Commission adopts new block exemption regulation for liner shipping consortia

Antje Prisker (1)

On 28 September 2009 the Commission adopted Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (the ‘Consortia Regulation’) (2), which will enter into force on 26 April 2010 and will apply until 25 April 2015. The Consortia Regulation extends, subject to a number of amendments, the block exemption granted to liner shipping consortia currently provided by Regulation No 823/2000 (3) for another five years.

1. General remarks

1.1. Introduction

Consortia are forms of operational cooperation between liner shipping companies with a view to providing a joint maritime cargo transport service. Liner shipping carriers transport cargo, in practice mostly by container, on a regular basis and on the basis of advertised timetables to ports on a particular geographic route. The cooperation within a liner shipping consortium must be limited to operational cooperation (notably sharing space on their respective vessels). The consortium members therefore market and price their services individually.

Council Regulation (EC) No 246/2009 (the ‘Council Enabling Regulation’) empowers the Commission to adopt a block exemption regulation for such cooperation within a liner shipping consortium (4). Carriers in a consortium cooperate on various competition parameters, notably on the capacity offered on a given market. As capacity is the key competition parameter which drives prices on the market, such consortia are generally found to restrict competition. However, it is generally acknowledged that such liner shipping consortia, which have been covered by a specific Commission block exemption regulation since 1995, may help to improve the productivity and quality of available liner shipping services. Due to the high number of vessels required to operate a regular liner shipping service on a route, consortia allow the rationalisation of their members’ activities, economies of scale, and more efficient use of vessel capacity. Consortia thus help to improve the service that would be offered individually by each of the members. Customers receive a benefit from such cooperation, in terms of services provided (higher, more regular, frequencies, wider coverage of ports), as long as the consortium is subject to effective competition. The Consortia Regulation sets out the conditions — in particular a market share threshold — that liner shipping companies organised in consortia need to fulfil in order to benefit from an exemption from the prohibition enshrined in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (5). The current block exemption regulation — Regulation No 823/2000 — expires on 25 April 2010. The Commission considers that the justification for a block exemption for liner shipping consortia is still valid and thus renews the exemption for five more years until 25 April 2015.

The general objective of a block exemption regulation is to provide legal certainty: there is a presumption that consortium agreements that comply with the conditions of the Consortia Regulation — in particular remain below the market share threshold — fulfil the four conditions laid down in Article 101(3) TFEU. As clarified in recital 4 of the Consortia Regulation, this does not mean that agreements that fall outside the scope of the block exemption regulation are by nature prohibited. It simply means that they do not benefit from the safe harbour provided by the block exemption regulation but an

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.


(5) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate.
individual assessment needs to be made as to their compatibility with Article 101 TFEU. An agreement not covered by the Regulation might well not even infringe Article 101(1) TFEU or, if it does infringe Article 101(1) TFEU, there is no presumption that such an agreement would not fulfil the cumulative conditions of Article 101(3) TFEU. In this respect the Consortia Regulation also clarifies that when conducting a self-assessment specific features may be taken into account, such as markets with small volumes carried or situations where the market share is only exceeded as a result of the presence of a small carrier without important resources in the consortium and whose increment to the overall market share of the consortium is only insignificant.

1.2. The revision process

In summer 2007, the Directorate-General for Competition started the process of revising Regulation No 823/2000 by launching a comprehensive market investigation and sent questionnaires to all major shipping lines as well as to transport users (shippers and freight forwarders). The market investigation aimed to ascertain how the Regulation was being applied in practice and the extent to which transport users benefit from the cooperation between shipping lines in consortia. Information was received from a number of the carriers operating in consortia to and from Europe, transport users and their respective representative organisations. The Regulation was revised based on the outcome of the market investigation and published for consultation in October 2008. The Commission received 19 submissions from carriers and transport users as well as from some Member States (7). The Commission also consulted Member States twice in Advisory Committee meetings on draft versions of the Regulation.

1.3. Objectives of the revision

The Consortia Regulation comprises significant changes compared to the Regulation currently in force. The revision was more comprehensive than it had been in 2005 and the Regulation was revised, simplified and shortened significantly. However, substantive changes remain limited. In short, the review process pursued three main objectives:

1.3.1. Taking account of the current regulatory framework

The Consortia Regulation reflects the end of the liner conference block exemption regulation, which was repealed by the Council in September 2006 (8). Therefore, any explicit or implicit reference to liner conferences and to the practices allowed under a price fixing conference system are deleted from the Consortia Regulation.

