

## COMMISSION REGULATION (EC) No 870/95

of 20 April 1995

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

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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)<sup>(1)</sup>, as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1 thereof,

Having published a draft of this Regulation<sup>(2)</sup>,

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

(1) Whereas certain categories of agreements, decisions and concerted practices between shipping companies relating to the joint operation of liner transport services (consortia), 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 85 (1) of the Treaty;

(2) Whereas the analysis carried out by the Commission of consortium agreements indicates that a large number of agreements may nevertheless normally be regarded as fulfilling the requirements of Article 85 (3); whereas this category of consortia should be defined;

(3) Whereas the Commission has taken due account of the special features of maritime transport; whereas those features will also constitute a material factor in any Commission assessment of consortia not covered by this block exemption;

(4) Whereas consortia, as defined in this Regulation, generally help to improve the productivity and quality of available liner shipping services by reason of the rationalization they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilization of port facilities; whereas they also help to promote technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity;

(5) Whereas users of the shipping services provided by consortia generally obtain a fair share of the benefits resulting from the improvements in productivity and service quality which they bring about; whereas these 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 personalized services through the use of more modern vessels and other equipment including port facilities; whereas users can benefit effectively from consortia only if there is sufficient competition in the trades in which the consortia operate;

(6) Whereas these agreements should therefore benefit from a block exemption, provided they do not give the companies concerned the possibility of eliminating competition in a substantial part of the trade in question; whereas in order to take account of the constant fluctuations in the maritime transport market and the frequent changes made by the parties to the terms of consortium agreements or to the activities covered by the agreements, an object of this Regulation is to clarify the conditions to be met by consortia in order to benefit from the block exemption it grants;

(7) Whereas, for the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments; whereas the non-utilization of a certain percentage of vessel capacity within a consortium is not an essential feature of consortia;

<sup>(1)</sup> OJ No L 55, 29. 2. 1992, p. 3.

<sup>(2)</sup> OJ No C 63, 1. 3. 1994, p. 8.

- (8) Whereas the block exemption granted by this Regulation covers both consortia operating within a liner conference and consortia operating outside such conferences, except that it does not cover the joint fixing of freight rates ;
- (9) Whereas rate fixing activities come under Council Regulation (EEC) No 4056/86<sup>(1)</sup>, as amended by the Act of Accession of Austria, Finland and Sweden ; whereas consortium members that wish to fix rates jointly and do not satisfy the criteria of Regulation (EEC) No 4056/86 must apply for individual exemption ;
- (10) Whereas the first of the conditions attaching to the block exemption should be that a fair share of the benefits resulting from the improved efficiency, as well as the other benefits offered by consortia, are passed on to transport users ;
- (11) Whereas this requirement of Article 85 (3) should be regarded as being met when a consortium is in one or more of the three situations described below :
- there is effective price competition between the members of the conference within which the consortium operates as a result of independent rate action,
  - there exists within the conference within which the consortium operates a sufficient degree of effective competition in terms of services provided between consortium members and other conference members that are not members of the consortium, as a result of the fact that the conference agreement expressly allows consortia to offer their own service arrangements, e.g. the provision by the consortium alone of a 'just-in-time delivery' service or an advanced 'electronic data interchange' (EDI) service allowing users to be kept informed at all times of the whereabouts of their goods, or a significant increase in the frequency of sailings and calls in the service offered by a consortium compared with that offered by the conference,
  - consortium members are subject to effective, actual or potential competition from non-consortium lines, whether or not a conference operates in the trade in question ;
- (12) Whereas, in order to satisfy this same requirement of Article 85 (3), provision should be made for a further condition aimed at promoting individual competition as to quality of service between consortium members as well as between consortium members and other shipping companies operating in the trade ;
- (13) Whereas it should 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 ;
- (14) Whereas the aim of the conditions should also be to prevent consortia from imposing restrictions of competition which are not indispensable to the attainment of the objectives justifying the grant of the exemption ; whereas, to this end, consortium agreements should contain a provision enabling each shipping line party to the agreement to withdraw from the consortium provided it gives reasonable notice ; whereas, however, provision should be made in the case of highly integrated and/or high-investment consortia for a longer notice period in order to take account of the higher investments undertaken to set them up and the more extensive reorganization entailed in the event of a member leaving ; whereas it should also be stipulated that, where a consortium operates with a joint marketing structure, each member must have the right to engage in independent marketing activities provided it gives reasonable notice ;
- (15) Whereas exemption must be limited to consortia which do not have the possibility of eliminating competition in a substantial part of the services in question ;
- (16) Whereas for the purposes of block exemption and for reasons of legal certainty, reference will be made to the consortium's share of direct trade between the ranges of ports it serves, calculated on the overall basis of all of those ports ;
- (17) Whereas in order to determine for the purposes of individual exemption whether effective competition exists, account should be taken both of direct trade between the ranges of ports covered by a consortium as well as of any competition from other liner services sailing from ports which may be substituted for those served by the consortium and also, where appropriate, of other modes of transport ;

