

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION BY THE COMMISSION

Report on the possibility of a group
exemption for consortia agreements in liner shipping

Proposal for a

COUNCIL REGULATION (EEC)

on the application of Article 85(3) of the Treaty
to certain categories of agreements, decisions and
concerted practices between shipping companies

(presented by the Commission)

Communication by the Commission

Report on the possibility of a group exemption
for consortia agreements in liner shipping

1. Introduction

- 1.1. In December 1986, at the time of the adoption of Regulation no. 4056/86, the Commission undertook to submit within one year, a report to the Council on whether to provide for block exemptions for consortia, and to make proposals to that effect if necessary⁽¹⁾.
- 1.2. As explained in the interim reports made to the Transport Working Group on 7 January⁽²⁾ and 29 November 1988⁽³⁾, the Commission was unable despite its repeated efforts to complete its work within one year because the industry did not make available to it a sufficient number of consortia agreements to constitute a satisfactory basis for analysis. This was finally done in stages up to September 1989.

2. Background

- 2.1. The Commission is aware of present and prospective developments and organisational changes in world shipping and the implications which these may have for the Community's shipping and competition policies.

(1) See Council Doc. No. 11584/86 MAR 84 of 19 December 1986 Annex III

(2) See doc. No. 4130/88 MAR 3 of 11.1.1988

(3) See doc. No 10048/88 MAR 38 of 13.12.1988

Competition in the liner shipping industry has created the need for companies to be efficient in order to compete on the world market. The shipping industry is a capital intensive one, with a high proportion of fixed to variable costs. Ships therefore need to be as fully utilised as possible if the capital costs are to be covered. Individual enterprises acting alone without having strong financial resources are in a vulnerable position if heavy overcapacity shows itself on their particular trade routes.

2.2. The development of container services has increased pressures for co-operation and rationalisation, especially on the longer deep sea trade routes. Because of the large amounts of cargo which can be handled daily from a containership, operators have been able to use bigger ships without increasing, and indeed even reducing, port time. However, since the amount of cargo available remains much the same, fewer of the larger ships are needed to serve a particular trade. Community shipowners have difficulty to operate with container ships of the size needed to obtain the available economies scale and thus minimise costs, whilst maintaining a satisfactory frequency of service.

2.3. Other related pressures towards closer association between operators on containerised trade routes were that:

- the establishment of a container service necessitated an initial capital investment greater than that required to replace tonnage on conventional services. Individual lines therefore hesitated to make this investment on their own account;
- container ships were less free to transfer from one trade to another because many were designed for a particular trade route; in addition many ports did not have the equipment and infrastructure to handle container ships (a problem which still exists in some developing countries)

2.4. These pressures for cooperation led individual shipping lines to enter into joint fleet operations usually described as consortia.

3. Analysis of consortia agreements

3.1. The Comité des Associations d'Armateurs des Communautés Européennes (CAACE) has provided the Commission with a list of consortia serving Europe showing the conference, the consortium and its members and indicating the scope of clauses included. A copy of the list is attached as Annex I.

The Commission has also received copies of the 23 consortia agreements listed in Annex II. The Commission has been asked to treat the details of these agreements as confidential.

3.2. The examination of the agreements in the possession of the Commission and of such information as has been given by CAACE and by others has permitted the following findings:

- (i) There are approximately 57 consortia operating worldwide, at least 40 of which operate in Community liner trades. The number of consortia in particular trade, their organisation and membership, and the scope and terms of the consortia agreements all vary.
- (ii) The variety and complexity of the different arrangements is considerable. Almost the only common factor is that they are coalitions of several independent shipping lines seeking some form of co-operation in order to maintain profitability through rationalisation in the widest sense and to spread the expense of investment in container operations. Each could, in principle, be considered sui generis. However, a number of specific arrangements seem to be common to most consortia.

(iii) Joint fleet operations

- a) Joint schedule: 37 consortia
- b) Space/slot exchange: 37
- c) Equipment pool: 20 (in some cases optional or only amongst some members of the consortium)
- d) Joint operational office: 30

(iv) Terminals

- a) Joint terminal operation: 37 (in some cases only optional)
- b) Joint terminal contracts: 37 (in some cases optional or negotiated jointly but concluded separately)

(v) Pooling

- a) Cargo pool: 28
- b) Revenue pool: 28
- c) Net result pool: 27

(vi) Conference rights

5 consortia hold single voting rights in conferences in which they participate.

4 consortia whilst not having formal voting rights in conferences do nevertheless act in that way.

(vii) Marketing

- a) Joint marketing: 18
(some limited by regions)
- b) Joint bill of lading: 22

(viii) Joint price fixing

7 consortia have pricing fixing authority.

CAACE has indicated that in some cases the consortium would have the authority to fix prices but that the "no" in the descriptive list means that it does not do so in practice. In some other trades the consortium operates either outside the conference or on routes where there is no conference.