It was also necessary to take account of Regulation No 1/2003 (9) and the fact that maritime transport is now entirely under the enforcement framework of that Regulation. As a result, some provisions had become either inconsistent or redundant. This concerns in particular the obligation to demonstrate compliance with the Regulation (Article 9(5) Regulation No 823/2000), the provision on professional secrecy (Article 11 Regulation No 823/2000) or the withdrawal provision (Article 12 Regulation No 823/2000). The latter two provisions are now covered by Regulation No 1/2003 and have been deleted as there is no longer any need to provide for parallel provisions in the Consortia Regulation itself.

1.3.2. Greater convergence between the Consortia Regulation and other horizontal block exemption regulations

The Consortia Regulation aims to achieve greater convergence with other block exemption regulations for horizontal cooperation such as the block exemption regulation on specialisation agreements, on research and development agreements or on technology transfer agreements (9). It is a legitimate aim of the Commission to have consistent rules in horizontal as well as in sector-specific antitrust legislation such as the Consortia Regulation. It has therefore been part of DG Competition’s general policy over the last few years to subject the transport sector to the same rules that apply to other sectors. For instance, in line with the approach in other horizontal block exemption regulations, a new article on hard-
core restrictions (Article 4 Consortia Regulation) provides that the most severe antitrust infringements such as price or capacity fixing and customer or market allocation will take away the benefit of the block exemption. The aim to bring the market share threshold closer to the thresholds applied in other block exemption regulations for horizontal cooperation described in more detail below is also a step in this direction.

1.3.3. Amendments reflecting current market practices in liner shipping

Markets change and evolve constantly and block exemption regulations therefore have to be reviewed periodically. The Commission has to ensure that the scope of the block exemption regulation and the conditions under which undertakings may benefit from it still reflect the current market environment and practice.

The list of consortium activities exempted by the Regulation has been revised since the market investigation revealed that some of these activities were simply not carried out by consortia in practice. Similarly the Consortia Regulation no longer provides for an obligation on the consortium members to consult with transport users (Article 9 Regulation 832/2000). This obligation was deleted in view of the fact that such joint consultation between the consortium members and their transport users was never implemented in practice and that individual contacts between a consortium member and its customer are the adequate forum for discussions on the conditions and quality of the liner service.

2. The major substantive changes

2.1 Market share condition

The amendment most discussed during the public consultation was the revision of the market share condition. The block exemption, as is commonly the case in block exemption regulations, only applies to consortia which do not exceed a given market share threshold in the relevant market where they operate. Regulation No 823/2000 sets a threshold of 30 % for consortia that operate within a liner conference and 35 % for all other ones. After the end of the liner conference system to and from Europe, the new uniform market share threshold of the Consortia Regulation is 30 % for all consortia and thus represents a reduction of the upper limit. However, in practice this reduction will not affect the majority of existing consortia currently covered by Regulation No 823/2000, as most consortia have already been subject to the lower 30 % market share threshold in the past — since their members operated until recently within a conference.

When assessing the market share condition, liner carriers must first define the relevant product and geographic market or markets where the consortium operates. The Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (the ‘Maritime Guidelines’) published in July 2008 provide carriers with more guidance in this respect.

Article 5(1) of the Consortia Regulation clarifies that the market share of a consortium is the sum of the individual market shares of the consortium members. In fact, this merely codifies the Commission’s reading of Regulation No 823/2000. The individual market share of a consortium member includes all volumes carried by that member, whether within the consortium in question or outside that consortium — be it on the member’s own vessels or on its behalf on third party vessels on the basis of a slot charter agreement or any other cooperation agreement (Article 5(2) Consortia Regulation). The rationale behind this approach is that a consortium member cannot really be expected to compete with itself. The market power of a consortium may well be underestimated if one looks only at the volumes carried by the consortium members in the consortium. Once the market share of each of the consortium members has been calculated on that basis, they need to be added up to verify whether jointly they remain under the market share threshold of 30 % for the application of the Regulation.

The market investigation showed that links between consortia have become more and more common as carriers are often a party to several consortium agreements on the same relevant market. Such links between several consortia on the same relevant market through common membership are relevant for the competitive assessment although they sometimes might arguably be rather indirect and remote through various contractual agreements. This situation may be captured in a block exemption regulation in two ways: either upfront, by including in the market share of a given consortium the market shares of other consortia on the same relevant market which are interlinked through common membership (this would have the effect that fewer consortia could benefit from the safe harbour of the block exemption regulation); or by withdrawing the benefit of the block exemption in an individual case where the existence of interlinked consortia leads to anti-competitive effects on a given market. As illustrated in recital 12, the Consortia Regulation follows the latter approach — in line with the approach taken in the horizontal block exemption regulations.