<sup>(1)</sup> OJ No L 378, 31. 12. 1986, p. 4.

- (18) Whereas the block exemption granted by this Regulation is hence applicable only on condition that this share of the trade held by a consortium does not exceed a given size ;
- (19) Whereas the share of the trade held by a consortium within a conference should be smaller in view of the fact that the agreements in question are superimposed on an existing restrictive agreement in the trade ;
- (20) Whereas, however, it is appropriate to offer consortia which exceed the limits laid down in this Regulation by a given percentage but which continue to be subject to effective competition in the trades in which they operate a simplified procedure so that they may benefit from the legal certainty afforded by block exemptions ; whereas such a procedure must also enable the Commission to carry out effective monitoring and simplify the administrative control of agreements ;
- (21) Whereas, however, consortia which exceed the latter limit may benefit from exemption by individual decision provided they satisfy the tests of Article 85 (3), taking account of the special features of maritime transport ;
- (22) Whereas this Regulation applies only to agreements concluded between the members of a consortium ; whereas, therefore, the block exemption does 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 ; whereas it also does not apply to restrictive agreements between different consortia operating in the same trade or between the members of such consortia ;
- (23) Whereas certain obligations must also be attached to the exemption ; whereas in this respect transport users must 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 ; whereas provision should be made for real and effective consultations between the consortia and transport users on the activities covered by the agreements ; whereas this Regulation also specifies what is meant by real and effective consultations and what main procedural stages are to be followed for such consultations ; whereas provision is made for such mandatory consultation, limited to the activities of consortia as such, in view of the present degree of openness of the market in question ; whereas maintenance of this requirement in the event of amendment of this Regulation will have to be reviewed in the light of market trends ;
- (24) Whereas such consultations are likely to secure a more efficient operation of maritime transport services which takes account of users' requirements ; whereas, consequently, certain restrictive practices which could ensue from such consultations should be exempted ;
- (25) Whereas, for the purposes of this Regulation, the concept of *force majeure* is that laid down by the Court of Justice of the European Communities in its established case law ;
- (26) Whereas provisions should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the Commission in order to enable it to verify that consortia are not thereby exempted from the conditions and obligations provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86 ;
- (27) Whereas this Regulation should provide, in accordance with Article 3 of Regulation (EEC) No 479/92, that it applies with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of its entry into force, provided they meet the conditions and obligations established in this Regulation ;
- (28) Whereas it is necessary to provide that, for the duration of the specified period, the prohibition laid down in Article 85 (1) of the Treaty does not apply to consortium agreements existing at the date of its entry into force and not satisfying the conditions of Article 85 (3) as specified in this Regulation, if they have been modified in the six months following the entry into force of this Regulation in order to meet its conditions and if the amendments are notified to the Commission ;
- (29) Whereas provision should be made for fair and positive treatment of consortia which exist at the time of entry into force of this Regulation and which, whilst exceeding the limits on the share of trade laid down by this Regulation as a condition for exemption, satisfy the other conditions of this Regulation ;
- (30) Whereas it is necessary to specify, in accordance with Article 6 of Regulation (EEC) No 479/92, the cases in which the Commission may withdraw from companies the benefit of the block exemption ;

- (31) Whereas no applications under Article 12 of Regulation (EEC) No 4056/86 need be made in respect of agreements automatically exempted by this Regulation; whereas, however, when real doubts exist, companies may request the Commission to declare whether their agreements comply with this Regulation;
- (32) Whereas this Regulation is without prejudice to the application of Article 86 of the Treaty,

agreement with a consortium (or one of its members) for the shipment of goods, or any association of shippers,

- '*independent rate action*' means the right of a maritime conference member to offer, on a case-by-case basis and in respect of goods, freight rates which differ from those laid down in the conference tariff, provided notice is given to the other conference members.