(ix) Inland operations

- a) Joint consolidation: 18 (some are optional or limited by regions)
- b) Joint haulage: 16 (some are optional or limited by regions)

(x) Duration/termination

Clauses concerning duration and termination of consortia agreements are not included in CAACE's list. Of the 23 agreements examined by the Commission:

- a) Indefinite duration until cancellation/termination: 11
- b) Limited duration or without prolongation clause: 10 (2 agreements do not contain clear provisions)

c) Cancellation/termination

36 months notice: 1 Agreement
24 months notice: 2
12 months notice: 6
6 months notice: 8
Specific rules: 4

d) Without cancellation/termination clause: 1

(xi) Purposes/objectives of consortia agreements

This aspect has not been dealt with by CAACE's descriptive list. In the 23 agreements the following clauses are typical:

"The purpose of the Agreement is to establish a joint service/consortium capable of securing the economies and advantages of modern shipping technology through coordinated management of roll-on/roll-off, container or similar modern vessels, and all related activities".

"To enable the parties to operate a service as defined in the agreement in the most economical and efficient way; to promote and maximize the trade and the movement of cargoes between the points and ports referred to".

"The purpose of this Agreement is to authorize the parties to continue their joint service in the trades covered by this Agreement".

"The purpose of this Agreement is to enable the parties collectively to establish and maintain a superior overall common carrier shipping service, and thereby to promote to oceanborne commerce, in the trade between "... and ...".

"The purpose of the Agreement is to allow the partners hereto to operate as an ocean common carrier by direct call or intermodal through service under the name ... as provided herein".

"The purpose of the Agreement is to permit the parties to achieve efficiencies and economics in offering services in the trades covered by the Agreement".

"To cooperate in the operation of a joint container service between ... and the ... - including the inland movement of containers - for the purpose of achieving optimal economic results through operation of container vessels and sharing the outcome through money pool upon the terms and conditions set forth in the agreement".

3.3. Multiple membership

- a) According to the information available there are 47 European shipping lines participating in 35 consortia serving European trades. (In the remaining 5 consortia serving European trades there seem to be no European shipping lines participating).

Some of these shipping lines are members of more than one consortium :

| CGM | participates in 13 consortia | | |
|--------------------|------------------------------|----|---|
| Nedlloyd | " | 12 | " |
| Hapag Lloyd | " | 11 | " |
| P&OCL | " | 7 | " |
| CMB | " | 6 | " |
| Swedish Transocean | " | 5 | " |
| Incotrans | " | 4 | " |

| | | |
|--------------------|---|---|
| Cunard |) | |
| EAC |) | |
| Charente Harrisson |) | 5 lines each participate in 3 consortia |
| Ellerman |) | |
| Lloyd Triestino |) | |
| | | |
| Wilh. Wilhelmsen |) | |
| Finn carriers |) | |
| Hoegh |) | |
| Johnson |) | 7 lines each participate in 2 consortia |
| Wallenius |) | |
| DAL |) | |
| Delmas-Vieljeux |) | |

b) Shipping lines which are members of a consortium are in many cases also member of a conference. Some conferences have, among their members, the participants in more than one consortium. For instance, as shown in Annex III,

- the members of the consortia CAROL, EURO-Caribe, S.A.C. and Streamline are all members of the Association of West India Transatlantic Steamship Lines, the WITASS Conference;
- the members of the consortia OMEX, Scan Dutch, TRIO, ACE and Med Club are members of the Far Eastern Freight Conference;

It should be noted that there are also other situations in European liner shipping trades. Two examples might be cited:

The Europe/Australia & New Zealand Conference used to have participants in four consortia among its members (ANZECS, ACT(A)ANL, Scancarriers and Scanbarber). Scancarriers was taken over by one of its members and Scanbarber as well as ACT(A)ANL were disbanded, so that this Conference is now almost (except for Baltic Shipping Company) identical with the ANZECS consortium. As a second example, the UK West Africa Lines Joint Service (UKWAL) is a consortium which is also a conference.

4. Views of shipowners and shippers

4.1. CAACE and CENSA have argued, in various submissions to the Commission, that Community shipping lines need to participate in consortia in order "not to be put at a disadvantage compared with their competitors, the single entity, multi-trade giants". In their view consortia are either excepted, as technical agreements, under Article 2 of Regulation No 4056/86, or are covered by the block exemption in Article 3 of the same regulation. For cases not so covered there should be a group exemption. These views were not shared by the Union of Greek shipowners who argued that the Commission should only grant individual exemptions, where appropriate.

