

**Commission notice pursuant to Article 12 (2) of Council Regulation (EEC) No 1017/68
concerning Case No IV/35.592 — European Rail Shuttle (ERS)**

(97/C 328/05)

(Text with EEA relevance)

I. Application

The parties listed from 1 to 4 in section III have submitted an application pursuant to Article 12 of Regulation (EEC) No 1017/68 with a view to obtaining a declaration of non-applicability of the prohibition in Article 2 to a number of agreements relating to the establishment and operation of the European Rail Shuttle Service, in accordance with Article 5 of that Regulation.

II. Background

In 1994 the notifying parties established a private limited company under Dutch law, called European Rail Shuttle BV (ERS), for the joint operation of container transport by rail shuttle-service. A. P. Møller-Maersk Line joined ERS in 1995. The business of ERS is to organize and operate rail shuttle services within the area covering north, west, south and central Europe, Scandinavia and the UK. ERS therefore purchases train services from the railways and sells the wagon space to the parties and, if available, to third parties. If the establishment of a new shuttle service is not feasible as regards the volumes concerned, ERS will buy rail transportation capacity from other rail operators. ERS has appointed VGL Rail Cargo in Rotterdam as managing agent, to deal with various operational matters. As a result of the agreements, ERS currently operates services on the following routes: Rotterdam-Milan (vice versa); Rotterdam-Germersheim and (vice versa); Rotterdam-Neuss and (vice versa); and Rotterdam-Padua and (vice versa). All shuttles are operated under the same basic conditions although frequency and composition of the trains may vary.

III. The parties to the agreements

1. Holland Rail Container BV (HRC): a 100 % subsidiary of NS Cargo NV;
2. Nedlloyd Lines BV (Ndll): a shipping line established in the Netherlands;
3. P&O Containers Ltd (P&O): a shipping line established in the UK;
4. Sea-Land Service Inc. (S-L), a company incorporated in the USA;
5. VGL Rail Cargo (VGL), a 100 % Nedlloyd subsidiary;

6. A. P. Møller-Maersk Linie, a shipping line established in Denmark.

IV. Summary of the agreements

Association/joint venture agreement

An agreement signed in January 1994 between: HRC, Ndll, P&O and S-L, in which they state their intention to establish a private limited company for the operation of a rail-shuttle service between Rotterdam and Milan, and in which they arrange a number of items such as the object, shareholdership and funding of the company.

These items were subsequently reproduced in the Deed of Incorporation of European Rail Shuttle BV established before notary in Rotterdam on 17 February 1994. Nedlloyd provided the issued capital of Fl 40 000 which is used as working capital.

The association agreement came into force on the date of its signature, and was established to remain in force until 18 January 1995 and to be tacitly extended for one-year-periods thereafter. This agreement was amended by the accession agreement which provides that the agreement would be effective for an indefinite period.

Accession agreement

Agreement of 1 October 1995 whereby A. P. Møller-Maersk Line became a part of the joint venture on the same terms as the other shipping companies. It also expanded the activities of ERS and allows the joint venture to continue indefinitely. The object of ERS, originally limited to the operation of container shuttle trains on the Rotterdam-Milan route, was amended to include new shuttle services within the geographic area covering north, west, south and central Europe. The functions of ERS, originally limited to the development of rail-shuttle services, was extended to also cover the joint-buying of rail transportation capacity from other rail operators, if the establishment of a new shuttle service is not feasible in regard to the volumes concerned, and to become directly involved in the operation of rolling stock and traction for new shuttle products.

Framework agreement

Agreement of 1 October 1995 setting out the general terms for the operation and continuation of the joint venture. It is no longer limited to a particular shuttle service but applies the terms of the original joint venture to all the operations of ERS. According to this agreement the ERS participating companies shall agree on the allotments (meaning the number of slots allocated to each of the parties) for each shuttle service operating under separate agreement between the parties. The parties are entitled to use their respective slots for cargo generated by associated companies and by certain alliance partners. Any excess space (meaning non-used slots within the allotments of each party) must be tendered to the other parties at cost price. Any excess space then remaining shall be marketed to third parties on joint behalf at terms and a price to be agreed on.

Agency agreement

An agreement between VGL Rail Cargo and ERS, signed on 17 May 1994, under which VGL Rail Cargo undertakes to organize and carry out the operational, administrative and commercial tasks of the Rotterdam-Milan shuttle train under the name of ERS, and ERS undertakes to pay a certain price to VGL Rail Cargo for the services provided. Although no new agency agreement has been drawn up in respect of the other shuttle services, those services will be carried out under similar conditions as the framework agreement.

Under the framework agreement, VGL has furthermore been granted the right of first refusal in respect of the marketing and operating of all new shuttle services of the parties/ERS departing from a Benelux port. For other shuttle services, affiliates of the parties will have a right of first refusal to provide agency services provided that they meet market conditions.

The agreement is effective as from 18 January 1994, and terminable at three month's notice.

Letters of intent and contracts regarding particular shuttle services

Under the above-mentioned matrix of arrangements, a series of letters of intent and contracts regarding the various shuttle services have been concluded between ERS and the relevant railway undertakings.

