

Opinion of the Economic and Social Committee on the 'Commission preliminary draft Regulation 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) pursuant to Council Regulation (EEC) No 479/92' (1)

(2000/C 117/04)

On 20 December 1999 the Economic and Social Committee decided, under Rules 23 (2) and 25 of its Rules of Procedure, to draw up an additional opinion on the above-mentioned preliminary draft Regulation.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 3 February 2000. The rapporteur was Dr Bredima-Savopoulou.

At its 370th plenary session on 1 and 2 March 2000 (meeting of 1 March) the Committee adopted the following opinion by 121 votes for, 1 vote against and 1 abstention.

1. Introduction

1.1. At the time of adoption of the four maritime regulations in 1986, constituting stage I of the common shipping policy of the EC, the Council invited the Commission to consider whether it was necessary to submit new proposals regarding competition, inter alia, in consortia in liner shipping. The Commission undertook to report to the Council within a year on whether it was necessary to provide for block exemption for consortia in liner shipping. The Council noted at that time that 'where the object and effect of joint ventures and consortia is either to achieve technical improvement or cooperation as provided for in Article 2 of the Regulation or where close — knit consortia only cover minor market shares the prohibition laid down in Article 85(1) of the Treaty does not apply to them'.

1.2. The need for clarification of the position of consortia vis-à-vis the competition rules was identified by the Commission in its report on 'A future for the Community shipping industry — Measures to improve the conditions of Community shipping' (2) as being one of the positive measures to increase competitiveness of the Community fleet. The ESC in its opinion on the above measures noted 'the importance of reaching an acceptable and early solution to the (consortia) issue, similar to that achieved for liner conferences in the first stage of shipping policy' (3).

1.3. After considerable deliberation following the receipt of further information on consortia, the Commission produced in June 1990 a 'report on the possibility of a group exemption

for consortia agreements in liner shipping' (4), with attached proposal for 'Council Regulation on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies'.

1.4. On 25.2.1992 the Council adopted the enabling Regulation 479/92 (5) which empowered the Commission to apply article 85(3) of the Treaty by Regulation to exempt the joint operation of liner consortia from the anti-competitive prohibition contained in Article 85(1).

1.5. The ESC adopted an opinion (6) on the enabling Regulation which endorsed the Commission's positive evaluation of consortia and emphasized the need to avoid bureaucracy. The ESC argued that liner consortia can broadly be defined as 'co-operative ventures in the liner sector in which the lines involved engage in a range of activities on a joint basis in order to achieve the necessary advantages of economy of scale and of service rationalization in a particular trade, thus combining the concepts of vessel cost sharing and cargo pooling'. It noted that there had been widespread recognition of the value and usefulness of consortia as tools of rationalization in the container age and endorsed the findings of the Commission that 'the Community shipping industry needs to attain the necessary economies of scale to compete on the world liner shipping market' and that 'consortia can help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress'.

(1) OJ C 379, 31.12.1999, p. 13.

(2) COM(89) 266 final, 3.8.1989.

(3) ESC Opinion — OJ C 56, 7.3.1990, p. 70.

(4) COM(90) 260 final.

(5) OJ L 55, 29.2.1992, p. 3.

(6) OJ C 69, 18.3.1991, p. 16.

1.6. Having noted that a block exemption from competition rules had already been granted in respect of liner conferences by Council Regulation 4056/86⁽¹⁾, the ESC reached the conclusion that a regulatory regime for liner consortia was necessary and that a new independent Regulation granting block exemption was required because consortia are fundamentally different from conferences both in structure and in operation. However, it expressed the view that the Commission should spell out more clearly the lines along which it intended to proceed concerning the terms and conditions of the exemption. Such conditions should safeguard transparency and free competition at three levels: within the consortium, within the conference, and within the trade. The ESC argued for a legal treatment of consortia, subject to checks, and balances without granting a blank cheque either to the Commission or to consortia. The principle objection of the ESC was the inclusion of the multimodal transport within the scope of the consortia regulation. In its view such a complex area required to be dealt with by a separate regulation. The enabling Regulation 479/92 accorded with the conclusions of the ESC's above Opinion.

1.7. On 20.4.1995 the Commission adopted Regulation 870/95⁽²⁾ on the application of Article 85(3) of the Treaty to liner consortia. This Regulation exempted all agreements whose objective is the joint operation of liner shipping services provided that they fulfilled the conditions and obligations set out in the Regulation. Moreover, it provided that a consortium should have a maximum trade share to benefit of the block exemption. Namely, three levels of trade share were distinguished:

- a trade share of 30 % or 35 % which would mean a consortium was automatically exempt
- a trade share of between 30/35 % and 50 % which would allow a consortium to apply for exemption under a simplified opposition procedure
- a trade share in excess of 50 % which would require a consortium to seek individual exemption.