HAS ADOPTED THIS REGULATION:

## CHAPTER I

### DEFINITIONS AND SCOPE

#### Article 1

##### Definitions

For the purposes of this Regulation:

- '*consortium*' means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to a particular trade and the object of which is to bring about cooperation in the joint operation of a maritime transport service, which improves the service which would be offered individually by each of its members in the absence of the consortium, in order to rationalize their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing,
- '*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,
- '*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 a user, in return for an undertaking to have the latter transport a certain quantity of goods over a given period of time, receives an individual undertaking from the consortium member or the consortium to provide an individualized service of a given quality and which is specially tailored to its needs,
- '*transport user*' means any undertaking (e.g. shipper, consignee, forwarder, etc.) which has entered into, or demonstrated an intention to enter into, a contractual

#### Article 2

##### 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.

## CHAPTER II

### EXEMPTIONS

#### Article 3

##### Exempted agreements

1. Pursuant to Article 85 (3) of the EC Treaty and subject to the conditions and obligations laid down in this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to the activities listed in paragraph 2 of this Article when contained in consortia 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 comprise solely 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 rental, leasing or purchase contracts for such equipment;
    - (vi) the use of a computerized data exchange system and/or joint documentation system;
  - (b) temporary capacity adjustments;
  - (c) the joint operation or use of port terminals and related services (e.g. lighterage or stevedoring services);
  - (d) the participation in one or more of the following pools; tonnage, revenue or net revenue;

- (e) the joint exercise of voting rights held by the consortium in the conference within which its members operate, in so far as the vote being jointly exercised concerns the consortium's activities as such ;
- (f) a joint marketing structure and/or the issue of a joint bill of lading ;
- (g) any other activity ancillary to those referred to above in points (a) to (f) which is necessary for their implementation.

#### Article 4

##### Non-utilization of capacity

The exemption provided for in Article 3 shall not apply to a consortium when the consortium includes arrangements concerning the non-utilization of existing capacity whereby shipping line members of the consortium refrain from using a certain percentage of the capacity of vessels operated within the framework of the consortium.

### CHAPTER III

#### CONDITIONS ATTACHING TO EXEMPTION

##### Article 5

##### Basic condition for the grant of exemption

The exemption provided for in Article 3 shall apply only if one or more of the conditions set out below are met :

- there is effective price competitions between the members of the conference within which the consortium operates due to the fact that the members are expressly authorized by the conference agreement, whether by virtue of a statutory obligation or otherwise, to apply independent rate action to any freight rate provided for in the conference tariff, or
- there exists within the conference within which the consortium operates a sufficient degree of effective competition between the conference members in terms of the services provided, due to the fact that the conference agreement expressly allows the consortium to offer its own service arrangements, irrespective of form, concerning the frequency and quality of transport services provided as well as freedom at all times to adapt the services it offers in response to specific requests from transport users, or
- whether or not a conference operates in the trade in question, the consortium members are subject to effective competition, actual or potential, from shipping lines which are not members of that consortium.

#### Article 6

##### Conditions relating to share or trade

1. In order to benefit from the exemption provided for in Article 3, a consortium must possess, in respect of the ranges of ports it serves, a share of the direct trade of under 30 %, calculated by reference to the volume of goods carried (freight tonnes or 20-foot equivalent units) when it operates within a conference, and under 35 % when it operates outside a conference.
2. The exemption provided for in Article 3 shall continue to apply if the share of the trade referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one 10th.
3. Where one of the limits specified in paragraphs 1 and 2 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 trade of a carrier which is not a member of the consortium.

#### Article 7

##### Opposition procedure

1. The exemption provided for in Articles 3 and 10 shall also apply to consortia whose share of the trade exceeds the limit laid down in Article 6 but does not, however, exceed 50 % of the direct trade, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation (EEC) No 4260/88 <sup>(1)</sup>, and that the Commission does not oppose such exemption within a period of six months.
2. The period of six months shall run from the date on which notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.
3. Paragraph 1 shall apply only if :
  - (a) express reference is made to this Article in the notification or in a communication accompanying it ;  
and
  - (b) the information furnished with the notification is complete and in accordance with the facts.
4. The benefit of paragraph 1 may also be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.

