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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)

(Text with EEA relevance)

(OJ L 100, 20.4.2000, p. 24)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Commission Regulation (EC) No 463/2004 of 12 March 2004	L 77	23	13.3.2004
►**M2**	Commission Regulation (EC) No 611/2005 of 20 April 2005	L 101	10	21.4.2005

Amended by:

►**A1**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

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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)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) ([1]), as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1 thereof,

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

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport,

Whereas:

(1) Regulation (EEC) No 479/92 empowers the Commission to apply Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between shipping companies (consortia) relating to the joint operation of liner transport services, 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 this power by adopting Commission Regulation (EC) No 870/95 ([3]). In the light of experience thus acquired so far, it is possible to define a category of consortia which are capable of falling within the scope Article 81(1) but which can normally be regarded as satisfying the conditions laid down in Article 81(3).

(3) The Commission has taken due account of the special features of maritime transport. Those features will also constitute a material factor in any Commission assessment of consortia not covered by this block exemption.

(4) 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.

(5) Users of the shipping services provided by consortia generally obtain a fair share of the benefits resulting from the improvements in productivity and service quality which they bring about. Those benefits may also take the form of an improvement in the frequency of railings 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. Users can benefit effectively from consortia only if there is sufficient competition in the trades in which the consortia operate.

([1]) OJ L 55, 29.2.1992, p. 3.
([2]) OJ C 379, 31.12.1999, p. 13.
([3]) OJ L 89, 21.4.1995, p. 7.

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(6) Those agreements should therefore enjoy a block exemption, provided that they do not give the companies concerned the possibility of eliminating competition in a substantial part of the trades in question. In order to take account of the constant fluctuations in the maritime transport market and the frequent changes made by the parties to the terms of consortium agreements or to the activities covered by the agreements, one of the objects of this Regulation is to clarify the conditions to be met by consortia in order to benefit from the block exemption it grants.

(7) For the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments. The non-utilisation of a certain percentage of vessel capacity within a consortium is not an essential feature of consortia.

(8) The block exemption granted by this Regulation should cover both consortia operating within a liner conference and consortia operating outside such conferences, except that it does not cover the joint fixing of freight rates.

(9) Rate-fixing activities come under 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 [1], as amended by the Act of Accession of Austria, Finland and Sweden. Consortium members that wish to fix rates jointly and do not satisfy the criteria of Regulation (EFC) No 4056/86 must apply for individual exemption.

(10) The first of the conditions attaching to the block exemption should be that a fair share of the benefits resulting from the improved efficiency, as well as the other benefits offered by consortia, are passed on to transport users.

(11) This requirement of Article 81(3) should be regarded as being met when a consortium is in one or more of the three situations described below:

— there is effective price competition between the members of the conference within which the consortium operates as a result of independent rate action,

— there exists within the conference within which the consortium operates a sufficient degree of effective competition in terms of services provided between consortium members and other conference members that are not members of the consortium, as a result ofthe fact that the conference agreement expressly allows consortia to offer their own service arrangements, e.g. the provision by the consortium. alone of a ‘just-in-time delivery’ service or an advanced ‘electronic data interchange’ (EDI) service allowing users to be kept informed at all times of the whereabouts of their goods, or a significant increase in the frequency of sailings and calls in the service offered by a consortium compared with that offered by the conference,

— consortium members are subject to effective, actual or potential competition from non-consortium lines, whether or not a conference operates in the trade or trades in question.

(12) In order to satisfy this same requirement of Article 81(3), provision should be made for a further condition aimed at promoting individual competition as to quality of service between consortium members as well as between consortium members and other shipping companies operating in the trade or trades.

(13) It should be a condition that consortia and their members do not, in respect of a given route, apply rates and conditions of carriage

[1] OJ L 378, 31.12.1986, p. 4.

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which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary to transport, unless such rates or conditions can be economically justified.

(14) The aim of the conditions should also be to prevent consortia from imposing restrictions on competition which are not indispensable to the attainment of the objectives justifying the grant of the exemption. To this end, consortium agreements should contain a provision enabling each shipping line party to the agreement to withdraw from the consortium provided that it gives reasonable notice. However, provision should be made for a longer notice period in the case of highly integrated and/or high-investment 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's leaving. It should also be stipulated that, where a consortium operates with a joint marketing structure, each member should have the right to engage in independent marketing activities provided that it gives reasonable notice.

(15) Exemption must be limited to consortia which do not have the possibility of eliminating competition in a substantial part of the services in question.

(16) In order to determine for the purposes of exemption whether exemption competition exists on each market upon which the consortium operates, 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 which may be substituted for those served by the consortium and, where appropriate, of other modes of transport.

(17) The block exemption granted by this Regulation is therefore applicable only on condition that on each market upon which the consortium operates the market share held by a consortium does not exceed a given size.

(18) The market share held by a consortium within a conference should be smaller in view of the fact that the agreements is question are superimposed on an existing restrictive agreement.

(19) However, it is appropriate to offer consortia which exceed the limits laid down in this Regulation by a given percentage but which continue to be subject to effective competition in the trades in which they operate a simplified procedure so that they may benefit from the legal certainty afforded by block exemptions. Such a procedure should also enable the Commission to carry out effective monitoring and simplify the administrative control of agreements.

(20) However, consortia which exceed the limit should be able to obtain exemption by individual decision, provided that they satisfy the tests of Article 81(3), regard being had to the special features of maritime transport.

(21) This Regulation should apply only to agreements concluded between the members of a consortium. Therefore, the block exemption should not cover restrictive agreements concluded between, on the one hand, consortia or one or more of their members, and, on the other hand, other shipping companies. Nor should it apply to restrictive agreements between different consortia operating in the same trade or between the members of such consortia.

(22) Certain obligations should also be attached to the exemption. In this respect, transport users should at all times be in a position to acquaint themselves with the conditions for the provision of the maritime transport services jointly operated by the members of the consortium. Provision should be made for real and effective consultations between the consortia and transport users

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on the activities covered by the agreements. This Regulation also specifies what is meant by 'real and effective consultations' and what main procedural stages are to be followed for such consultations. Provision should be made for such mandatory consultation, limited to the activities of consortia as such.

(23) Such consultations are likely to secure a more efficient operation of maritime transport services which takes account of users' requirements. Consequently, certain restrictive practices which could ensue from such consultations should be exempted.

(24) For the purposes of this Regulation, the concept of *force majeure* is that laid down by the Court of Justice of the European Communities in its established case-law.

(25) Provision should be made whereby awards given at arbitration and recommendations made by conciliators and accepted by the parties are to he notified to the Commission forthwith, in order to enable it to verify that consortia are not thereby exempted from the conditions and obligations provided for in the Regulation and thus do not infringe the provisions of Articles 81 and 82.

(26) It is necessary to specify, in accordance with Article 6 of Regulation (EEC) No 479/92, the cases in which the Commission may withdraw from companies the benefit of the block exemption.

(27) 11 consortia benefited from the block exemption contained in Regulation (EC) No 870/95 by application of the opposition procedure in that Regulation which enabled the Commission in particular to check that they were subject to effective competition. There is no indication that circumstances have since become such that those consortia are no longer subject to effective competition. Those consortia should therefore continue to be exempted on the terms laid down in this Regulation.

(28) No applications under Article 12 of Regulation (EEC) No 4056/86 should need to be made in respect of agreements automatically exempted by this Regulation. However, when real doubts exist, companies should be permitted to request the Commission to declare whether their agreements comply with this Regulation.

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

(30) In view of the expiry of Regulation (EC) No 870/95, 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 transport services from or to one or more Community ports.

Article 2

Definitions

For the purposes of this Regulation:

1. 'consortium' means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to one or more trades, and the object of which is to bring about

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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, with the exception of price fixing;

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 againstpayment;

3. 'service arrangement' means a contractual arrangement concluded between one or more transport users and an individual member of a consortium or a consortium itself under which, in return for an undertaking to commission the transportation of a certain quantity of goods over a given period of time, a user receives an individual undertaking from the consortium member or the consortium to provide an individualised service which is of a given quality and specially tailored to its needs;

4. 'transport user' means any undertaking (such as shipper, consignee, forwarder) which has entered into, or demonstrated an intention to enter into, a contractual agreement with a consortium (or one of its members) for the shipment of goods, or any association of shippers;

5. 'independent rate action' means the right of a maritime conference member to offer, on a case-by-case basis and in respect of goods, freight rates which differ from those laid down in the conference tariff, provided that notice is given to the other conference members;

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6. 'commencement of the service' means the date on which the first vessel sails on the service or, when there has been substantial new investment, the date on which the first vessel sails under the conditions directly arising from that substantial new investment;

7. 'substantial new investment' means investment which results in the building, purchase or long-term charter of vessels, which are specifically designed, required and substantial for the operation of the service and which constitutes at least half of the total investment made by the consortium members in relation to the maritime transport service offered by the consortium.

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CHAPTER II

EXEMPTIONS

Article 3

Exempted agreements

1. Pursuant to Article 81(3) of the Treaty and subject to the conditions and obligations laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the activities listed in paragraph 2 of this Article when contained in consortium agreements as defined in Articles 1 and 2 of this Regulation.

