

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Notice pursuant to Article 4 of Council Regulation (EEC) No 479/92 on the application of Article 81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies ('consortia')

(Text with EEA relevance)

(2008/C 266/01)

In accordance with Article 4 of Council Regulation (EEC) No 479/92 ⁽¹⁾, the Commission invites interested parties to send their comments concerning the attached draft Commission Regulation (EC) on the application of Article 81(3) of the EC Treaty to categories of agreements in the field of maritime transport. Comments (reference HT.1065) should be sent within one month of the date of publication of this notice, to:

European Commission
Directorate-General for Competition
Reference HT.1065
Unit COMP/F1, Office J70 2/55
B-1049 Brussels
Fax (32-2) 295 01 28
E-mail: COMP-GREFFE-ANTITRUST@ec.europa.eu

⁽¹⁾ OJL 55, 29.2.1992, p. 3.

‘PRELIMINARY DRAFT
COMMISSION REGULATION (EC) No [XXX]
of [XXX]
on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and
concerted practices between liner shipping companies (“consortia”)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ⁽¹⁾, and in particular Article 1 thereof,

Having published a draft of this Regulation ⁽²⁾,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 479/92 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices between shipping companies (consortia) relating to the joint operation of liner transport services, which, through the cooperation they bring about between the shipping companies that are parties thereto, are liable to restrict competition within the common market and to affect trade between Member States and may therefore be caught by the prohibition contained in Article 81(1) of the Treaty.

(2) The Commission has made use of this power by adopting Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ⁽³⁾, which will expire on 25 April 2010. On the basis of the Commission’s experience to date it can be concluded that the justifications for a block exemption for liner consortia are still valid as it has been found to function well for the benefit of carriers and transport users. Adjustments however have to be introduced to delete references to the repealed Regulation (EC) No 4056/86 containing the liner conference block exemption which allowed liner shipping lines to fix prices and capacity. Modifications also target a greater convergence between Regulation (EC) No 823/2000 and other block exemption regulations for horizontal cooperation in force whilst taking into account current market practices in the liner industry.

(3) There is a great variety of different consortia agreements operating in the market. For the purposes of this Regulation a consortium agreement should consist of one or a set of separate but interrelated agreements under which the parties operate the joint service. The legal form of the arrangements is considered less important than the underlying economic reality that the parties provide a joint service.

(4) By contrast, this Regulation should not cover restrictive agreements concluded between, on the one hand, consortia or one or more of their members, and, on the other hand, other shipping companies. Nor should it apply to restrictive agreements between different consortia operating in the same trade or between the members of such consortia.

(5) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(6) Consortia, as defined in this Regulation, generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. For the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments in response to fluctuations in supply and demand. By contrast, unjustified output limitation as well as the joint fixing of freight rates or market and customer allocation are unlikely to bring any efficiency. Therefore, consortia agreements that involve such activities should be excluded from the benefit of this Regulation, irrespective of the market power of the parties.

(7) A fair share of the benefits resulting from the efficiencies should be passed on to transport users. Users of the shipping services provided by consortia may benefit from the improvements in productivity which consortia can bring about. Those benefits may also take the form of an improvement in the frequency of sailings and port calls, or an improvement in scheduling as well as better quality and personalised services through the use of more modern vessels and other equipment, including port facilities.

⁽¹⁾ OJ L 55, 29.2.1992, p. 3.

⁽²⁾ [...].

⁽³⁾ OJ L 100, 20.4.2000, p. 24.