<sup>(1)</sup> OJ No L 376, 31. 12. 1988, p. 1.

5. The Commission may oppose the exemption. It shall oppose the exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw its opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and its opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Section II of Regulation (EEC) No 4056/86.

#### Article 8

##### Other conditions

Eligibility for the exemptions provided for in Articles 3 and 10 shall be subject to the following conditions:

1. The consortium must allow each of its members to offer, on the basis of an individual contract, its own service arrangements.
2. 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, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed. This right shall be subject to a maximum notice period of six months which may be given after an initial period of 18 months starting from the entry into force of the agreement.

However, in the case of a highly integrated consortium which has a net revenue pool and/or 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 be six months, which may be given after an initial period of 30 months starting from the entry into force of the agreement.

3. Where a consortium operates with a joint marketing structure, each member of the consortium must be free to engage in independent marketing without penalty subject to a maximum period of notice of six months.
4. Neither the consortium nor consortia 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 rates or conditions can be economically justified.

#### CHAPTER IV

#### OBLIGATIONS

##### Article 9

##### Obligations attaching to exemption

The following obligations shall be attached to the exemption provided for in Article 3:

1. There shall be real and effective consultations between users or their representative organizations, 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.

These consultations shall take place whenever requested by any of the abovementioned parties.

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.

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 other party;

- (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 shippers taking part will 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 parties, the disagreement shall be acknowledged and publicly announced. It may be brought to the Commission's attention by either party;
- (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.
2. 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.
3. Arbitration awards and recommendations of conciliators that have been accepted by the parties and settle disputes concerning practices of consortia covered by this Regulation shall be notified forthwith to the Commission by the consortium.
4. Any consortium claiming the benefit of this Regulation must be able, on being given a period of notice which the Commission shall determine on a case-by-case basis and which shall be not less than one month, to demonstrate at the Commission's request that the conditions and obligations imposed by Articles 5 to 8 and points 1 and 2 of this Article are met and must submit to it the consortium agreement in question within this period.

#### Article 10

#### **Exemption for agreements between transport users and consortia concerning the use of scheduled maritime transport services**

Agreements, decisions and concerted practices between transport users or their representative organizations, on the one hand, and a consortium exempted under Article 3, on the other hand, concerning the conditions and quality of liner shipping services provided by the consortium and all general questions connected with such services, in so far as they arise out of the consultations

provided for in point 1 of Article 9, are hereby exempted from the prohibition laid down in Article 85 (1) of the Treaty.

### CHAPTER V

#### MISCELLANEOUS PROVISIONS

##### Article 11

#### **Professional secrecy**

1. Information acquired as a result of the application of Article 7 and point 4 of Article 9 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.

##### Article 12

#### **Withdrawal of block exemption**

The Commission may withdraw the benefit of this Regulation, in accordance with Article 6 of Regulation (EEC) No 479/92, where it finds in a particular case that an agreement, decision or concerted practice exempted under this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or are prohibited by Article 86 of the Treaty, in particular where:

1. in a given trade, competition from outside the conference within which the consortium operates or from outside a particular consortium is not effective;
2. a consortium fails repeatedly to comply with the obligations provided for in Article 9;
3. the behaviour of a consortium produces effects that are incompatible with Article 86 of the Treaty;
4. such effects result from an arbitration award.

##### Article 13

#### **Final provisions**

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*. It shall be valid for a period of five years starting from the date of its entry into force.

It shall apply with retroactive effect to agreements, decisions and concerted practice which were in existence at the date of its entry into force, from the time when the conditions for exemption were met.

In the case of agreements, decisions and concerted practices which were in existence on the date of entry into force of this Regulation and which did not on that date meet the conditions and obligations set out herein, the prohibition laid down in Article 85 (1) of the Treaty shall not apply to the period before they were amended in

order to satisfy those conditions, provided such amendment is made within six months of such entry into force and is communicated to the Commission within the same period.

However, during a period of six months following the entry into force of this Regulation the opposition procedure provided for in Article 7 may be applied to consortia which, whilst exceeding the limit on the share of trade, nevertheless satisfy the other conditions set out in this Regulation.

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

Done at Brussels, 20 April 1995.

*For the Commission*

Franz FISCHLER

*Member of the Commission*

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