2. The declaration of non-applicability shall apply only to the following activities:

(a) the joint operation of liner shipping transport services which comprise solely the following activities:

(i) the coordination and/or joint fixing of sailing timetables and the determination of ports of call;

(ii) the exchange, sale or cross-chartering of space or slots on vessels;

(iii) the pooling of vessels and/or port installations;

(iv) the use of one or more joint operations offices;

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(v) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment;

(vi) the use of a computerised data exchange system and/or joint documentation system;

(b) temporary capacity adjustments;

(c) the joint operation or use of port terminals and related services (such as lighterage or stevedoring serrices);

(d) the participation in one or more of the following pools: cargo, revenue or net revenue;

(e) the joint exercise of voting rights held by the consortium in the conference within which its members operate, in so far as the vote being jointly exercised concerns the consortium's activities as such;

(f) a joint marketing structure and/or the issue of a joint bill of lading;

(g) any other activity ancillary to those referred to above in points (a) to (f) which is necessary for their implementation.

3. The following clauses shall in particular be considered ancillary activities within the meaning of paragraph 2(g):

(a) an obligation on members of the consortium to use on the trade or trades in question vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties;

(b) an obligation on members of the consortium not to assign or charter space to other vessel-operating carriers on the trade or trades in question except with the prior consent of the other members of the consortium.

Article 4

Non-utilisation of capacity

The exemption provided for in Article 3 shall not apply to a consortium when the consortium includes arrangements concerning the non-utilisation of existing capacity whereby shipping line members of the consortium refrain from using a certain percentage of the capacity of vessels operated within the framework of the consortium.

CHAPTER III

CONDITIONS FOR EXEMPTION

Article 5

Basic condition for the grant of exemption

The exemption provided for in Article 3 shall apply only if one or more of the conditions set out below are met:

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(a) there is effective price competition between the members of the conference within which the consortium operates, due to the fact that the members are expressly authorised by the conference agreement, whether by virtue of a statutory obligation or otherwise, to apply independent rate action to any freight rate provided for in the conference tariff and/or to enter into individual confidential contracts; or

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(b) there exists within the conference within which the consortium operates a sufficient degree of effective competition between the conference members in terms of the services provided, due to the fact that the conference agreement expressly allows the consortium to offer its own service arrangements, irrespective of form, concerning the frequency and quality of transport services provided as well as freedom at all times to adapt the services it offers in response to specifc requests from transport users; or

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(c) whether or not a conference operates in the trade or trades in question, the consortium members are subject to effective competition, actual or potential, from shipping lines which are not members of that consortium.

Article 6

Conditions relating to market share

1. In order to qualify for the exemption provided for in Article 3, a consortium must possess on each market upon which it operates a market share of under 30 % calculated by reference to the volume of goods carried (freight tonnes or 20-foot equivalent units) when it operates within a conference, and under 35 % when it operates outside a conference.

2. The exemption provided for in Article 3 shall continue to apply if the market share referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one tenth.

3. Where one of the limits specified in paragraphs 1 and 2 is exceeded, the exemption provided for in Article 3 shall continue to apply for a period of six months following the end of the calendar year during which it was exceeded. This period shall be extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.

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Article 8

Other conditions

Eligibility for the exemptions provided for in Articles 3 and 10 shall be subject to the following conditions:

(a) the consortium must allow each of its members to offer, on the basis of an individual contract, its own service arrangements;

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(b) the consortium agreement must give member companies the right to withdraw from the consortium without financial or other penalty such as, in particular, an obligation to cease all transport activity in the trade or trades in question, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed. This right shall be subject to a maximum notice period of six months which may be given after an initial period of 18 months starting from the date of entry into force of the consortium agreement or the agreement to make a substantial new investment in the joint maritime service. If the date of entry into force of the agreement is earlier than the date of commencement of the service, the initial period shall not be more than 24 months starting from the date of entry into force of the consortium agreement or the date of entry into force of the agreement to make a substantial new investment in the joint maritime service.

However, in the case of a highly integrated consortium which has a net revenue pool and/or high level of investment due to the purchase or charter by its members of vessels specifically for the purpose of setting up the consortium, the maximum notice period shall be six months, which may be given after an initial period of 30 months starting from the date of entry into force of the consortium agreement or the agreement to make a substantial new investment in the joint maritime service. If the date of entry into force of the agreement is earlier than the date of commencement of the service, the initial period shall not be more than 36 months starting from the date of entry into force of the consortium agreement or the date of entry into force of the agreement to make a substantial new investment in the joint maritime service;

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(c) where a consortium operates with a joint marketing structure, each member of the consortium must be free to engage in independent marketing without penalty subject to a maximum period of notice of six months;

(d) neither the consortium nor consortia members shall, within the common market, cause detriment to certain ports, users or carriers by applying to the canriage of the same goods and in the area covered by the agreement, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

CHAPTER IV

OBLIGATIONS

Article 9

Obligations attaching to exemption

1. The obligations provided for in paragraphs 2 to of this Article shall be attached to the exemptions provided for in Article 3 and Article 13(1).

