

## Exemption extended – Existential for shipping alliances?

by Hendrikje Herrmann\*

The European Commission has extended the Consortia Block Exemption Regulation for another four years. It outlines the conditions for vessel sharing arrangements by liner shipping consortia under EU antitrust rules.

### A. European Antitrust Legislation

While the European Union's antitrust rules are set out in various legal instruments, the Treaty on the Functioning of the European Union (TFEU) contains the core provisions in its Sects. 101 et seq. In essence, these ban agreements between companies that restrict competition in the European internal market.

This relates to the abuse of a dominant position which shall be prohibited in so far as it may affect trade between Member States as per Art. 102 TFEU on the one hand. Such misuse may, in particular, consist in imposing unfair prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. On the other hand, as per Art. 101 para. 1 TFEU, also agreements between businesses which may affect trade between Member States and intend or effect the prevention, restriction or distortion of competition within the internal market shall be automatically void. Such behaviour might relate to fixing prices, limiting or controlling markets or investments as well as sharing markets or sources of supply.

However, Art. 101 para. 3 TFEU foresees the possibility to declare the provisions set out in para. 1 inapplicable: if the respective agreement or concerted practice contributes to improving distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit – provided such undertakings do not eliminate competition in respect of a substantial part of the products in question. In this respect, various Regulations have been adopted by the Council of the European Union and the European Commission. While some of these set out general rules, others relate to particular types of conduct or specific sectors. Sector specific legislation is available for f.e. insurance, postal services and transport.

In transport, namely maritime transport, the so-called "Consortia Block Exemption Regulation" (Commission Regulation (EC) No 906/2009 of 28 September 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)) was adopted.

### B. The Consortia Block Exemption Regulation and its contents

The Consortia Block Exemption Regulation allows shipping lines to operate in alliance structures without infringing the aforementioned EU antitrust rules. This form of cooperation has seen an increase over the past years. It intends to boost productivity and quality of shipping by combining its member firms' (special) know-how, economically viable vessel operation and use of port infrastructure. The major benefit, however, shall be the improved efficiency in the use of vessel capacity and the corresponding ability to quickly react to fluctuations in supply and demand. This is a feature especially important during the current COVID-19 pandemic and its effects on the supply chain, including changed demands for f.e. protective medical equipment or container overcapacities in China.

As per the Regulation, shipping companies with a combined market share of below 30% may enter into agreements, decisions and concerted practices relating to the joint operation of liner shipping services (known as "consortia"). The 30% combined market share is calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units. The Regulation applies to consortia only in so far as they provide international liner shipping services from or to one or more ports of the European Community. It may, however, serve as guidance for other national competition authorities.

The Regulation itself sets out that consortium agreements may vary significantly. Highly integrated ones require a high level of capital investment for f.e. the purchase or charter of vessels for the consortium and setting up joint operations centres while others are designed as flexible slot exchange agreements only. Taking this into account, the Regulation refers to a consortium as an agreement or a set of interrelated agreements between



two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades. The object of the consortium is defined as to bring about cooperation in the joint operation and improvement of the service that would otherwise be offered individually by each member, in order to rationalise operations by means of technical, operational and/or commercial arrangements. It is to be noted that the legal form of the arrangements is less important than the economic reality of the parties providing a joint service. Additionally, in order to qualify for the block exemption, the consortium must give each member the right to withdraw from the consortium provided that it gives reasonable notice. Highly integrated consortia may establish a longer notice period and initial lock-in period as these have higher initial investment costs and more organisational changes are required if a member leaves. It is to be noted that contractual penalties, be they financially or f.e. in the form of non-competition clauses in the event of a member's termination are prohibited in the consortium's underlying contracts.

Lastly, it is essential that the consortium neither directly nor indirectly fixes prices when selling liner shipping services to third parties, limits capacities or sales except for capacity adjustments in response to fluctuations in supply and demand, or splits up markets or customers. All of these activities would be considered hardcore restrictions, bereaving the consortium of the application of the exemption, irrespective of its market share.

### **C. Public Consultation on the Regulation and its findings**

In September 2018, the European Commission conducted an evaluation of the Regulation and thereafter launched a public consultation for feedback from maritime stakeholders. The Commission found that the Regulation did not cause restraints of competition. In contrast, costs for carriers and prices for customers per TEU are said to have decreased by approximately 30% over the years without a deterioration of service levels. As consortia allow their members to pool their vessels and provide liner services in frequencies that they could not provide on their own, it could thus be concluded that the benefits in efficiency were passed on to transport users. Also, the Regulation provides guidance and facilitates the assessment of consortia's compliance with competition rules and helps carriers to save resources. Given the still on-going economic challenges (as well as ecological and technical challenges with regard to f.e. IMO 2020) for the shipping industry, the increase in consolidation and concentration and the ever increasing vessel sizes, the need to save costs and operate efficiently is said to be still dominant. Therefore, the Commission concluded that at

this stage, the market conditions of the liner shipping sector necessitate the existence of the Regulation. In this last respect, the Commission notes that sector-specific Block Exemption Regulations are the exception. In fact, today only the shipping and motor vehicle sector benefit from a sector-specific block exemption.

Taking into account its findings and the feedback received in the consultation process, the European Commission decided to extend the Consortia Block Exemption Regulation for another four years until 25.04.2024.

### **D. The effects of COVID-19 on competition law and shipping**

In addition to Regulations, the European Commission has adopted various non-regulatory documents related to antitrust matters. These intend to explain in more detail the policy of the Commission on a number of issues.

The most recent statement (issued together with the national competition authorities of all EU Member States) concerns the application of competition law during the Corona crisis. There, it is set out that the current situation might necessitate businesses to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In this respect, no active intervention will take place against essential and temporary measures established to avoid a shortage of supply. Inversely, action will be undertaken should businesses, especially with regard to the supply of health-related products, cartelize or abuse their dominant market position.

While the Commission decided on the prolongation of the Consortia Block Exemption Regulation before the COVID-19 pandemic hit the world, the extension is an important sign for the shipping and trading industries. At least the legal certainty that joint vessel sharing continues to be a safe harbour might help the operators of liner shipping services in navigating through this global crisis.

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