- (8) Users can benefit effectively from consortia only if there is sufficient competition in the trades in which the consortia operate. This requirement of Article 81(3) should be regarded as being met when a consortium remains below a given market share threshold and can therefore presumed to be subject to effective actual or potential competition from non-consortium lines. In order to assess market shares, account should be taken not only of direct trade between the ports served by a consortium but also of any competition from other liner services sailing from ports which may be substituted for those served by the consortium and, where appropriate, of other modes of transport.
- (9) This Regulation should not exempt agreements containing restrictions of competition which are not indispensable to the attainment of the objectives justifying the grant of the exemption. To this end, the activities listed in Article 4 should be excluded from the scope of this Regulation
- (10) In addition, the benefit of the present exemption should be subject to the fulfilment of certain conditions. In particular, consortium agreements should contain a provision enabling each shipping line party to the agreement to withdraw from the consortium provided that it gives reasonable notice. However, provision should be made for a longer notice period in the case of highly integrated and/or high-investment consortia in order to take account of the higher investments undertaken to set them up and the more extensive reorganisation entailed in the event of a member's leaving. It is justifiable for consortia to seek security for new investments committed to an existing service. Therefore, the possibility for the parties to a consortium agreement to enter into a "non-withdrawal" clause should also apply where the parties to an existing consortium agreement have agreed to make substantial new investments and the costs of such new investments justify a new "non-withdrawal" clause.
- (11) It should also be a condition that consortia and their members do not, in respect of a given route, apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary to transport, unless such rates or conditions can be economically justified on the basis of cost differences.
- (12) Certain obligations should also be attached to the exemption. In this respect, transport users should at all times be in a position to acquaint themselves with the conditions for the provision of the maritime transport services jointly operated by the members of the consortium. Provision should be made for real and effective consultations between the consortium and transport users on the activities covered by the agreements. This Regulation also specifies what is meant by "real and effective consultations" and what main procedural stages are to be followed for such consultations.
- (13) Such consultations are likely to secure a more efficient operation of maritime transport services which takes account of users' requirements. Consequently, certain restrictive practices which could ensue from such consultations should be exempted. Such consultations should however be limited to the conditions and the quality of the scheduled maritime transport service provided by the consortium or its members and exempted by this Regulation.
- (14) The market share threshold, the exclusion of certain conduct from the benefit of this exemption as well as the other conditions and obligations attached to it should normally ensure that the agreements to which the block exemption applies do not give the companies concerned the possibility of eliminating competition in a substantial part of the trades in question.
- (15) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission may withdraw the benefit of the block exemption.
- (16) This Regulation is without prejudice to the application of Article 82 of the Treaty.
- (17) In view of the expiry of Regulation (EC) No 823/2000, it is appropriate to adopt a new Regulation renewing the block exemption,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

This Regulation shall apply to consortia only in so far as they provide international liner transport services from or to one or more Community ports.

Article 2

Definitions

For the purposes of this Regulation:

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

2. "liner shipping" means the transport of goods on a regular basis on a particular route or routes between ports and in accordance with timetables and sailing dates advertised in advance and available, even on an occasional basis, to any transport user against payment;
3. "service arrangement" means a contractual arrangement concluded between one or more transport users and an individual member of a consortium or a consortium itself under which, in return for an undertaking to commission the transportation of a certain quantity of goods over a given period of time, a user receives an individual undertaking from the consortium member or the consortium to provide an individualised service which is of a given quality and specially tailored to its needs;
4. "transport user" means any undertaking (such as shipper, consignee, forwarder) or its representative organisations which has entered into, or demonstrated an intention to enter into, a contractual agreement with a consortium (or one of its members) for the shipment of goods;
5. "commencement of the service" means the date on which the first vessel sails on the service or, when there has been substantial new investment, the date on which the first vessel sails under the conditions directly arising from that substantial new investment;
6. "substantial new investment" means an investment which results in the building, purchase or long-term charter of vessels, which are specifically designed and required for the operation of the service and which constitutes at least half of the total investment made by the consortium members in relation to the maritime transport service offered by the consortium.

CHAPTER II

EXEMPTIONS

Article 3

Exempted agreements

1. Pursuant to Article 81(3) of the Treaty and subject to the conditions and obligations laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the activities listed in paragraph 2 of this Article when contained in consortium agreements as defined in Articles 1 and 2 of this Regulation.
2. The declaration of non-applicability shall apply only to the following activities:
 - (a) the joint operation of liner shipping transport services which includes any of the following activities:
 - (i) the coordination and/or joint fixing of sailing timetables and the determination of ports of call;
 - (ii) the exchange, sale or cross-chartering of space or slots on vessels;
 - (iii) the pooling of vessels and/or port installations;
 - (iv) the use of one or more joint operations offices;

- (v) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;
 - (vi) the use of a computerised data exchange system and/or joint documentation system;
 - (b) capacity adjustments in response to fluctuations in supply and demand;
 - (c) the joint operation or use of port terminals and related services (such as lighterage or stevedoring services);
 - (d) any other activity ancillary to those referred to in points (a) to (c) which is necessary for their implementation.
3. The following clauses shall in particular be considered ancillary activities within the meaning of paragraph 2(d):
 - (a) an obligation on members of the consortium to use on the trade or trades in question vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;
 - (b) an obligation on members of the consortium not to assign or charter space to other vessel-operating carriers on the trade or trades in question except with the prior consent of the other members of the consortium.

Article 4

Agreements not covered by the exemption

The exemption provided for in Article 3 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the fixing of prices when selling liner services to third parties;
- (b) the limitation of capacity or sales except for the capacity adjustments referred to in Article 3(2)(b) of this Regulation;
- (c) the allocation of markets or customers.

CHAPTER III

CONDITIONS FOR EXEMPTION

Article 5

Conditions relating to market share

1. In order to qualify for the exemption provided for in Article 3, a consortium must possess on each market upon which it operates a market share of under 30 % calculated by reference to the volume of goods carried (freight tonnes or 20-foot equivalent units).
2. For the purpose of establishing whether this threshold is met:
 - (a) the market shares of carriers that provide services both individually and within a consortium on the same relevant market have to be aggregated;
 - (b) the market shares of consortia operating in the same relevant market and interlinked by common membership have to be aggregated.

3. The exemption provided for in Article 3 shall continue to apply if the market share referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one tenth.

4. Where one of the limits specified in paragraphs 1 and 3 is exceeded, the exemption provided for in Article 3 shall continue to apply for a period of six months following the end of the calendar year during which it was exceeded. This period shall be extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.

Article 6

Other conditions

In order to qualify for the exemption provided for in Article 3, all of the following conditions must be met:

- (a) the consortium must allow each of its members to offer, on the basis of an individual contract, its own service arrangements;
- (b) the consortium agreement must give member companies the right to withdraw from the consortium without financial or other penalty such as, in particular, an obligation to cease all transport activity in the trade or trades in question, whether or not coupled with the condition that such activity may be resumed after a certain period has elapsed. This right shall be subject to a maximum notice period of six months. The consortium agreement may however stipulate that such notice can only be given after an initial period of maximum 18 months starting from the date of entry into force of the consortium agreement or the agreement to make a substantial new investment in the joint maritime service. If the date of entry into force of the agreement is earlier than the date of commencement of the service, the initial period shall not be more than 24 months starting from the date of entry into force of the consortium agreement or the date of entry into force of the agreement to make a substantial new investment in the joint maritime service. In the case of a highly integrated consortium with a high level of investment due to the purchase or charter by its members of vessels specifically for the purpose of setting up the consortium, the maximum notice period shall also be six months, but the agreement may stipulate that such notice can only be given after an initial period of maximum 30 months starting from the date of entry into force of the consortium agreement or the agreement to make a substantial new investment in the joint maritime service. If the date of entry into force of the agreement is earlier than the date of commencement of the service, the initial period shall not be more than 36 months starting from the date of entry into force of the consortium agreement or the date of entry into force of the agreement to make a substantial new investment in the joint maritime service;
- (c) neither the consortium nor consortium members shall, within the common market, cause detriment to certain ports, users or carriers by applying to the carriage of the same goods and in the area covered by the agreement, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such differences in rates or conditions can be economically justified on the basis of differences in the costs of carriage.