Under these contracts, NS Cargo NV for itself and on behalf of the other railways involved in the foreign parts of the routes operated by ERS undertake to run shuttle trains with certain specified composition and at certain specified times between Rotterdam and the destinations currently operated by ERS and back, a certain minimum number of times per week in both directions. For its part,

ERS undertakes to pay a certain price in consideration for the service provided by the railway undertakings.

V. Arguments of the parties concerning the agreements' qualification for negative clearance or exemption

Relevant market

The parties are of the opinion that in relation to the carriage of carrier haulage cargoes by them in their capacity as conference members, the market should be defined as, at least, the through-intermodal market for containerizable cargo between ports and points in Europe, and between ports and points at the other end of the conference trade in question.

To a large extent, the shuttles are used by the parties for the inland leg of their multi-modal transport operation. In principle, a customer may choose whether to use the inland transport service offered by the shipping company or to arrange it himself, i.e. through merchant hauliers. Substitutability is confirmed by the responsiveness of prices for one service to price changes in the other.

The mode of transport used for the inland journey are rail, road and inland waterway. These types are highly interchangeable and substitutable means of transporting containerized cargo.

The relevant service market is therefore, in the opinion of the parties, that for inland transport as part of multi-modal transport operations.

As regards the geographic market, the parties are of the opinion that any of the major European ports may be substitutable for Rotterdam in respect to serving inland points. In particular, as regards cargo destined for, or originating from inland points in northern Europe, Hamburg, Bremen and Antwerp are all viable alternatives, and as regards southern Europe, Le Havre, Antwerp, Marseilles, Genoa and La Spezia are substitutable. Therefore, the assessment is that the mainland of Europe, bordered by the above-mentioned ports makes up the relevant geographic market.

Apart from inland transport as part of multi-modal transport operations, ERS is also used for continental transport of unitized cargo in general. This is especially true as regards the slots used by third parties. Therefore, the relevant market for the sale of third party slots on ERS is the intra-European market for the transport of unitized cargo, moving within the geographic area of the European Continent and coming from or bound for ports such as Hamburg, Bremen, Amsterdam, Rotterdam, Antwerp, Le Havre, Algiciras, Valencia, Barcelona, Marseilles, Genoa and La Spezia.

Applicability of Article 2 of Regulation (EEC) No 1017/68

The parties consider that the ERS agreements fall outside the scope of Article 2 of Regulation (EEC) No 1017/68. It is the parties' view that the ERS has a very limited market share on the relevant market as defined and, as a consequence, the agreements have no appreciable effect on competition and trade between Member States.

Exemption within the meaning of Article 5 of Regulation (EEC) No 1017/68

Where the Commission may conclude that the ERS agreements fall for consideration within Article 2 of Regulation (EEC) No 1017/68, the parties argue that they qualify for exemption pursuant to Article 5 of Regulation (EEC) No 1017/68 for the following reasons:

- In the first place, the parties consider that there is no possibility of eliminating competition on the relevant market. Rail transport accounts for a very limited proportion of the service market as defined by the parties. Besides, Intercontainer have a highly dominant position in rail transport whereas ERS has only a tiny proportion. The creation of ERS has actually increased competition on the relevant market.
- As regards the indispensability of the agreements, the Contracting Parties contend that none of them could have set up a shuttle service on its own. In order for the shuttle to operate successfully, a minimum number of journeys transporting a minimum number of cargo units must be made each week. At present the parties are using the shuttle for almost 100 % of their cargo on the relevant routes. Even at that, the volume of cargo is very varied and relies on the operational combination of integrated liner shipping operations, whereby sufficient cargo volumes are generated at a common range of ports or terminals at the same time. Trains departing following such an arrival or preceding a departure will carry mainly ERS party cargo as part of their multi-modal operations. On such trains there is little excess space for third party sale, whereas the proportion of excess space on the other trains is higher. Such a variation in volume means that no single party could take the financial risk of operating a shuttle alone. Fluctuating markets mean that sales to third parties alone could not be relied on to maintain financial viability. Therefore, a shuttle service, like the ERS can only operate if the various partners generate sufficient

cargo volume at the same point of time, at the regions and the ports served by the shuttle.

- The parties entered into this joint venture in line with the objectives pursued by the process of liberalization in the railway sector of Council Directive 91/440/EEC. Presuming that the purpose of liberalizing the rail transport market was to achieve economic progress, then the agreement obviously does just that. It offers an alternative product in a closed market as far as rail transport is concerned. It also encourages the transfer of traffic from road to rail which is a stated Community objective (recitals of Directive 92/106/EEC). The dedicated shuttle service will be far more reliable than the common user trains currently provided by Intercontainer.
- The parties to the joint venture are not a closed group as can be seen by the accession of A. P. Møller in 1995.

Accordingly, it is the view of the parties that the joint venture and ancillary agreements improve the quality of intermodal transport services, promote continuity and stability, increase productivity and further economic progress. Moreover, the agreements contain no restrictions which are not essential and competition is increased rather than eliminated.

VI. Third party comments

This notice is published pursuant to the procedure established by Article 12(2) of Regulation (EEC) No 1017/68.

The Commission has not, at this stage, formed any view on the agreements' qualification for negative clearance or exemption.

The Commission invites all interested parties to submit their comments to it within 30 days of publication of this notice, quoting Case IV/35.592 — European Rail Shuttle, by fax ((32-2) 296 98 12), or by post to:

European Commission,
DG IV, Directorate D,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels.