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COMMUNICATION TO THE COMMISSION

Expiry of Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

1. Introduction

Liner shipping is the provision of regular, scheduled, maritime freight transport, mainly by container, between ports on a particular route, generally known as a trade. In 2020, about 70% of the value of international trade was carried by maritime transport, of which about two thirds was carried by containers.

For the provision of liner shipping services carriers often cooperate in consortia, defined as joint service agreements between carriers designed to rationalise their operations. The most integrated form of consortium is an alliance, in which carriers pool a pre-decided number of vessels contributed by each of them and operate these vessels jointly on a number of trades.

In 2009, the Commission adopted Commission Regulation (EC) No 906/2009¹ (the Consortia Block Exemption Regulation or CBER). Following its extensions in 2014² and 2020³, the CBER is due to expire on 25 April 2024.

This communication summarises the main findings of the evaluation of the CBER⁴ carried out under the Commission's 'better regulation'⁵ commitment. The evaluation has not brought sufficient evidence to justify any further extension of the CBER beyond 25 April 2024.

2. What was the expected outcome of the intervention?

The CBER sets out the conditions under which consortia are exempted from the prohibition of agreements between competitors set out in Article 101(1) TFEU.

The general objective of the CBER is to facilitate the creation and operation of consortia, to the extent that they do not pose risks to effective competition. This general objective draws from findings, at the time of the adoption of the CBER in 2009, about both: (i) the efficiency gains and consumer benefits brought by consortia between small and medium-sized carriers (such as improved frequency of sailings and port coverage, better quality, and personalised services); and (ii) the role of these consortia in preventing the creation of oligopolistic market structures.

¹ Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256, 29.9.2009, p. 31.

² Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 184, 25.6.2014, p. 3.

³ Commission Regulation (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 90, 25.3.2020, p. 1.

⁴ See Commission Staff Working Document, Evaluation of Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), 10.10.2023, SWD(2023) 670.

⁵ Commission Staff Working Document, Better Regulation Guidelines, 3.11.2021, SWD(2021) 305 final.

The CBER has two specific objectives. Firstly, it aims to provide legal certainty to carriers, in particular small and medium-sized ones, as to the forms of cooperation that can be considered as compliant with Article 101 TFEU. Secondly, it aims to simplify administrative supervision by providing a common framework for the Commission, national competition authorities, and national courts for assessing cooperation between carriers under Article 101 TFEU.

3. How has the situation evolved over the evaluation period?

Over the 2020-2023 evaluation period, consortia remained a prevalent feature of the sector, even though large carriers became less reliant on alliances.

By contrast with the stability seen in the prevalence of consortia, the evaluation period has been characterised by dramatic changes in other market circumstances that had previously been identified as driving the need for cooperation between carriers. More specifically, the evaluation period has seen a transitory and exceptional phase of excess demand over effective capacity and of record profits for carriers. This transitory and exceptional phase has temporarily interrupted the trend towards oversupply and low profitability in the sector.

In terms of the level of concentration during the evaluation period, the liner shipping sector did not undergo any major operation of horizontal consolidation. The trend towards vertical integration of carriers continued, with substantial investments in port, terminal and logistics operations.

4. Evaluation findings

To what extent was the intervention successful and why?

The evidence collected from carriers points towards the – at best limited – effectiveness and efficiency of the CBER during the evaluation period.

Indeed, both the small number of unique⁶ consortia falling within the scope of the CBER in 2020 and the profile of these consortia (always involving one of the top-five carriers which was also a member of a non-exempted consortium on the same trade) tend to show that the CBER brought limited compliance cost savings to carriers and was no longer fulfilling its goal of promoting competition by enabling smaller carriers to cooperate between themselves and offer alternative services in competition with larger carriers.

