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) (Text with EEA relevance)

COMMISSION REGULATION (EC) No 906/2009

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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 the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 246/2009 of 26 February 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)], and in particular Article 1 thereof,

Having published a draft of this Regulation[(2)],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 246/2009 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 relating to the joint operation of liner shipping services (consortia), 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 its 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. However, certain changes are necessary in order to remove references to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport[(4)] which allowed liner shipping lines to fix prices and capacity, but has now been repealed. Modifications are also necessary to ensure a greater convergence with other block exemption regulations for horizontal cooperation in force whilst taking into account current market practices in the liner industry.

Changes to legislation: *There are outstanding changes not yet made to Commission Regulation (EC) No 906/2009. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(3) Consortium agreements vary significantly ranging from those that are highly integrated, requiring a high level of investment for example due to the purchase or charter by their members of vessels specifically for the purpose of setting up the consortium and the setting up of joint operations centres, to flexible slot exchange agreements. For the purposes of this Regulation a consortium agreement consists of one or a set of separate but interrelated agreements between liner shipping companies under which the parties operate the joint service. The legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service.

(4) The benefit of the block exemption should be limited to those agreements for which it can be assumed with a sufficient degree of certainty that they satisfy the conditions of Article 81(3) of the Treaty. However, there is no presumption that consortia which do not benefit from this Regulation fall within the scope of Article 81(1) of the Treaty or, if they do, that they do not satisfy the conditions of Article 81(3) of the Treaty. When conducting a self-assessment of the compatibility of their agreement with Article 81 of the Treaty, parties to such consortia may consider the specific features of markets with small volumes carried or situations where the market share threshold is exceeded as a result of the presence in the consortium of a small carrier without important resources and whose increment to the overall market share of the consortium is only insignificant.

(5) 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 limitation of capacity and sales as well as the joint fixing of freight rates or market and customer allocation are unlikely to bring any efficiency. Therefore, the exemption provided for in this Regulation should not apply to consortium agreements that involve such activities, irrespective of the market power of the parties.

(6) 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.

(7) Users can benefit effectively from consortia only if there is sufficient competition in the relevant markets in which the consortia operate. This condition should be regarded as being met when a consortium remains below a given market share threshold and can therefore be presumed to be subject to effective actual or potential competition from carriers that are not members of that consortium. In order to assess the relevant market, 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

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which may be substituted for those served by the consortium and, where appropriate, of other modes of transport.

(8) 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 that end, severely anti-competitive restraints (hardcore restrictions) relating to the fixing of prices charged to third parties, the limitation of capacity or sales and the allocation of markets or customers should be excluded from the benefit of this Regulation. Other than the activities which are expressly exempted by this Regulation, only ancillary activities which are directly related to the operation of the consortium, necessary for its implementation and proportionate to it should be covered by this Regulation.

(9) The market share threshold and the other conditions set out in this Regulation, as well as the exclusion of certain conduct from its benefit, 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 relevant market in question.

(10) For the assessment of whether a consortium fulfils the market share condition, the overall market shares of the consortium members should be added up. The market share of each member should take into account the overall volumes it carries within and outside the consortium. In the latter case account should be taken of all volumes carried by a member within another consortium or in relation to any service provided individually by the member, be it on its own vessels or on third party vessels pursuant to contractual arrangements such as slot charters.

(11) In addition, the benefit of the block exemption should be subject to the right of each consortium member to withdraw from the consortium provided that it gives reasonable notice. However, provision should be made for a longer notice period and a longer initial lock-in period in the case of highly integrated 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 leaving.

(12) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption, on the basis of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[(5)]. In that respect, the negative effects that may derive from the existence of links between the consortium and/or its members and other consortia and/or liner carriers on the same relevant market are of particular importance.

(13) Furthermore, where agreements have 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 the block exemption in respect of that territory pursuant to Regulation (EC) No 1/2003.

(14) This Regulation is without prejudice to the application of Article 82 of the Treaty.

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(15) 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 shipping services from or to one or more Community ports.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

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 relating to one or more trades, 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. ‘transport user’ means any undertaking (such as shipper, consignee or forwarder) which has entered into, or intends to enter into, a contractual agreement with a consortium member for the shipment of goods;

4. ‘commencement of the service’ means the date on which the first vessel sails on the service.