COMMISSION REGULATION (EC) No 611/2005

of 20 April 2005

amending Regulation (EC) No 823/2000 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], 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) Commission Regulation (EC) No 823/2000 [3] grants a general exemption to liner shipping consortia from the prohibition contained in Article 81(1) of the Treaty, subject to certain conditions.

(2) Regulation (EC) No 823/2000 will expire on 25 April 2005. On the basis of the Commission's experience in applying that Regulation, it appears that the justifications for a block exemption for consortia are still valid. The application of Regulation (EC) No 823/2000 should therefore be extended for a further five years.

(3) However, in some respects the provisions of Regulation (EC) No 823/2000 are not sufficiently attuned to current practice applied in the industry. It is therefore appropriate to introduce some minor amendments in order to make Regulation (EC) No 823/2000 more suitable for its purpose, pending the outcome of the review of 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], following which more substantial amendments may prove necessary.

(4) In particular, Regulation (EC) No 823/2000 provides that consortium agreements must give member companies the right to withdraw from the consortium without financial or other penalty, subject to certain conditions concerning the period of notice to be given. Practice has shown that it is unclear how this provision is to be interpreted in the event that the date of entry into force of the consortium agreement is earlier than the date the service actually starts, for example, when vessels are unavailable, or still under construction. Specific provision should therefore be made for that situation.

(5) It is justifiable for consortia to seek security for new investments committed to an existing service. Therefore, the possibility for the parties to a consortium agreement to enter into a 'non-withdrawal' clause should also apply where the parties to an existing consortium agreement have agreed to make substantial new investments and the costs of such new investments justify a new 'non-withdrawal' clause.

(6) Regulation (EC) No 823/2000 provides that the exemption is subject to compliance with certain conditions, including the existence of 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 to apply independent rate action to any freight rate provided for in the conference tariff. It has been brought to the Commission's attention that independent rate action can no longer be considered as a common general market practice. Instead, individual confidential contracts are now more important on various trades. Such confidential contracts may also bring about effective competition between liner conference members. The existence of individual confidential contracts should therefore also be regarded as an indicator of effective price competition between the members of the conference.

[1] OJ L 55, 29.2.1992, p. 3. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[2] OJ C 319, 23.12.2004, p. 2.
[3] OJ L 100, 20.4.2000, p. 24. Regulation as last amended by Regulation (EC) No 463/2004 (OJ L 77, 13.3.2004, p. 23).
[4] OJ L 378, 31.12.1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

(7) Regulation (EC) No 823/2000 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 823/2000 is amended as follows:

1. In Article 2 the following points 6 and 7 are added:

'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.';

2. In Article 5 point (a) is replaced by the following:

'(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';

3. In Article 8 point (b) is replaced by the following:

'(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.';

4. In the second paragraph of Article 14, the date '25 April 2005' is replaced by '25 April 2010'.

Article 2

This Regulation shall enter into force on 26 April 2005.

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

Done at Brussels, 20 April 2005.

For the Commission
Neelie KROES
Member of the Commission