2. There shall be real and effective consultations between users or their representative organisations, on the one hand, and the consortium, on the other hand, for the purpose of seeking solutions on all important matters, other than purely operational matters of minor importance, concerning the conditions and quality of scheduled maritime transport services offered by the consortium or its members.

These consultations shall take place whenever requested by any of the abovementioned parties.

The consultations must take place, except in cases of *force majeure*, prior to the implementation of the measure forming the subject of the consultation. if, for reasons of *force majeure*, the members of the consortium are obliged to put a decision into effect before consultations have taken place, any consultations requested shall take place within 10 working days of the date of the request. Save in the case of such *force majeure*, to which reference shall be made in the notice announcing the measure, no public announcement of the measure shall be made before the consultations.

The consultations shall take place in accordance with the following procedural stages:

(a) prior to the consultation, details of the subject matter of the consultation shall be notified in writing by the consortium to the other party;

(b) an exchange of views shall take place between the parties either in writing or at meetings or both in the course of which the representatives of the consortium members and of the shippers taking part shall have authority to reach a common point of view and the parties shall use their best efforts to achieve that end;

(c) where no common point of view can be reached despite the efforts of both parties, the disagreement shall be acknowledged and publicly announced. It may be brought to the Commission's attention by either party;

(d) a reasonable period for the completion of consultations may be fixed, if possible, by common agreement between the two parties. That period shall be not less than one month, save in exceptional cases or by agreement between the parties.

3. The conditions concerning the maritime transport services provided by the consortium and its members, including those relating to the quality of such services and all relevant modifications, shall be made available on request to transport users at reasonable cost and shall be available for examination without cost at the offices of the consortium members, or the consortium itself, and their agents.

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5. Any consortium claiming the benefit of this Regulation must be able, on being given a period of notice which the Commission or the Member States' competition authorities shall determine on a case-by-case basis and which shall be not less than one month, to demonstrate at the request of the Commission or the Member States' competition authorities that the conditions and obligations imposed by Articles 5 to 8 and paragraphs 2 and 3 of this Article are met. It must submit the consortium agreement in question to the Commission or the Member States' competition authorities as appropriate within that period.

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Article 10

Exemption for agreements between transport users and consortia on the use of scheduled maritime transport services

Agreements, decisions and concerted practices between transport users or their representative organisations, on the one hand, and a consortium exempted under Article 3, on the other hand, concerning the conditions and quality of liner shipping services provided by the consortium and all general questions connected with such services in so far as they arise out of the consultations provided for in paragraph 2 of Article 9, are hereby exempted from the prohibition laid down in Article 81(1) of the Treaty.

CHAPTER V

MISCELLANEOUS PROVISIONS

Article 11

Professional secrecy

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1. Information acquired as a result of the application of Article 9(5) shall be used only for the purposes of this Regulation.

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2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation which is of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or studios which do not contain information relating to particular undertakings or associations of undertakings.

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Article 12

Withdrawal in individual cases

1. The Commission may withdraw the benefit of this Regulation, in accordance with Article 29 of Council Regulation (EC) No 1/2003 ([1]), where it finds in a particular case that an agreement, decision by an association of undertakings or concerted practice to which Article 3 or Article 13(1) of this Regulation apply nevertheless has certain effects which are incompatible with Article 81(3) in particular where:

(a) in a given trade, competition from outside the conference within which the consortium operates or from outside a particular consortium is not effective;

(b) a consortium fails repeatedly to comply with the obligations provided for in Article 9 of this Regulation;

(c) such effects result from an arbitration award.

([1]) OJ L 1, 4.1.2003, p. 1.

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2. Where, in any particular case, an agreement, decision by an association of undertakings or concerted practice referred to in paragraph 1 has 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 this Regulation in respect of that territory.

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Article 13

Transitional provisions

1. Article 81(1) of the Treaty shall not apply to agreements in force on 25 April 2000 which fulfil, on that date, the exemption requirements laid down by Regulation (EC) No 870/95 and to which the opposition procedure provided for by Article 7 of that Regulation was applied.

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2. A notification made pursuant to Article 7 in respect of which the period of six months referred to in the second subparagraph of paragraph 1 of that Article has not expired shall lapse as from 1 May 2004.

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3. 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 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) if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in this Regulation.

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Article 14

Entry into force

This Regulation shall enter into force on 26 April 2000.

It shall apply until ►M2 25 April 2010 ◄.

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