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EXECUTIVE SUMMARY OF THE EVALUATION
of the

Commission 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)

{SWD(2019) 411 final}

INTRODUCTION

On 28 September 2009 the Commission adopted the Commission 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) (“Consortia BER”).¹ Initially due to expire on 25 April 2015, the Consortia BER was prolonged for an additional 5 years with the Commission Regulation (EU) No 697/2014 (“Prolonging Regulation”) and will expire on 25 April 2020.²

OBJECTIVE AND SCOPE OF THE EVALUATION

The Consortia BER declares that in accordance with Article 101(3) TFEU the prohibition in Article 101(1) TFEU does not apply to certain types of consortia agreements and sets the specific conditions under which they are exempted.

The objective of the Consortia BER is to facilitate the creation and operation of consortia that meet certain conditions. The Consortia BER achieves this objective by providing consortia with clarity and legal certainty with respect to their compliance with EU competition rules. The Commission established that a BER for consortia agreements is justified because “*consortia generally bring rationalisation and economies of scale which help to improve the productivity and quality of available liner shipping services*” and “*promote technical and economic progress*”,³ while “*users of the shipping services [...] may benefit from the improvements in productivity which consortia can bring about*”.⁴ When the Consortia BER was prolonged, the Commission established that “*the justifications for a block exemption for consortia are still valid and that the conditions on the basis of which the scope and content of [the Consortia BER] were determined have not substantially changed*”.⁵

With the expiry date of Consortia BER approaching, the purpose of the evaluation is to assess whether the Consortia BER is still relevant and delivering on its objective. This will inform the decision of whether to let it expire or prolong it and, if so, under which

¹ 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), OJ L 256, 29.9.2009, p. 31–34.

² Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, OJ L 184, 25.6.2014, p. 3. The only purpose of this Regulation is to amend one provision in Consortia BER and extend its validity until 25 April 2020.

³ Consortia BER, Recital 5.

⁴ Consortia BER, Recital 6.

⁵ Prolonging regulation, Recital 1. See also Commission press release IP/14/717 of 24 June 2014 accessible at: http://europa.eu/rapid/press-release_IP-14-717_en.htm (last accessed: 6 May 2019).

conditions, if any.⁶ The criteria that the Commission applied in the evaluation are Effectiveness, Efficiency, Relevance, Coherence, and EU added value.

The temporal scope of the evaluation is the period since the last prolongation of the Consortia BER in 2014 to this day.⁷

EVALUATION METHODOLOGY

The Commission published the Roadmap of the Evaluation and ran a four-week consultation for public feedback on its Consultation.⁸ The Commission also ran an online Public Consultation on the Consortia Block Exemption Regulation on its website for legislative initiatives.⁹ Furthermore, targeted questionnaires were sent to several stakeholders as well as contacted all NCA's to inform them about the ongoing evaluation and invite them to submit any observations.¹⁰ In addition to the above, the Commission has conducted its own internal study of the liner shipping market and its developments (analysing e.g. relevant merger decisions, guidance documents, and sector-specific reports), organized several bilateral meetings with requesting stakeholders, and participated to a number of forums and conferences.

The evaluation consists of the interrelated assessments of whether the Consortia BER fulfils the criteria: Effectiveness, Efficiency, Relevance, Coherence and EU added value. For their assessment, the five criteria were elaborated into evaluation questions. The assessments draw from knowledge and collected data, which have been assessed based on their relevance, credibility and weight. The evaluation faced minor limitations, most notably as regards the collection of overall service price, the calculation of precise market shares, or to the difficulty in establishing and assessing causal links between factors.

MAIN FINDINGS

Effectiveness

The Consortia BER provides guidance on the conditions under which consortia agreements would be compatible with Article 101 TFEU. The Consortia BER is tailored to consortia agreements, referring to arrangement that are specific to consortia. It also employs industry-specific terminology that is easily understandable to industry

⁶ Allowing the Consortia BER to expire would not mean that consortia agreements would become unlawful but that they would be examined under the general rules on competition just as cooperation agreements in other sectors.