2.2 Definition of a consortium

The Consortia Regulation clarifies the definition of a consortium in two ways. First, a consortium can consist of either one agreement or ‘a set of interlinked agreements’. This amendment better reflects market reality. Second, the definition of a consortium now extends to all international liner shipping services of cargo, whether or not such services are provided ‘chiefly by container’. The Council Enabling Regulation did not provide for a limitation on containerised cargo as previously laid down by Article 2 Regulation No 823/2000. However, in order to qualify as a consortium, the joint service must meet all the characteristics of a liner shipping service as defined by Article 2(2) of the Consortia Regulation. As in practice most liner shipping services concern containerised cargo, the impact will be limited to some exceptional non-containerised services which meet all these criteria.

To resolve some ambiguities which emerged during the public consultation, recital 21 of Regulation No 823/2000 on agreements between consortia or consortia members and a third party was deleted. An agreement between a consortium member and a third party can qualify as a consortium and benefit from the block exemption as long as all conditions of the Regulation are fulfilled, notably the market share threshold.

2.3 Exempted activities

The Consortia Regulation provides for a list of exempted activities which are generally considered indispensable for the provision of a joint liner shipping service, such as coordination and joint fixing of timetables, determination of the ports of call, pooling of vessels or exchange of space.

The revised list of exempted activities in Article 3 of the Consortia Regulation is simpler. The following activities are removed from the current list: (i) activities that are not carried out in practice, in particular as the carriers market their service individually; (ii) activities related to price fixing conferences; and (iii) activities which are not indispensable for the provision of a joint service. Such is the case of the use of a joint documentation system, participation in cargo, revenue or net revenue pools, as well as joint marketing structures and the issuance of a joint bill of lading. As none of the submissions during the public consultation called for the addition of any new type of indispensable activities, no new activities were added to the list during the revision.

Article 3 of the Consortia Regulation clarifies also what types of capacity reductions are exempted, a key issue in a consortium cooperation. The wording was changed from ‘temporary capacity adjustments’, which was considered not fully accurate, to ‘capacity adjustments in response to fluctuations in supply and demand’. This article thus clarifies the reason for reducing capacity, i.e. a response to fluctuations in supply and demand, to limit such restriction to what is indispensable for the provision of an improved joint service. The creation of a consortium as a vehicle to mainly jointly reduce capacity would arguably not be covered by the block exemption regulation.

As other block exemption regulations, the Consortia Regulation does not apply where the consortium contains hardcore restrictions. Such hardcore restrictions include the restrictions usually found in block exemptions on horizontal cooperation: price fixing, capacity or sale limitations, or market or customer allocation. Article 4 of the Consortia Regulation is rather a clarification than a substantively new provision in this respect, as these prohibitions already resulted, directly or indirectly, from Regulation No 823/2000.

2.4 Extension of lock-in clauses/notice periods

Regulation No 823/2000 exempts consortium agreements on condition that members can withdraw from the consortium. But due to consortium-specific investment decisions of the members it accepts that such withdrawal may not take place before the expiry of an initial period (the ‘lock-in period’) and that the withdrawal of a member may be subject to a notice period. In order to safeguard a sufficient degree of flexibility for a consortium member wanting to leave a consortium, the Regulation determines upper limits for these periods.

The Consortia Regulation simplifies the provision on exit clauses and lock-in periods. The public consultation revealed that the current provision, which was revised inter alia in 2005, is sometimes difficult to apply in practice. The Consortium Regulation therefore now only provides for two sets of deadlines. First, the right to withdraw from a consortium is subject to a maximum notice period of 6 months or, in the case of highly integrated consortia, 12 months. Second, this right may be granted only after a lock-in period of a maximum duration of 24 months or 36 months in the case of highly integrated consortia. The lock-in period starts running from the date of entry into force of the consortium agreement or, if it is later, the date of commencement of the service. Longer notice and lock-in periods apply for highly integrated consortia due to the higher investments undertaken to set them up and the resulting more extensive reorganisation entailed in the event of a member leaving.
3. Conclusion

In recent years the Commission has significantly revised and modernised the framework of the EU competition rules applicable to the maritime transport sector. After the repeal of the block exemption for liner shipping conferences (which allowed for price- and capacity-fixing arrangements), and the adoption of the Maritime Guidelines providing the industry with guidance on the application of Article 101 TFEU in the maritime sector, the adoption of the Consortia Regulation was the last step in this review process.

The Consortia Regulation provides a safe harbour for the operation of liner shipping consortia which fulfil all the conditions of the block exemption regulation, not least that they do not contain any hardcore restrictions and they meet the new reduced market share condition of 30%. In accordance with Article 2 of the Council Enabling Regulation, the Consortia Regulation will apply for five years as of 25 April 2010.