AT.39850 Container Shipping paras.35-36.

[197] Case C-8/08 T-Mobile para.59.

[198] Communication 2022/C164 para.439.

[199] Case C-307/18 Generics para.87.

[200] Gassler (2021) p.200.

Furthermore, the case *Asnef-Equifax* concerned an information exchange system on debtor information, meant to provide solvency and credit information relating to the risks of providing credit. Financial institutions would be provided with both negative and positive information regarding customers' history of credit balances, securities, and defaults. The Court emphasised that the exchanges could improve lenders' information, remove information asymmetry, and thus improve the functioning of the lending market. Consequently, the practice was found not to have by its nature, the object of restricting competition.[201]

Following this rationale, an exchange of information which is plausible to produce efficiency gains, such as improving the functioning of the market, is less likely to be categorised as an object-infringement.[202] Some plausible efficiencies are obvious when considering the cooperation, such as capacity cooperation between carriers resulting in more optimal usage of ships' cargo space. Others are less intuitive and require considerable analysis of the cooperation and its effect on the market. For instance, the pooling of ships, which in practice reduces the number of independent competitors, can actually increase competition on certain routes because the scale of the demand far exceeds most independent carriers, making them unable to bid individually. One may argue that the economic and legal context must be addressed to reveal the cooperation's actual effects, and that the analytical approach is required. However, the referred case law looks to the basic functions of the conduct to identify efficiencies, which supports that an orthodox approach is sufficient. Additionally, one may argue that if the efficiencies are not easily identifiable, the conduct is more suited for the 'by effect'-assessment, supporting the orthodox approach.

Liner Shipping companies will argue that most public announcements and agreements, as pooling or consortia, produce efficiencies to the benefit of shippers and consumers. Cooperating on joint operations, sailing schedules and capacity utilisation may enable faster and more efficient transport of cargo, tailored to the concrete demands on different routes. It may also support sustainability, as better cargo and space utilisation reduces the number of voyages and thus decreases the negative impact on the environment. Signalling of prices may inform shippers and easier allow them to choose the best option. These factors arguably signal that cooperation in liner shipping primarily should be assessed under the 'effect'-alternative.

However, simply pointing to such transporting efficiencies provides no safe harbour for liner shipping companies. Should the exchange of information exceed what is necessary to achieve the efficiencies, it may, depending on the circumstances, be categorised as an 'object'-

[201] Case C-238/05 Asnef-Equifax paras.46-48.

[202] Ibáñez Colomo & Lamadrid (2016) p.26.

infringement.[203] Should the excess information enable price-fixing, that restriction is not justified by improved cargo-utilisation. For pure information exchanges, *Container Shipping* shows how also signalling can have little value for customers, depending on its characteristics. The Commission emphasises the unbinding character of GRIs and that customers are unable to compare prices with certainty.[204] If the public information is less available or less relevant for customers than for competitors, it can be considered as lacking efficiencies.

Pure information exchanges thus require complex assessments of the relevant characteristics. The evaluation assists in answering the research question, as one may, by identifying these characteristics, attain substantial guidance to whether the exchange in question is contrary to Art. 101 (1). *Container Shipping* exemplifies how to conduct that assessment in liner shipping.

3.3.3 Public announcements restricting competition in *Container Shipping*

Considering whether the information exchange restricts competition by object requires a case-by-case approach.[205] The starting point is whether the exchange is "capable of removing uncertainty between participants as regards the timing, extent and details" of their future modifications of conduct.[206]

On the one hand, the wording "capable of removing uncertainty" implies a lower threshold than the restrictive interpretation currently established. On the other hand, detailed and specific information may be required in order to remove uncertainty regarding "timing, extent and details" of competitors' future modifications of conduct. Arguably, the threshold can be deducted to require concrete facts to reveal future conduct, but not evidence of the exact restriction.

The remaining assessment depends on the concrete characteristics of the exchange and the methodical approach applied. Although private communication may cause more significant concern for collusion, also public announcements can fulfil the criteria.

In *Container Shipping*, the Commission first restated the general condition that the cooperation must reveal a sufficient degree of harm to competition. If so, it is not necessary to consider the effects. Even though the required threshold was not commented, three relevant points of consideration were presented and analysed, in that order:

1) The content (and nature) of the concerted practice,

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[203] Communication 2022/C164 para.409.

[204] Case AT.39850 Container Shipping paras.43-44.

[205] Capobianco (2004) p.1250.

[206] Case C-286/13 P Dole (CJEU) para.122.

2) The objectives behind the practice, and
3) Its economic and legal context.[207]

Regarding its content and nature, it was held that future pricing constitutes the most sensitive commercial information. Additionally, GRIs were announcements of future intentions rather than of actual and current prices. Moreover, GRIs included the intended implementation date and the geographic area concerned. Finally, the GRIs were individualised as each company's intentions were identifiable.[208]

As with public announcements generally, the GRIs may have had the objective of informing customers and increasing their predictability when planning future shipments of cargo. However, the Commission pointed to GRIs' potentially limited value for shippers and raised the concern that the objective possibly were to communicate pricing intentions "to competitors rather than informing customers."[209]

The economic and legal context revealed that a large number of GRI rounds had taken place. That regular practice may have allowed the carriers to "develop a climate of mutual certainty" regarding each other's prices. Additionally, the GRIs were announced regardless of high or low prices and may have had "limited connection to real market conditions." Due to these factors, the announcements possibly allowed liner shipping companies to coordinate their prices.[210]

By preliminarily finding an 'object-infringement', the Commission seemingly distinguished concerted practices from restrictions by object only by taking into account the frequency and duration of the exchange. It argued that competing carriers are presumed to use the information announced when determining their own conduct, and "even more so when the concertation occurs on a regular basis and over a long period."[211]

Nevertheless, the concrete assessment shows that the Commission considered, or at least pointed to, several other factors, namely that the GRIs

1) concerned *future* intentions,
2) provided *individualised* data,
3) were *commercially strategic and sensitive*, and

[207] Case AT.39850 Container Shipping para.48.
[208] Ibid. paras.35 and 50-51.
[209] Ibid. para.52.
[210] Ibid. paras.49 and 53-54.
[211] Ibid. paras.35-36.

4) had *limited value* for customers.[212]

The characteristics applied in *Container Shipping* largely correspond to the case law discussed above. The finding of an 'object'-infringement may therefore be contingent on identifying several of these characteristics. Identifying more of them arguably increases the likelihood of finding an 'object-infringement.' Similarly, the more sensitive information exchanged, or the more explicit a company's future intentions are expressed, the more likely it is to remove uncertainty regarding competitors' future modifications of commercial conduct.

Container Shipping exemplifies how to apply the analytical approach in liner shipping cases. The structure clearly follows a two-step analysis, as the Commission initially evaluated the content and nature of the GRI-practice, before placing it in the economic and legal context.

Applying the orthodox approach, the liner shipping companies would likely evade the categorisation of an 'object'-infringement. Although the GRIs concerned highly sensitive information (future prices) the practice was based on unilateral announcement of each carrier. Unilateral public announcements fall outside the typical restrictions by object. Applying a restrictive interpretation of the 'object'-alternative, the GRIs are likely placed outside of the "object box." The question would therefore become whether the practice had anti-competitive effects, in which the economic and legal context would be a central consideration.

Simultaneously, the Commission's regard to the context of the exchange was scarce. One may argue that identifying a large number of GRIs over a long period of time does not require any considerable analysis of the context nor market structures. In that sense, the GRIs were not placed within the functioning of the market, at least not explicitly. This may support that the distinction between the orthodox and analytical approach remains theoretical and is not appropriate in all cases of information exchange.

This section has uncovered important characteristics when assessing pure information exchanges, and an example of the assessment has been illustrated in *Container Shipping*. Since the question is whether the exchange removes uncertainty regarding competitors' modifications of future conduct, the totality of the exchange must be considered. Defining the relevant market seems decisive, as its definition affects the exchange's context, such as the degree of concentration and transparency the market. To deem pure information exchanges as restrictions by object, the removal of uncertainty should be easily identifiable within the economic and legal context of the liner shipping market. Consequently, in terms of the research question, liner shipping companies may reduce the chances of having their public announcements pursued by

[212] Ibid. paras.35 and 49-54.

competition authorities by infrequently announcing only highly aggregated data and refrain from speculating on future developments of competitive parameters.

Many of the observations regarding the exchange's characteristics and market conditions are relevant also in the next section, which addresses information being exchanged ancillary to a formal agreement.

3.4 Information exchanges as agreements restricting competition by object

3.4.1 Introduction

Ancillary information exchanges occur as part of a wider arrangement and is ancillary to that scheme.[213] Cooperation between competing carriers, for instance regarding capacity utilisation, often requires some exchange of commercially sensitive information. The question becomes whether that exchange can give rise to collusive outcome regarding the participants' activities within and outside the cooperation.[214] Relevant case law is reviewed to uncover the legal requirements for ancillary information exchange to restrict competition by object. After identifying certain key features, the discussion addresses whether the different forms of cooperation in liner shipping can restrict competition by object.

In liner shipping, information can be exchanged ancillary to a pooling, alliance, conference, or consortium agreement. Most of these agreements can be claimed to pursue efficiencies in terms of stabilising supply, optimising capacity-usage, or improving competition. However, analysing the information exchanges may uncover an objective to restrict competition and increase the profits of the currently operating carriers.

That was the rationale in *Fatty Acids*, which illustrates the delicate borders between pure and ancillary information exchanges.[215] Concerning an information-sharing agreement between competing producers of oleochemicals, the participants exchanged historic information every quarter regarding their respective quantities sold in the market.[216] The Commission held that it "bears a strong resemblance" to an outright quota-fixing agreement, restricting competition by object.[217] The information exchange agreement enabled and facilitated the objective of quota-fixing, and was in that sense ancillary. One may argue that the underlying quota-fixing agreement was disguised as an information-sharing agreement.

[213] Bennett & Collins (2010) p.328.
[214] Communication 2022/C164 para.409.
[215] Case IV/31.128 - Fatty Acids.
[216] Case IV/31.128 - Fatty Acids paras.1 and 12-13.
[217] Ibid. paras.39 and 44.

Especially complex cooperation blurs the lines between ancillary and pure information exchanges. *Fatty Acids* illustrates the importance of assessing such exchanges in the context of its agreement, and that the totality of the agreement and information exchanged must be assessed. Depending on the complexity, the spill-overs of commercially sensitive information can be minimised through safeguarding measures.[218] Such measures are also relevant to the assessment, for instance if obvious measures are not in place. Case law has seen that ancillary exchanges can constitute restrictions by object.

For statistical data exchanged ancillary to market-sharing and price-fixing, the exchange will often be considered a restriction by object, as in the case *Vegetable Parchment*.[219] The Commission noted that the exchange of statistical data must be analysed, since the sharing of especially specific statistics between competitors may exist for the tacit sharing of markets or fixing prices.[220] Similar exchanges in *Cobelpa* were found to have "crossed the threshold which separates a lawful information agreement from a practice intended to restrict and distort competition."[221] Finally, the case *Benelux Flat-glass* illustrates how the exchange of sale figures allowed competitors from the Benelux countries to monitor closely the sales of their main rivals, enabling them to control or modify the trade flows between the states.[222]

Arguably, the exchange of information must thus be central to the anti-competitive nature of the agreement, both in the sense of enabling the cooperation and to retain it through monitoring. The cases confirm that the characteristics discussed above remain equally important for ancillary exchanges. The totality of shared information between competing carriers must be assessed, where particularly frequent flow of individualised and commercially sensitive information may enable collusion of future conduct, constituting an 'object'-infringement. Thus, liner shipping companies engaged in cooperative agreements should strive to restrict the flow of information exchanges. Should competition authorities' investigations uncover exchanges of commercial information unrelated to for instance the cargo-sharing agreement, such as average freight rates for the routes in question, they may conclude on an anti-competitive object.

3.4.2 Liner conferences, consortia, and pools

EATA is illustrative for ancillary information exchanges in liner shipping. It concerned an agreement between competing liner shipping companies to establish a capacity management

[218] See Communication 2022/C164 para.341 regarding joint purchasing agreements.

[219] Case 78/252/EEC Vegetable Parchment para.69.

[220] Ibid., paras.63-64.

[221] Case 77/592/EEC Cobelpa para.27.