⁷ The last prolongation in 2014 also marks the conclusion of the most recent assessment of the Consortia BER – this is an additional reason why the temporal scope of the current evaluation starts at that point.

⁸ The consultation website and Roadmap are accessible at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2422025_en (last accessed: 3 April 2019).

⁹ The Public Consultation ran from 27 September to 20 December 2018 and in English, German and French.

¹⁰ The Targeted Questionnaires were prepared in three separate types: Targeted Questionnaire for Carriers, Targeted Questionnaire for Shippers and Freight-forwarders, Targeted Questionnaire for Port operators.

participants. Consequently, compared to a baseline in which it would be absent, the Consortia BER facilitates the conclusion of consortia agreements by making the assessment of their compatibility with Article 101 TFEU easier and by providing higher legal certainty that decreases legal risk.

Efficiency

This criterion is used to assess what the effect of the Consortia BER is on costs, in particular, whether it helps undertakings to reduce costs or conversely whether it increases compliance costs. In the absence of the Consortia BER, the assessment of consortia compliance with competition rules would become more complex, thereby increasing the costs associated with self-assessment and possibly requiring the advice of external lawyers.

Overall, it is concluded that the Consortia BER is efficient as it helps carriers to reduce costs.

Relevance

Since the prolongation of Consortia BER in 2014, the liner shipping industry has been going through a process of consolidation, increased concentration and technological change, expressed in particular in the growing size of container vessels. Despite this evolution, the overall evidence available in this evaluation does not reveal material deterioration in the parameters of competition. In particular, over the evaluation period, prices have rather diminished alongside costs; levels of services seem to have remained broadly stable.

Consequently, there is no reason to depart from the longstanding view that consortia are an efficient way for providing and improving liner shipping services; moreover a fair share of the benefits resulting from the efficiencies are passed on to consumers¹¹.

Cooperation in consortia is and will remain the mainstay of the industry. Furthermore, a material number of existing consortia appear to fall within the scope of the Consortia BER, and for those not within its scope, the Consortia BER would still be of some relevance as a useful guidance regarding e.g. compliance with Article 101(3) TFEU.

Therefore, the Consortia BER is and will remain relevant in the medium term considering the major developments in the industry and the modes of cooperation between carriers.

Coherence

Consortia BER does not present inconsistencies with other instruments of EU competition law. In addition, the evaluation has shown that the special features of the industry, which relies heavily on cooperation, still merits an exceptional sector specific BER. Furthermore, the Consortia BER is coherent with other the EU's policies, such as environmental protection (vessel sharing agreements contribute to reduced fuel consumption per TEU¹²) and technological development (through newer, more efficient,

¹¹ The "consumers" for the purpose of Article 101(3) TFEU include not only the final consumer but also the direct customers of the producers concerned (see recital 84 of the Article 101(3) Guidelines).

¹² Twenty-foot equivalent units.

more technically up-to-date modern ships and improved IT systems for container tracking to meet shipper demands). Lastly, the objective of the Consortia BER and its actual contribution to the (global) competitiveness of the Union's shipping sector are aligned with the Commission priority on jobs, growth and investment.¹³

Therefore, the Consortia BER is coherent with other policies and instruments of the EU.

EU added value

The EU level is more appropriate for guidance on the application of competition rules to the provision of international liner shipping services than the individual Member States for two reasons. Firstly, because liner shipping is a cross-border industry by its very nature. Secondly, since the Council granted only the Commission, and not the Member States, the power to adopt a BER for consortia. Furthermore, the Consortia BER also has added value when compared to the existing instruments providing general guidance on the application of competition rules, since as a sector-specific instrument (with sector specific terminology and content) it by nature provides higher legal certainty to consortia than they would have without it.

Therefore, the Consortia BER provides EU added value.

¹³ More on Commission priorities for 2015-2019 is accessible at: https://ec.europa.eu/commission/priorities_en (last accessed on 21 June 2019).