1.8. The Regulation contained additional conditions and obligations such as not to discriminate between ports in the EU and to have consultations with the transport users. Finally, it included 'grandfather' provisions relating to consortia agreements existing on the date of its coming into force.

1.9. The ESC adopted an opinion⁽³⁾ on Regulation 870/95 concluding that a balance between the interests of shippers and consortia must be achieved and that the competitive position of non consortia members must be safeguarded. Moreover, flexibility must be retained for consortia to respond to the needs of their users. Finally, the ESC argued that the draft Regulation needed clarification of certain terms and re-examination of certain points.

2. The proposed Commission Regulation

2.1. In its report on the application of Regulation 870/95⁽⁴⁾, the Commission found that the Regulation has worked well and examined various policy options for the legal regime following its expiry on 20.4.2000. The Commission concluded that in light of experience acquired so far and in the interests of legal certainty the best course of action would be a renewal of Regulation 870/95 with modifications until 21.4.2005.

2.2. The basic changes provided in the proposed Regulation are as follows:

- Change from trade share to market share (of each market in which the consortium operates)
- Exclusivity clauses on space chartering exempted
- Ten consortia exempted under the opposition procedure continue to be exempted
- Notifications in process under Regulation 870/95 to be automatically treated under the new Regulation
- Previous grandfathering clauses evidently deleted
- Wording simplified where appropriate.

3. General Comments

3.1. Eight years after adoption of the first consortia Regulation⁽⁵⁾ the ESC notes the vast and rapid changes occurring in the international liner market. The consortia Regulations apply to consortia in the 'international liner shipping for the carriage of cargo chiefly by container', Containerisation is increasingly being introduced into liner shipping. Transportation by container vessels doubled in the period between

⁽³⁾ OJ C 195, 18.7.1994, p. 20.

⁽⁴⁾ 20 January 1999.

⁽⁵⁾ H.Kreis: 'European Community Competition Policy and International Shipping' Fordham International Law Journal (1989-90), 411; J.Temple Lang: European Transport Law Review (1993), 405; P. Ruttley: European Competition Law Review (1991), 9; EMLLO Report 1993.

⁽¹⁾ OJ L 378, 31.12.1986, p. 4.

⁽²⁾ OJ L 89, 21.4.1995, p. 7.

1989-1998 from 249 million tonnes to 509 million tonnes. This corresponds to an annual increase of 11 %. According to the latest rough estimates prospects are for an even more rapid expansion of the container transport. This is mainly due to an increase of transports of manufactured and semi-manufactured goods. It is also expected that in the years to come there will be a shift of transportation of some bulk cargoes (e.g. grains, fertilisers, sugar) towards container transport. A reversal of the above trend is most unlikely. More particularly, since adoption of the first consortia Regulation in the period 1993-1997 the increase in container transport by sea has been dramatic amounting to 44 %⁽¹⁾ (expressed in tonnes). The above changes have 'led to the replacement of a labour intensive industry by one which is now highly capital intensive'⁽²⁾. These changes, on the one hand, have provided benefits regarding the level of services to shippers; on the other hand, they have led to re-organization of employment at sea and ashore. Indeed the container has become a key agent in the globalisation process, which is bringing wholesale economic and social changes to developing and developed countries alike⁽³⁾.

3.2. The above market trend coincided in time with other changes in liner shipping having competition law implications, namely: the diminishing role of conferences, the increasing importance of consortia and concentration/consolidation into larger units. Liner shipping is characterised recently by continuous mergers and acquisitions resulting in the creation of maritime giants operating hundreds of ships each and having world-wide distribution networks. This development of the so-called mega carriers contrasts with the situation prevailing in the bulk carrier market where the small company size is not the exception but the rule. While consortia are a welcome phenomenon facilitating the survival of small and medium size undertakings it is evident that the interests of small and medium size members versus the mega carriers members in the consortium should be safeguarded. Otherwise, consortia may become one of the vehicles exacerbating the trend towards concentration.

3.3. From the point of view of future policy making and rule making the above developments will have to be monitored and assessed according to their implications upon shipowners, users (shippers/receivers) and ports. The ESC invites the Commission to take into consideration 'the changing and dynamic nature of consortia'⁽²⁾ in its future policy making regarding the consortia phenomenon.

3.4. For the above reasons whilst acknowledging 'the value of consortia to the economic and technological progress of the shipping industry'⁽²⁾, the ESC — in line with its past opinions⁽⁴⁾ — reiterates the necessity of safeguarding transparency and competition vis-à-vis other consortia members as well as non consortia members — outsiders in the liner trades in question as has been done in art. 5 and art. 8 of the draft Regulation. Moreover, safeguarding the interests of users and ports should also be included in the armoury of future legal yardsticks. The above caveats should be translated into legal parameters under the EU competition rules for consortia in the future.