In addition, carriers have said that the key terms of the CBER are clear, unambiguous and accessible to all carriers, in particular small ones. However, their feedback tends to show an incomplete or inconsistent understanding of the substantive provisions of the CBER, even among large carriers with proven antitrust experience and compliance resources. This incomplete or inconsistent understanding relates in particular to (i) the types of agreements

⁶ A “unique” consortium (or “deduplicated” consortium) corresponds to a consortium as defined in Article 2(1) of the CBER (an agreement or a set of interrelated agreements relating to one or more trades). This means that an agreement or a set of interrelated agreements relating to two trades will be counted as a unique consortium.

that fall within the definition of consortia and should be taken into account in the calculation of market shares; (ii) the market(s) relevant for the calculation of the market share(s); (iii) the application, to consortia serving more than one trade, of the conditions for exemption relating to market share; and (iv) the need to be able to demonstrate compliance with the conditions set out in the CBER

Finally, carriers confirm that the decision to enter into a consortium is guided by commercial needs and that antitrust rules play – at most – a subordinate role. As an illustration, no carrier has identified the CBER, or more generally the scope of the applicable antitrust exemption, as a factor for the decision to enter into a consortium or for the allocation of capacity between independent and joint services, or between joint services. The subordinate role played by antitrust rules may be explained by the insignificance of the compliance costs compared to the carriers' operating costs.

How did the EU intervention make a difference and to whom?

Stakeholders other than carriers generally call for strengthened supervision of the sector rather than administrative simplification, which calls into question the added value of a dedicated block exemption regulation at EU level.

Furthermore, putting an end to sector-specific rules and bringing the liner shipping sector under the general Article 101 regime would allow stakeholders to benefit from the Commission's efforts of clarification put into both the new Specialisation Block Exemption Regulation⁷ and the new Guidelines on horizontal cooperation agreements⁸.

Is the intervention still relevant?

The question of the relevance of the CBER requires an assessment of whether: (i) it can still be concluded with a sufficient degree of certainty that consortia which meet the conditions of the CBER generally fulfil the conditions of Article 101(3) TFEU; and (ii) cooperation between carriers continues to help both to improve the competitiveness of the EU liner shipping industry and to develop EU trade.

With regard to the first part of the assessment, the evidence submitted by carriers to support the claimed efficiencies is inconclusive, due in particular to the impossibility of overcoming certain methodological limitations. These limitations make it difficult to establish causal links between consortia and consumer benefits. The limitations include an absence of counterfactuals, the interdependence of the possible causes of benefits under examination, and the volatility of freight rates. Market developments in the sector during the evaluation period tend to confirm both the inelasticity of demand for liner shipping services and the limited

⁷ Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 143, 2.6.2023, p. 20.

⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1.

elasticity of supply. In combination, these two factors reduce the likelihood that any cost efficiencies achieved by carriers would be passed on to transport users. Moreover, it is difficult to consider that consortia are indispensable within the meaning of Article 101(3) TFEU to achieve environmental efficiencies, since the sector is subject to binding international and EU measures to reduce greenhouse emissions and pollution.

With regard to the second part of the assessment, the disruptions faced by the different players in the EU supply chain and shippers during the COVID-19 pandemic show the limits of an antitrust tool. This is because the CBER has helped to commoditise liner shipping services, while the ability of shippers to reap the benefits of carriers' increasing scale and reach is limited by the capacity constraints of the other players in the supply chain (such as port and land operators). More structurally, while transport users acknowledge that consortia have enabled and supported the required investment to operate intercontinental services at a lower unit cost and faster transit time, they warn that consortia now appear to contribute to a market where the cost of entry has become prohibitive and where service differentiation has disappeared at the expense of shippers. In addition, the decline in direct connectivity (i.e. number of country pairs that can be reached without transshipment) that had started before the COVID-19 crisis continued over the evaluation period, whereas it has been empirically shown that direct regular shipping connections help to reduce trade costs and increase trade volumes.

5. Conclusion

Overall, the CBER does not appear to be fit for its purpose any more, as it does not fulfil the criteria of effectiveness, efficiency and EU added value. This conclusion is based on both: (i) the information submitted by stakeholders in respect of the 2020-2023 period; and (ii) other evidence collected in the course of the evaluation in relation to the functioning of the container shipping sector and the contribution of consortia to the competitiveness of this sector. The evidence collected during the evaluation process is inconclusive as to the continued relevance and coherence of the CBER.

Against this background, the Commission is invited not to further extend the CBER, which will therefore expire on 25 April 2024.