CHAPTER IV

OBLIGATIONS

Article 7

Obligation to consult transport users

1. The obligations provided for in paragraphs 2 and 3 of this Article shall be attached to the exemptions provided for in Article 3.
2. There shall be real and effective consultations between transport users or their representative organisations, on the one hand, and the consortium, on the other hand, for the purpose of seeking solutions on all important matters, other than purely operational matters of minor importance, concerning the conditions and quality of scheduled maritime transport services offered by the consortium or its members.
3. These consultations shall take place whenever requested by any of the above mentioned parties.
4. The consultations must take place, except in cases of *force majeure*, prior to the implementation of the measure forming the subject of the consultation. If, for reasons of *force majeure*, the members of the consortium are obliged to put a decision into effect before consultations have taken place, any consultations requested shall take place within 10 working days of the date of the request. Save in the case of such *force majeure*, to which reference shall be made in the notice announcing the measure, no public announcement of the measure shall be made before the consultations.
5. The consultations shall take place in accordance with the following procedural stages:
 - (a) prior to the consultation, details of the subject matter of the consultation shall be notified in writing by the consortium to the transport users or their representative organisations;
 - (b) an exchange of views shall take place between the parties either in writing or at meetings or both in the course of which the representatives of the consortium members and of the transport users or their representative organisations taking part shall have authority to reach a common point of view and the parties shall use their best efforts to achieve that end;
 - (c) where no common point of view can be reached despite the efforts of both sides, the disagreement shall be acknowledged and publicly announced. It may be brought to the Commission's attention by either side;
 - (d) a reasonable period for the completion of consultations may be fixed, if possible, by common agreement between the two parties. That period shall be not less than one month, save in exceptional cases or by agreement between the parties.
6. The conditions concerning the maritime transport services provided by the consortium and its members, including those relating to the quality of such services and all relevant modifications, shall be made available on request to transport users at reasonable cost and shall be available for examination without cost at the offices of the consortium members, or the consortium itself, and their agents.

*Article 8***Other obligations attached to exemption**

Any consortium claiming the benefit of this Regulation must demonstrate at the request of the Commission or a Member State's competition authority that the conditions and obligations imposed by Articles 5 to 7 are fulfilled. To that end the requesting authority shall on a case by case basis determine a time-limit, which shall not be less than three months.

CHAPTER V

MISCELLANEOUS PROVISIONS*Article 9***Professional secrecy**

1. Information acquired as a result of the application of Article 8 shall be used only for the purposes of this Regulation.
2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation which is of the kind covered by the obligation of professional secrecy.
3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or studies which do not contain information relating to particular undertakings or associations of undertakings.

This Regulation shall be binding in its entirety and directly applicable in all Member States.'

*Article 10***Withdrawal in individual cases**

1. The Commission may withdraw the benefit of this Regulation, in accordance with Article 29 of Council Regulation (EC) No 1/2003 ⁽¹⁾, where it finds in a particular case that an agreement, decision by an association of undertakings or concerted practice to which Article 3 of this Regulation applies nevertheless has certain effects which are incompatible with Article 81(3) of the Treaty in particular where:

- (a) in the relevant market where the consortium operates, the consortium members are not subject to effective competition, actual or potential, from shipping lines, which are not members of the consortium;
- (b) consumers do not receive a fair share of the benefits generated by the consortium in particular if it fails repeatedly to comply with the obligations to consult provided for in Article 7 of this Regulation.

2. Where, in any particular case, an agreement, decision by an association of undertakings or concerted practice referred to in paragraph 1 has effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation in respect of that territory.

*Article 11***Entry into force**

This Regulation shall enter into force on 26 April 2010.

It shall apply until 25 April 2015.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.