[222] Case 84/388/EEC Benelux Flat-glass paras.45 and 47.

programme for their common trade routes. The express purpose was to allow the parties to stabilise and increase their freight rates through e.g. controlling the transport capacity supplied by each participant. The agreement also contained provisions regarding the exchange of information.[223]

The parties would exchange information as frequently as every month concerning their maximum declared capacities, their percentage utilisation and total of actual filled shots, their forecasted capacity for the following two months, and their estimated monthly total for the next four months. The information was individualised to each member and would ensure their compliance with any collective decision on non-capacity utilisation.[224]

The Commission expressly recognised that information as commercially sensitive, and that these private and frequent exchanges of sensitive information confirmed the anti-competitive context of the exchange. Additionally, the exchange of information concerning the market conditions was one of the measures to give effect to the objectives of the EATA. Thus, the exchanges both confirmed the anti-competitive conduct (collusion) and maintained the collusion. The Commission conducted its analysis by explicitly evaluating the liner shipping market structure. It pointed to the very high combined market shares of the parties (up to 86 %), to the fact that most EATA-parties were members of the same association of shipping lines, and that many were parties to another agreement concerning tariff charges and sub charges. These links increased the total restrictions on competition and increased the flow of information between the participants.[225] Accordingly, the market conditions can be of decisive importance.

The case law concerning information exchanges illustrates certain competition law concerns in the liner shipping sector. Although one may argue that information within the shipping sector quickly becomes historic, *EATA* illustrates how information on past, current, and future capacities can all be deemed commercially sensitive, and that frequent exchanges of such information violate Art. 101 (1). Considering the case law examined in section 3.2.3 *supra* such an exchange may constitute a restriction by object, especially if applying an analytical approach where the liner shipping market structure is evaluated.

EATA also illustrates that even though the Conference BER was applicable, such group exemptions are interpreted narrowly. The Conference BER exempted agreements under a "liner conference" having as its objective the fixing of rates and conditions of carriage.[226] The condition

[223] Case 1999/485/EC EATA paras.9-14.
[224] Ibid. paras.154-155.
[225] Ibid. paras.14, 66-71, 77-79 and 152-155.
[226] Regulation 4056/86 art.4.

of a "liner conference" required that the parties "operate under uniform or common freight rates" and other trading conditions.[227] Even though its objective was to fix the freight rates offered, *EATA* var considered not to fall under the scope of a conference agreement, as it had "no *direct mechanism* for agreeing on the implementation of freight-rate increases"[228] (emphasis added).

EATA thus confirms that although the current Consortia BER exempts a variety of operational agreements, these will not benefit from the exemption should they exceed the scope of the activities expressly mentioned in Article 3 or the market share limits in Article 5. Furthermore, agreements having the object of fixing prices, sharing markets or limit capacities outside the scope of Article 3 (hardcore restrictions) will not benefit from the exemption.[229]

Challenging nuances emerge when considering statements in *Budapest Bank*, where the Court confirmed that also cooperation which "indirectly determines" the prices offered constitutes restrictions by object.[230] The scope of "indirect" price fixing in relation to information exchanges is uncertain. However, one may argue that pooling agreements concerning capacities and revenues can fix prices indirectly, depending on the competitive situation on a given route.

Some authors have advocated that revenue-pooling is regarded as the most anti-competitive form of cartel in terms of competitive pricing.[231] Although current practice of pools may be less strictly assessed, the pooling of revenues and information thereof can effectively reduce participants' incentive to compete on price and other parameters, especially in smaller pools facilitating monitoring. This may hold especially true in pools consisting of fewer participants, as each party more easily can monitor the developments of its competitors. Depending on the "relevant market" definition, the pooling agreement may thus indirectly fix prices on a route. Furthermore, should the pool exercise full disclosure between the participants, full information regarding competitors' vessel performance, hereunder average speed, fuel consumption, utilised space v available space, would be exchanged. Consequently, one may argue that pooling agreements "indirectly fix" the quality and quantity of the transport services offered, potentially constituting 'object'-infringements.

Information exchanged ancillary to e.g. a consortium may facilitate and enable cooperation exceeding the scope of the agreement and the conditions in the BER, potentially resulting in a

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[227] Regulation 4056/86 art.1 (3)b).

[228] Case 1999/485/EC EATA para.82.

[229] Regulation 906/2009 art.3-5.

[230] Case C-228/18 Budapest Bank para.62. Indirect price fixing is recognised as pursuing anti-competitive object or effects in Art. 101 (1) *litra* a): "directly or indirectly fix purchase or selling prices or any other trading conditions." However, Budapest Bank explicitly recognises indirect pricing as an *object*-infringement.

[231] Bennathan & Walters (1969) p.172.

restriction by object. Agreements regarding capacity adjustments, which are exempted only if "in response to fluctuations in supply and demand"[232] are likely be deemed capacity controls if the frequent exchange of individualised, sensitive information go beyond what is necessary to address the issue of fluctuating supply and demand. Liner shipping companies should therefore be observant not to exchange more information than necessary for the functioning of the joint operation agreement. The characteristics must be assessed in the context of the relevant liner shipping market, considering concentration, transparency, and barriers of entry. To categorise coordination of capacities as an object-infringement, the analytical approach is arguably required. The orthodox approach is likely to simplify the agreement and deem its nature not to restrict competition, thus referring it to a 'by effect'-assessment.

3.4.3 Strategic liner alliances

Also strategic alliances can restrict competition by object. Alliance agreements govern horizontal coordination of service capabilities of the participants,[233] and may regulate terms of container utilization on a large scale for several sailing routes.[234] Alliances may consist of a combination of vessel sharing, slot exchange and slot chartering,[235] providing for a potentially large degree of cooperation on commercially important parameters. Depending on the underlying agreements, alliances may fall under the definition of a consortium, and can, in principle, fulfil the conditions of the Consortia BER.[236] However, because of the current alliances' extensive scope and market shares, information exchanges within alliances may be so harmful to competition that they constitute 'object'-infringements

Neither the Courts nor the Commission have assessed liner alliances under Art. 101.[237] Generally though, cooperation and information exchanged within the major liner shipping alliances may violate Art. 101, and the Commission is expected to subject them to great scrutiny.[238] Some guidance can be found in case law from the aviation sector. Being part of the transport sector, central considerations are transferable to liner shipping. Depending on how the relevant market is defined, alliances often hold very large market shares on several routes,[239] both industries are capital-intensive, and there exists substantial barriers of entry.[240]

[232] Regulation 906/2009 art.3 (2).
[233] Slack et al. (2011) pp.65-66.
[234] Panayides & Wiedmer (2011) p.26.
[235] Van Bael & Bellis (2021) p.1458.
[236] Ghorbani et al. (2022) p.440.
[237] Van Bael & Bellis (2021) p.1458.
[238] OECD (2015b) p.5.
[239] Case COMP/AT.39595 Continental/United/Lufthansa/Air Canada (Continental) para.43.
[240] Case AT.39964 Air France/KLM/Alitalia/Delta (Air France) paras.59, 79 and 97.

The case *British Airways* concerned extensive cooperation between three large airlines on certain transatlantic flights. The parties were members of the "Oneworld" alliance, and cooperating through a variety of agreements. After conducting its investigation, the Commission found that a revenue-sharing joint venture restricted competition by object on several routes. It was emphasised that the competitors cooperated in relation to "key parameters" of competition, namely fare prices, capacities, schedules, and sales and marketing. This extensive level of cooperation would practically "eliminate competition" on prices, capacities, and other parameters.[241]

In the case *Continental*, the parties were all members of the "Star Alliance" and enjoyed long-standing extensive cooperation on several transatlantic routes. The agreement primarily under scrutiny was a revenue-sharing joint venture ("A++ agreement"), expanding the scope of cooperation further and eliminating competition which "most likely could not be replaced."[242]

In the case *Air France* is the most recent of the three and concerned particularly a joint venture agreement ("TAJV") between members of the "Skyteam Alliance." The TAJV established profit- and loss-sharing between them on several transatlantic routes, and due to the comprehensive cooperation the parties were deemed to "fully coordinate their activities on capacity, schedule, pricing and revenue management" on these routes.[243]

Firstly, these cases confirm that, depending on the geographic coverage and operating routes in question, members of alliances are under competition rules fully regarded as competitors.[244] Secondly, alliances can involve cooperation in many aspects of the transport service. In *Continental*, the Commission found that the members' strategic network plans included capacity requirements, potential schedule patterns, pursuing joint revenue, inventory, and marketing management, combining their pricing functions, and aligning their pricing policies. Additionally, the A++ agreement included provisions concerning cooperation in relation to airport operations, quality management, IT and monitoring. Considering the case law reviewed in this thesis, there can be little doubt that coordination on all these commercial aspects necessarily includes a substantive degree of information exchanges which heavily increase market transparency. The creation of similar networks within liner shipping alliances will remove uncertainty regarding competitors' future conduct, thus restricting competition by object. The Commission's formulations that these agreements were "eliminating competition" on central parameters, and the parties "substituted competition with full cooperation" support this observation.[245]

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[241] Case COMP/39.596 British Airways/American Airlines/Iberia (British Airways) paras.2, 32-33 and 38.

[242] Case COMP/AT.39595 Continental paras.2, 8, 34-36 and 54.

[243] Case AT.39964 Air France paras.2, 10 and 38.

[244] Case COMP/AT.39595 Continental paras.16 and footnote 14.

[245] Ibid. paras.36-37.

Finally, the cases illustrate the challenge and importance of accurately identifying structures on the relevant market. One argument by the alliance members in *Air France* was that the Commission's assessment of the market failed to "fully capture the extent of competition that airlines experience from competing networks" notably from other alliances and coalitions.[246] Should the participants of a pooling agreement face fierce competition from other pools, competition may be sufficiently ensured. However, by consolidating independent capacities, the number of competing carriers decreases, potentially increasing concentration and transparency, and thus facilitate collusion. Regardless, alliance members' ability to show potential enhanced competition between alliances and pools on the relevant market may ease competition authorities from finding an object-infringement.

As seen, the extensive cooperation within alliances may cause the concern of ancillary information exchanges in areas of capacities, geographic coverage, technical developments, and marketing. Even if the cooperation in itself would not amount to a restriction by object, the increased transparency and knowledge about competitors' operations resulting from shared information may result in competition authorities finding a restriction by object.

This analysis seemingly requires some consideration of the economic and legal context of the agreement and information exchanged. The analytical approach may, therefore, more effectively capture the restrictive nature of the agreements in liner shipping. The cases of smaller pools and consortia will likely evade the 'by object'-categorisation when applying an orthodox approach. However, because of the liner shipping alliances' size and scope, that cooperation may be captured also when applying an orthodox approach. In *British Airways*, for instance, the Commission preliminary determines that the agreements "by their very nature" aimed at and had the potential of restricting competition, thus constituting an object-infringement.[247] Moreover, should the competition authorities similarly find that liner shipping alliances "eliminate" competition on the relevant market,[248] the agreements and information exchanged are more appropriately treated as 'object'- rather than 'effect'-infringements.

This section has addressed the anti-competitive potential of ancillary information exchanges. Examining when sharing of information restricts competition 'by object', certain characteristics determine the categorisation. Case law has emphasised the strategic or sensitivity nature of the information, to what extent information is individualised, and whether the information concerns future intentions or current and past results. Moreover, the frequency of the exchange and

[246] Case AT.39964 Air France para.19.

[247] Ibid. para.33.

[248] Case COMP/39.596 British Airways para.37.

whether the exchange produces any plausible efficiencies are relevant. Private exchanges may be deemed more likely to result in collusive outcome, although also public announcements can be deemed 'object'-infringements. The totality of the exchange is decisive and especially important for ancillary exchanges, where exchanges facilitating and enabling anti-competitive collusive outcome can be prohibited. Some traditional cooperation in liner shipping may be considered anti-competitive by object, should for instance the pooling or consortia agreement go further than what is necessary to improve capacity utilisation, or the cooperation within large alliances eliminates competition on certain parameters. Competing carriers should thus be aware of the information flows permitted in relation to their cooperative agreements, as the case law of Art. 101 illustrates how several such agreements can be deemed 'object'-infringements.

4 Concluding remarks

Liner shipping companies face considerable challenges regarding how EU competition law governs horizontal information exchanges. Competing carriers have, and continue to, engage in various agreements which, in addition to the public announcements, create different platforms for sharing information. Multiple platforms for information exchanges increase the market's transparency. Since the global liner shipping market is characterised by few competing carriers holding significant market shares, such increased transparency arguably increases both the options to engage in collusive outcome, and to monitor and maintain existing collusion.

The thesis has examined *how various forms of information sharing between liner shipping companies potentially can be viewed as pursuing anti-competitive objects* of Article 101 TFEU, and has demonstrated that both traditional agreements and sophisticated forms of concerted practices can restrict competition by object. Additionally, several legal uncertainties when applying Art. 101 have been uncovered, potentially increasing the risks of cooperating for competing carriers. EU Courts and legislators need to address these unclarities to secure legal predictability for carriers and competition authorities.

Firstly, the concept of a "concerted practice" requires that exchanges of information reduce or remove "strategic uncertainty" in the liner shipping market. Due to the presumption that carriers remaining active on the market and not distancing themselves from information disclosed will make use of the information, many exchanges, both public and private, may be deemed concerted practices. EU legislators should arguably provide guidance on the degree of reduced strategic uncertainty required to fulfil the condition. Particularly public announcements are challenging, illustrated in *Container Shipping*, since predictions of future market developments concerning capacities, geographic coverage and freight rates may be found in quarterly reports or press releases directed at one's customers. These statements can, however, reduce the degree of strategic uncertainty of competing carriers, potentially being treated as concerted practices.

Secondly, the definition of the relevant market has arguably paramount importance when determining both whether the exchange constitutes a "concerted practice" and if so, whether that practice restricts competition "by object or effect." Case law reveals several relevant characteristics of the exchange, such as its frequency, age, level of aggregation, and degree of commercial sensitivity. These characteristics will, however, have different impact on competition depending on the relevant market and the number of competitors on that market. Although one can determine the major liner shipping companies' global market shares, these shares will vary according to the region or trade route in question. Clear guidelines when determining the relevant market will increase predictability for competing carriers, especially in the current situation where a few liner shipping alliances dominate the global market.

Thirdly, there is unclarity regarding the distinction between 'object' v 'effect' and the assessments required. Traditionally, the dichotomy has implied to first checking whether the cooperation in its nature poses obvious threats to competition, restricting competition "by object." If not, enforcers must fully analyse the conduct and its context within the market conditions to uncover whether it restricts competition 'by effect.' Particularly two methodical approaches are highlighted in theory. Applying an orthodox approach follows a strict categorisation of certain types of cooperation as 'object'-infringements and can increase predictability for both undertakings and competition authorities. However, much of the case law in information exchanges applies an analytical approach by pointing to some degree of contextual analysis already in the 'by object'-assessment, blurring the lines between the alternatives. Still, this can be deemed necessary to correctly categorise the conduct. Sophisticated and complex information exchanges are, for instance, likely to evade a rigid categorisation of the orthodox approach, even if the exchange, after some analysis, is revealed to clearly pursue an anti-competitive object. It rests at the enforcers to strike a balance, but clarification is required to ensure harmonised and effective enforcement of the EU competition rules.

Finally, competing carriers should re-evaluate their cooperative engagement in relation to the competition rules. The discussion has uncovered potentially vast exchanges of information ancillary to agreements, such as the pooling of cargo or revenue, and other joint operations within consortia agreements. Without sufficient safeguards and isolation of the cooperative areas, excessive exchanges of information may give rise to collusive outcome on other competitive parameters. Similarly, extensive cooperation on several commercial aspects naturally increases the exchange of sensitive information, and that information can be particularly harmful to competition in transparent markets. Excessive sharing of information may remove uncertainty regarding competitors' future modifications of conduct, restricting competition "by object." The analysis conducted in Chapter 3 shows that cooperation, particularly within the liner shipping alliances, is at risk of being treated as 'object'-infringements. Because of the structural framework facilitating extensive cooperation on several commercial aspects, the agreements and

information exchanged between alliance members can effectively reduce or eliminate competition in certain markets. The European enforcers should therefore provide more guidance on how Art. 101 will be applied to liner shipping alliances.

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Regulation 4056/86	Council Regulation (EEC) No 4056 / 86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. OJ L 378, 31.12.1986.
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