3.5. Bearing in mind the above considerations, for the time being, the ESC maintains that the renewal of Regulation 870/95 up to the year 2005 subject to the proposed modifications is the best possible course of action. It, therefore, fully endorses the Commission's proposal.

4. Specific Comments

4.1. Definitions (Article 1)

4.1.1. The ESC is broadly in agreement to provide in the consortia definition for 'multi-trade consortia' in order to take into account recent market trends whereby consortia operate in more than one trades. This is a welcome clarification of the text.

4.2. Exempted Agreements (Article 3)

4.2.1. The Regulation provides among exempted activities (Article 3(2)g) ancillary activities to consortia operations. There is clarification of applicability of the block exemption to exclusivity clauses (obligation of consortium members to use vessels allocated to the consortium and refrain from chartering space on vessels belonging to third parties) and third party clauses (obligation of consortium members not to assign or charter space to other carriers on the trade except with the prior consent of consortium members). This is a helpful clarification in light of experience from application of Regulation 870/95. It is expected to increase legal certainty.

4.3. Market Share (Article 6)

4.3.1. The ESC notes that one of the conditions to be fulfilled, if exemption is to apply, provides for specific limitations on market share depending on the particular nature

⁽¹⁾ Data taken from Howe Robinson Research Paper Nr 9, January 1999, 'Containerization and Dry Bulk Trades'.

⁽²⁾ OJ C 195, 18.7.1994.

⁽³⁾ 'Container Market Outlook', Drewry, October 1999.

⁽⁴⁾ OJ C 69, 18.3.1991.

of the consortium of 30 %-35 % or 50 % calculated by reference to the volume of goods carried. This is a most welcome change and, indeed, the major change from Regulation 870/95 which referred to 'the trade share in respect of the range of ports the consortium serves in the direct trade'. The notion of 'trade share' proved very difficult to calculate in practice. By and large, a market share criterion is more appropriate, although there could still be some difficulties in its implementation. Clarification should be sought on the description of the specific market involved.

4.3.2. The experience with the Regulation since 1995 has told that the trade share approach on the basis of port pairs is not workable. Statistics on the basis of port pairs were often not available or, if available, incorrect and/or outdated. Moreover, most statistics are based on imports/exports out of a port/country to a country at the other end and not to a port. For the reasons mentioned above and since ports are often chosen for pure operational reasons information on the basis of trade shares/port pairs has often given a misleading and/or distorted picture. The scope of competition on most shipping lanes takes place between a variety of port permutations. A market share approach is more or less the general rule in the application of competition policy. The trade share approach was the exception. Thus, the proposed change would bring the consortia regulation into line with other block exemption regulations.

4.3.3. The ESC had already criticised the imprecise use of the phrases 'ranges of ports' and 'direct trade'. The adoption of the term 'market share' already removes a source of ambiguity concerning relevant calculations. However, the ESC still believes that the Commission should clarify 'whether it intends to consider transshipment within the market share equation' ⁽¹⁾.

4.4. *Opposition Procedure (Article 7)*

4.4.1. The same observations, as under 4.3.1 relating to the substitution of the 'trade share criterion' by 'market share', apply regarding the opposition procedure. It is noteworthy

⁽¹⁾ OJ C 195, 18.7.1994.

Brussels, 1 March 2000.

that ten consortia exempted under the Opposition Procedure of Regulation 870/95 continue to be exempted. Moreover, notifications in process under Regulation 870/95 will be automatically treated under the proposed Regulation. However, continuous compliance of consortia with the level of thresholds should be monitored from time to time.

4.5. *Other Conditions — Notice Periods (Article 8)*

4.5.1. Article 8 provides for a maximum initial period of 18 months from the signing of any agreement before member lines can give notice of withdrawal from the consortium or an initial period (during which lines are locked into the alliance) of 30 months for highly integrated consortia.

4.5.2. The ESC invites the Commission to reconsider the length of period with a view of rendering it longer taking into account, on the one hand, the need for investment to be recuperated and, on the other, the need for flexibility to leave the consortium.

4.6. *Final Provisions (Article 13)*

4.6.1. The 'grandfathering' clause of Regulation 870/95 referring to consortia already 'existing' in 1995 is evidently deleted.

5. **Conclusions**

5.1. The ESC believes that Regulation 870/95 has worked well in practice and that it has struck the correct balance between the interests of shipowners and the interests of their customers. It, therefore, welcomes the proposed renewal of Regulation 870/95 until 20.4.2005 subject to the modifications proposed.

5.2. Nevertheless, in view of rapid changes in the liner sector, the issue of consortia has to be studied and monitored in a wider perspective. Further developments and experience should be taken into consideration in assessing the legal regime of competition rules for consortia in the future.

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of the Economic and Social Committee
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