4.2. The British Shippers' Council has informed the Commission that, in its view, consortia are covered neither by Article 2 nor by Article 3 of Regulation No 4056/86 and that a new block exemption would be inappropriate. Individual exemptions should be granted only with special conditions and obligations. The European Shippers' Councils hold similar views, arguing that consortia should apply for individual exemption and that conditions and obligations, including an obligation to meaningful consultations with shippers, should be attached.

5. The Legal Status of Consortia

The examination of the texts of consortia agreements which have been made available and of other information available to the Commission services has led to the following main conclusions:

5.1. Consortia are not mergers

The information available suggests that consortia could not be regarded as mergers between the parties, for several reasons:

- a) All available agreements contain provisions to terminate the agreement with different periods of notice.

- b) There is no evidence which suggests that any of the parties to these agreements or to other agreements described by CAACE either transferred all its assets or activities to the consortium, so as to become mere holding companies, or completely and irreversibly abandoned business in the area covered by the consortium.

On the contrary, the parties to consortia agreements remain free to act independently on other routes, to join consortia involving other parties for other routes or to join consortia for other routes involving the same or almost the same parties, but on different terms. The findings on multiple membership indicate that this is the case for many shipping lines.

5.2. Consortia are not purely technical arrangements

The information available suggests that there are few if any consortia agreements whose sole object and effect are to achieve technical improvements or cooperation in the sense of Article 2 of Regulation No. 4056/86.

All but two of the 23 agreements examined contain arrangements not only on joint fleet and terminal operations but also on pooling and/or conference rights, pricing, marketing or inland operations. One of the two exceptions concerns a Slot Charter Agreement containing arrangements on joint schedule and space/slot exchange and arrangements on capacity restrictions for one of the parties regarding certain European ports. The other case concerns an agreement containing arrangements on joint fleet and terminal operations. However, it also provides for cost sharing arrangements for ships, administration and equipment. In addition it provides that conference trading rights may only be exercised by agreement of the consortium policy committee and that the parties, without having joint marketing, "may combine their interests".

In all these cases the consortium's sole object and effect are not purely technical.

There are, according to CAACE's descriptive list, some other consortia agreements limited to arrangements on joint fleet and terminal operations. However, these agreements cannot be regarded as purely technical since for instance one agreement also contains, inter alia, the parties' agreement to avoid unreasonable or unfair sales and marketing competition amongst themselves through a common freight policy. Such agreements restrict competition and cannot be considered as having exclusively technical objects and effects. Finally, the parties to consortia agreements regulate the use of their vessel capacities in given trade routes and are actual or potential competitors.

For all these reasons consortia cannot, other than perhaps in very exceptional cases, be considered as falling within the scope of Article 2 of Council Regulation 4056/86.

5.3. Consortia are not covered by the conference block exemption

- a) Conferences are arrangements which exist essentially to ensure that their members charge the same rates of freight. Some conferences also agree members' participation in a particular trade (which is defined either as sailing rights, ie the right to berth x number of sailings per annum from one area to another or as percentage shares in the trade) or even 'pool' either earnings or liftings (freight tons) or both: the intention generally being to equate 'share' with earnings and liftings.

Consortia are pursuing different objectives and are different in organisation. The size of container ships (say 3 to 6 conventional ships = 1 container ship) means that most single shipping companies are no longer capable of providing, on their own a satisfactory liner service to shippers. To be viable, a shipping service must provide a frequent, say weekly, service to its customers. Rationalisation of schedules is, therefore, a sine qua non of liner shipping with each participating line being allocated slots for each sailing. This is not the role of conferences.

Shipowners agree that consortia are different from conferences.

b) (consortia agreements, restrict or eliminate competition between the parties in some or all of the following areas:

- the provision and use of capacity and transport facilities
- timings and sailings
- marketing
- inland operations
- their policies as conference members and
- price competition (which is eliminated either by conference membership, or by arrangements in the consortium agreements which are to that extent equivalent to a conference agreement, or by some combination of the two).

A considerable number of consortia agreements thus contain restrictive arrangements which go beyond the scope of Article 3 of Council Regulation No 4056/86 and would therefore not be covered by the block exemption for conferences, even if they could be considered as conference agreements. This is the case for most of the 23 agreements available to the Commission and it would also be the case for the majority of the other agreements mentioned in CAACE's list.

c) Consortia are increasingly concerned with combined sea/land door-to-door transport. Multilateral agreements on combined sea/land transport are not covered by the conference block exemption, which applies only to the maritime sector.

5.4. It follows that consortia agreements which restrict competition and affect trade between Member States must, if they are not to be considered null and void in accordance with Article 85(2) of the Treaty, be covered either by an individual or by a block exemption. In view of the number of consortia agreements and the need for shipowners to retain the flexibility necessary to change their agreements in response to changing competitive circumstances, it is

desirable for administrative reasons to give a group exemption as far as possible. Accordingly the Commission has examined the scope for granting such a group exemption.

