Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (Codified version) (Text with EEA relevance)

COUNCIL REGULATION (EC) No 169/2009

of 26 February 2009

applying rules of competition to transport by rail, road and inland waterway

(Codified version)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Whereas:

(1) Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway[(3)] has been substantially amended several times[(4)]. In the interests of clarity and rationality the said Regulation should be codified.

(2) Rules of competition for transport by rail, road and inland waterway are part of the common transport policy and of general economic policy.

(3) Rules of competition for those sectors should take account of the distinctive features of transport.

(4) Since the rules of competition for transport derogate from the general rules of competition, it should be made possible for undertakings to ascertain what rules apply in any particular case.

(5) The system of rules on competition for transport should apply equally to the joint financing or acquisition of transport equipment for the joint operation of services by certain groupings of undertakings, and also to certain operations in connection with transport by rail, road or inland waterway of providers of services ancillary to transport.

(6) In order to ensure that trade between Member States is not affected or competition within the internal market distorted, it is necessary to prohibit in principle for the three modes of transport specified above all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings and all

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instances of abuse of a dominant position within the internal market which could have such effects.

(7) Certain types of agreement, decision and concerted practice in the transport sector the object and effect of which is merely to apply technical improvements or to achieve technical cooperation may be exempted from the prohibition on restrictive agreements since they contribute to improving productivity. In the light of experience following application of this Regulation, the Council may, on a proposal from the Commission, amend the list of such types of agreement.

(8) In order that an improvement may be fostered in the sometimes too dispersed structure of the industry in the road and inland waterway sectors, exemption from the prohibition on restrictive agreements should also be granted in the case of those agreements, decisions and concerted practices providing for the creation and operation of groupings of undertakings in these two transport sectors whose object is the carrying on of transport operations, including the joint financing or acquisition of transport equipment for the joint operation of services. Such overall exemption can be granted only on condition that the total carrying capacity of a grouping does not exceed a fixed maximum, and that the individual capacity of undertakings belonging to the grouping does not exceed certain limits so fixed as to ensure that no one undertaking can hold a dominant position within the grouping. The Commission should, however, have power to intervene if, in specific cases, such agreements should have effects incompatible with the conditions under which a restrictive agreement may be recognised as lawful, and should constitute an abuse of the exemption. Nevertheless, the fact that a grouping has a total carrying capacity greater than the fixed maximum, or cannot claim the overall exemption because of the individual capacity of the undertakings belonging to the grouping, does not in itself prevent such a grouping from constituting a lawful agreement, decision or concerted practice if it satisfies the relevant conditions laid down in this Regulation.

(9) It is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices.

(10) Therefore, undertakings should be allowed to conclude or operate agreements without declaring them. This exposes such agreements to the risk of being declared void with retroactive effect should they be examined following a complaint or on the Commission's own initiative, but does not prevent their being retroactively declared lawful in the event of such subsequent examination,

HAS ADOPTED THIS REGULATION:

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Article 1

Scope

The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 3 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of those objects or effects.

Article 2

Exception for technical agreements

1 The prohibition in Article 81(1) of the Treaty shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation by means of:

- a the standardisation of equipment, transport supplies, vehicles or fixed installations;
- b the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;
- c the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;
- d the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;
- e the coordination of transport timetables for connecting routes;
- f the grouping of single consignments;
- g the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.

2 The Commission shall, where appropriate, submit proposals to the Council with a view to extending or reducing the list in paragraph 1.

Article 3

Exemption for groups of small and medium-sized undertakings

1 Agreements, decisions and concerted practices as referred to in Article 81(1) of the Treaty shall be exempt from the prohibition in that Article where their purpose is:

(a) the constitution and operation of groupings of road or inland waterway transport undertakings with a view to carrying on transport activities;

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(b) the joint financing or acquisition of transport equipment or supplies, where these operations are directly related to the provision of transport services and are necessary for the joint operations of the aforesaid groupings;

always provided that the total carrying capacity of any grouping does not exceed:

(i) 10 000 metric tons in the case of road transport;

(ii) 500 000 metric tons in the case of transport by inland waterway.

The individual capacity of each undertaking belonging to a grouping shall not exceed 1 000 metric tons in the case of road transport or 50 000 metric tons in the case of transport by inland waterway.

2 If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.

Article 4

Repeal

Regulation (EEC) No 1017/68, as amended by the Regulation listed in Annex I, Part A, is repealed, with the exception of Article 13(3), which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to 1 May 2004 until the date of expiration of those decisions.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

Article 5

Entry into force, existing agreements

1 This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

2 The prohibition in Article 81(1) of the Treaty shall not apply to agreements, decisions and concerted practices which were in existence at the date of accession of Austria, Finland and Sweden or at the date of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and which, by reason of accession, fall within the scope of Article 81(1) of the Treaty if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in Article 3 of this Regulation. This paragraph does not apply to agreements, decisions and concerted practices which at the date of accession already fall under Article 53(1) of the EEA Agreement.

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