6. Proposal for a block exemption

6.1. Justification

The Community shipping industry needs to attain the necessary economies of scale to compete on the world liner shipping market. Consortia can help to provide the necessary means for improving the productivity of liner shipping services and promoting technical and economic progress by facilitating and encouraging the use of containers.

Users of the shipping services offered by consortia obtain several important advantages. First, they are ensured regular sailings at prices which do not depend on which ships are used for their containers. Second, economies of scale in the use of ships and on-shore facilities are achieved. Third, since consortia tend to bring about higher levels of capacity utilisation, costs are reduced for this reason also. Fourth, consortia increase the quality of shipping services by using more modern ships and equipment as well as port facilities. Last, but not least, through provision of joint inland services they are responding to many shippers' requirements for efficient door-to-door transport.

Thus, users can obtain a share of the benefits resulting from the improvement in productivity and service. However, any group exemption must give a sufficient guarantee that consortia are able to realise their advantages to the fullest extent and that users get a fair share of the resulting rationalisation and reduction in costs.

In order, therefore, to ensure that all the requirements of Article 85(3) are met it would be necessary, inter alia, to attach to the block exemption certain conditions and/or obligations to ensure

that a fair share of the benefits would be passed on to shippers and that competition in respect of a substantial part of the trades in question was not eliminated.

6.2. Form

A group exemption for consortia would need to be an independent, self-contained regulation, rather than an amendment or addition to any existing regulation, because

- there is a great variety of different consortia arrangements operating under different circumstances;
- consortia are a specialized form of joint ventures. Despite of the efforts of the Commission's services and the interested industries, it has proved impossible to draft a block exemption for joint ventures in general;
- many consortia deal with multi-modal transport operations which fall partly within the scope of Regulation No 4056/86 and partly under Regulation No 1017/68 and, insofar as containers are concerned, partly under Regulation No 17/62;

Consortia in liner shipping are a specialised and complex type of joint venture. Unlike most commercial and industrial joint ventures the scope, parties, activities and terms of consortia agreements are frequently altered. It would therefore, as well as for other reasons discussed above, be extremely difficult to decide which specific clauses and arrangements of consortia agreements should be permitted, and in what circumstances. It would also be undesirable to proceed in this way because it would often make legal advice necessary, and perhaps individual exemption by the Commission each time the terms of a consortium agreement are altered. A block exemption for consortia should therefore concentrate on clarifying the requirements under which consortia can be exempted from the prohibition of cartels pursuant Article 85(3) of the Treaty, rather than differentiating between consortia.

6.3. Scope and content of the block exemption

The block exemption would cover multi-modal as well as purely maritime consortia and would therefore be adopted on the basis of Regulation No 4056/86, No 1017/68 and No 17/62.

The group exemption should cover as wide a variety as possible of the kinds of clauses which are found in consortia agreements.

Since cooperation through consortia is a specific form of rationalisation cartels which goes further than conferences the Commission would need to attach some additional requirements to the block exemption. In fixing these requirements, e.g. certain conditions and/or obligations, the Commission must have regard not only to the interests of the shipping lines but also to those of shippers and of other transport modes who may compete with the land transport operations of members of consortia (for instance, road hauliers in respect of multi-modal consortia).

The details of these requirements can only be fixed after further consultations with parties concerned and with Member States in the Advisory Committee on Restrictive Practices and Dominant Positions. Nevertheless, as a preliminary statement, the Commission considers that it would be necessary, in particular, in order to make sure that the conditions of Article 85(3) are fulfilled :

- (i) to ensure that a fair share of the efficiency and other benefits from consortia could be passed on to shippers;
- (ii) to ensure that competition in respect of a substantial portion of the whole trade is not eliminated or unduly restricted, for instance by agreements between consortia operating in the same trade;
- (iii) to provide a maximum period of notice for withdrawal without penalty by a participant line;

(iv) to deal, in the case of multi-modal transport services offered by consortia, with multilateral agreements with inland hauliers on through rates;

(v) to ensure non-discrimination between shippers or ports.

In addition, there would need to be obligations relating, *inter alia*, to meaningful consultations with shippers, and rights for shippers to arrange their own inland haulage, if they wish.

The group exemption for consortia will take account, among other things, of the fact that almost all members of consortia are also members of conferences governed by Regulation 4056; the requirements of the group exemption will deal with the additional limitations of competition brought about by consortia.

6.4. The Commission considers that it would be desirable to grant a group exemption for consortia agreements. The Commission has thereby prepared the attached proposal (Annex IV) for a Council Regulation which would empower the Commission to grant a block exemption for consortia on the lines set out above. This enabling regulation follows the standard lines of such regulations and accordingly does not call for any specific comments.

The Commission intends to clarify the position under competition law of multimodal transport containing a shipping leg simultaneously with the group exemption on consortia.